IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION—CIVIL

NETTE PROPERTIES, LLC.	:	**October Term, 2007**
	:	
Plaintiff	:	**No. 02928**
	:	
v.	:	
	:	
	:	
FIRST AMERICAN TITLE INSURANCE COMPANY ET AL.	:	
	:	
Defendants	:	**Commerce Program**
	:	
and	:	
	:	
CLAIRE NELSON	:	
	:	
Defendant and Third Party Plaintiff	:	**Control Nos.**
	:	
v.	:	**09111838,**
	:	**09112088,**
PEPPER HAMILTON, LLP ET AL.	:	**10011191 and**
	:	**09112691**
Third Party *Defendants*	:	

OPINION

The motions, joinder motions, and cross motion for partial summary judgment, require this Court to determine whether Plaintiff may maintain the claims of fraud and breach of warranty against Defendant, and whether damages, if any, should include calculation of Plaintiff's alleged loss of the bargain. For the reasons below, Plaintiff may not maintain the claims of fraud and breach of warranty. Damages may not include calculation of any alleged loss of the bargain.

Background

In 1975, an entity named Marco Realty Associates ("Marco Realty,") owned the land and air rights to a property located at 1822 Spring Garden Street, Philadelphia, Pennsylvania. On 29 January 1975, Marco Realty sold the air rights of 1822 Spring Garden Street to an entity named Franklin Town ("Franklin Town."). The deed for this transaction identified the property by metes and bounds, and stated that the air space above 1822 Spring Garden Street was conveyed to Franklin Town.[1] The deed was properly recorded.

On 22 December 1975, Marco Realty sold the land rights of 1822 Spring Garden Street to Aron and Melba Cohen ("Cohen.") The deed describing this transaction specifically excluded any rights previously conveyed by Marco Realty to Franklin Town.

On 15 December 1976, Franklin Town sold the air rights to Lutheran Associates ("Lutheran,") a company doing business in Pennsylvania. The deed for this conveyance identified the property by metes and bounds, and specifically identified the air rights as "Being the same premises which Marco Realty ... by Deed ... recorded at Philadelphia in the Office of the Recording of Deeds, in Deed Book D.C.C. # 822 [and] 848 page 357 [and] 507, granted and conveyed unto Franklin Town ... in fee."[2]

On 22 April 1980, Cohen sold the land rights to the Philadelphia Authority of Industrial Development ("PAID.") The deed for this transaction excepted from conveyance "so much of the ... described premises as was conveyed to Franklin Town

[1] Deed of Correction and Confession, Exhibit I to Nette's response in opposition to the motion for partial summary judgment of Claire Nelson.
[2] Indenture between Franklin Town Corporation and Lutheran Associates, Exhibit H to Nette's response in opposition to the motion for partial summary judgment of Claire Nelson.

... by Deed dated 1/29/1975 and recorded in Philadelphia County Deed Book DCC 822 page 357 as corrected by Deed of Correction and Confirmation dated 4/22/1975."[3]

On the same day, 22 April 1980, PAID sold the land rights to Claire Nelson ("Nelson,") pursuant to an installment sale agreement. The installment agreement excluded from the sale any rights owned by Franklin Town.[4] In 1997, Nelson completed her installment payment plan and received the land rights to the Property by deed. This deed, unlike the prior installment agreement between PAID and Nelson, was silent as to any air rights.[5]

Between 2003 and 2004, Nelson decided to sell the Property. Nelson hired a realtor named Legend Properties ("Legend") to list the Property, and also hired the law firm of Pepper Hamilton to oversee the planned transaction. A title search company, Assurance Abstract Company ("Assurance Abstract,") was hired to perform a title search, and Assurance Abstract asked its agent or employee, Rod O'Mara, to do the work. The search did not disclose that another party already owned the air rights above the Property.

On 21 January 2004, the Board of Directors of Franklin Town delivered to Nelson a quit claim deed for the air rights of 1822 Spring Garden Street.[6] The quit claim deed was worthless because Franklin Town had already conveyed the air rights to Lutheran in 1976, and no longer had the power to convey any rights to Nelson.

---

[3] Indenture between Aaron and Melba Cohen and the PAID, Exhibit D to Plaintiff Nette's response in opposition to the motion for partial summary judgment of Claire Nelson.
[4] Memorandum of Installment Sale Agreement, Exhibit D to the response in opposition of Plaintiff Nette to the motion for partial summary judgment of Claire Nelson.
[5] Indenture Between PAID and Claire Nelson, Exhibit B to Plaintiff Nette's response in opposition to the motion for partial summary judgment of Claire Nelson.
[6] Exhibit E to the response in opposition of Plaintiff Nette to the motion for partial summary judgment of Claire Nelson.

In May 2004, Nette expressed an interest in acquiring 1822 Spring Garden Street, and asked Legend whether Nelson also owned the air rights to the Property. Legend replied: "The air rights are owned by the property owner ... as far as we know."[7]

Nelson and Nette entered into an Agreement of Sale, effective 24 June 2004. Nette paid consideration of $1.8 million for the land and air rights of the Property.[8] After completion of the sale, Nette insured the property for $1.8 million through First American Title Insurance Company ("First American Title.")[9]

On 27 December 2005, Nette signed an agreement of sale to sell the Property to a real estate developer, Meyer Greenbaum. Under the agreement, Greenbaum agreed to pay $3.9 million for the Property, and planned to build a forty-story building within its air space.[10]

On 28 August 2006, Nette received a letter from Lutheran. In the letter, Lutheran informed Nette that the planned erection of a forty-storey building at 1822 Spring Garden Street "would infringe" on the air rights of Lutheran.[11] Lutheran included in its letter a copy of the deed identifying the conveyance of air rights from Franklin Town to Lutheran. Upon this revelation, the planned erection of the forty-storey building was scrapped, the contract between Nette and Greenbaum was terminated, and Nette was left owning only the land rights to the Property.

---

[7] E-mails between Plaintiff Nette and Legend Properties, Exhibit J to the response in opposition of Plaintiff Nette to the motion for summary judgment of Claire Nelson.
[8] Agreement of Sale, Exhibit K to the response in opposition of Plaintiff Nette to the motion for partial summary judgment of Claire Nelson.
[9] Insurance Policy No. 104226394, Exhibit M to the response in opposition of Plaintiff Nette to the motion for partial summary judgment of Claire Nelson.
[10] Agreement for the Sale of Mixed Residential and Commercial Real Estate, Exhibit N to the response of Nette in opposition to the motion for partial summary judgment of Claire Nelson; Zoning Use Permit No. 710515, Exhibit R.
[11] Letter from Lutheran to Nette, Exhibit S to the response of Nette in opposition to the motion for partial summary judgment of Claire Nelson.

Nette filed the instant law suit against a number of defendants, including First American Title, Legend and Claire Nelson. Nette's lawsuit seeks damages amounting to the lost benefit of its bargain.

Defendant Nelson filed a Third Party Complaint, subsequently amended, against Third Party Defendants Pepper Hamilton and its attorneys Mark Blaskey and Gary Lozoff. Nelson also sued Third Party defendants Legend and its agent Marc Wiser, and Assurance Abstract. The Amended Third Party Complaint avers that if Nelson is liable to Nette, then Assurance Abstract, Legend, and their agents or employees, are liable to Nelson. As a result of this Third Party action, Legend and its agent Marc Wiser cross-claimed against Assurance Abstract, and Assurance Abstract cross-claimed against its employee or agent, Rod O'Omara.

Before the Court is the motion for partial summary judgment filed by Nelson, the joinder motions for partial summary judgment filed by Additional Defendants Legend Properties and Marc Wiser, Assurance Abstract, and Rod O'Mara, and the cross-motion for partial summary judgment filed by Plaintiff Nette Properties, LLC. For the reasons below, Plaintiff may not maintain the claims of breach of warranty and fraud, asserted respectively in Counts II and III of the complaint, and may not introduce at trial evidence regarding any lost benefit of its bargain.

Discussion

The Pennsylvania Rules of Civil Procedure instruct that "the court shall enter judgment whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense that could be established by additional discovery. Under the Rules, a motion for summary judgment is based on an evidentiary record that entitles the moving party to a judgment as a matter of law.

For purposes of summary judgment, the record includes any pleadings, interrogatory answers, depositions, admissions, and affidavits."[12] In considering the merits of a motion for summary judgment, a court views the record "in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Only where there is no genuine issue as to any material fact and it is clear that the moving party is entitled to a judgment as a matter of law will summary judgment be entered."[13]

I. NETTE MAY NOT MAINTAIN THE CLAIM OF FRAUD.

In the motion for summary judgment, Nelson argues that the claim of intentional fraud may not be maintained. Nelson points to a joint stipulation signed by the parties, wherein Nette concedes that Nelson believed she owned the air rights when she contracted with Nette.[14] Nelson concludes that her misrepresentations, if any, could not have been intentional because when she contracted with Nette, she believed she owned the air rights above the Property, and believed she was selling them to Nette.

In Bortz v. Noon, the Pennsylvania Supreme Court has laid out the elements necessary to prove the tort of intentional misrepresentation. They are:

(1) A representation;
(2) which is material to the transaction at hand;
(3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false;
(4) with the intent of misleading another into relying on it;
(5) justifiable reliance on the misrepresentation; and,
(6) the resulting injury was proximately caused by the reliance.[15]

---

[12] Scalice v. Pa. Emples. Benefit Trust Fund, 883 A.2d 429, 435 (Pa. 2005) (explaining Pa. R.C.P. 1035.2(1), 1035.2(2)).
[13] Abrams v. Pneumo Abex Corp., 981 A.2d 198, 203 (Pa. 2009).
[14] Stipulation of Facts for Purposes of Defendant Claire Nelson's Motion for Partial Summary Judgment, ¶ 2.
[15] Bortz v. Noon, 729 A.2d 555, 560 (Pa. 1999).

The Stipulation of Facts signed by Nette and Nelson states:

> 2. At the time she executed the Nelson Special Warranty Deed, Mrs. Nelson:
>
> a. believed that she owned the property located at 1822 Spring Garden Street in Philadelphia, Pennsylvania (the "Property");
>
> b. believed she owned the air rights above the Property;
>
> c. believed she had the right to sell and convey the Property and the air rights above it to Plaintiff as of the date of closing.[16]

This language is clear and unambiguous: Nelson believed she owned the air rights and had the right to sell them to Nette. Nette has stipulated and conceded this point. Nette may not maintain the claim of fraud/intentional misrepresentation because it cannot prove that Nelson knowingly or intentionally induced Nette to pay for rights which Nelson did not own.

Despite this stipulation, Nette opposes the motion, abandons its original claim of intentional fraud asserted in Count III of the complaint, and pursues another theory based on "innocent" yet fraudulent "misrepresentation."[17] Nette argues that a disappointed buyer of land is entitled to tort-based damages for seller's innocent but fraudulent misrepresentations, and relies on Boyle v. O'Dell to support this argument.[18] In Boyle, the owner of land had granted her neighbors the rights of first refusal upon certain parcels. The owner died and defendant O'Dell inherited the parcels. Unaware of the existence of the option, O'Dell sold the parcels to plaintiffs (the "Buyers.") After the sale, the party with the right of first refusal exercised its

---

[16] Stipulation of Facts for Purposes of Defendants Claire Nelson's Motion for Partial Summary Judgment, attached to Nelson's motion for partial summary judgment.
[17] Complaint, ¶ 61; Nette's brief in support of its response to Nelson's motion for partial summary judgment at IV C.
[18] Boyle v. O'Dell, 605 A.2d 1260 (Pa. Super. 1992).

option, and Buyers asserted against O'Dell the claim of fraud-in-the-conveyance-of-deeds. The Superior Court stated that "fraud may be established where there is a misrepresentation, innocently made, but relating to a matter material to the transaction involved."[19] The Superior Court also stated: "if it is determined that a purchaser in a real estate transaction has suffered from fraud by the seller .... he may seek to rescind the deed, or in the alternative, may sue for damages."[20] The Superior Court remanded the case to the Court below with instruction to make any appropriate fact finding on the disappointed buyers' request for relief.

Subsequent to this decision, the Pennsylvania Supreme Court explained the tort of innocent misrepresentation, and found no basis for awarding damages therefrom. In Bortz v. Noon, the Supreme Court stated: "A claim for 'innocent misrepresentation' has been recognized in this Commonwealth in order to rescind a real estate transaction that is based upon a material misrepresentation, even if the misrepresentation is innocently made. However, we have found no cases in which this Court adopted this theory as a basis to award monetary damages for tort recovery."[21] Subsequent to the Supreme Court's holding in Bortz, our Superior Court, in Growall v. Maietta, adopted the Supreme Court's holding. In Growall v. Maietta, the Superior Court held that damages are not available under the tort of innocent misrepresentation. The Superior Court stated: "There appears to be no basis for ... damages under a claim of innocent misrepresentation.... [O]rdinary damages based

[19] Boyle v. O'Dell, 605 A.2d at 1264 (Pa. Super. 1992) (citing La Course v. Kiesel, 77 A.2d 877 (Pa. 1951).
[20] Boyle v. O'Dell, 605 A.2d at 1265 (Pa. Super. 1992).
[21] Bortz v. Noon, 729 A.2d 555, 563-64 (Pa. 1999).

upon a claim of innocent misrepresentation ... [rely] on Section 552C of the Restatement (Second) of Torts which has not been adopted in Pennsylvania."[22]

Both the Supreme and Superior Courts maintain that no damages are available for recovery under the tort theory of innocent misrepresentation. Nette has failed to prove intentional fraud and may not maintain such a claim as asserted in Count III of the complaint. In addition, Nette may not seek damages under the theory of "innocent misrepresentation" because damages under this theory are not available in Pennsylvania.

II. NETTE MAY NOT MAINTAIN THE CLAIM OF BREACH OF WARRANTY.

In the motion for summary judgment, Nelson argues that she is not liable for breach of warranty. She notes that the express language in her deed created a Special Warranty which makes her liable, if at all, only against any adverse party claiming through the grantor herself.[23] Nelson concludes that she is not liable because the air rights to the Property had already been severed from the land rights before she acquired the Property, and no defect in title arose while she was the owner. Resisting the motion, Nette argues that the Special Warranty Deed from Nelson contains also warranties of seisin and quiet enjoyment, as reflected by the words "grant, bargain and sell" therein.[24] According to Nette, Nelson breached the warranties of seisin and quiet enjoyment because she purported to grant, bargain and sell the air rights of 1822 Spring Garden Street, even though she did not own such rights.

Under a Special Warranty Deed, "grantor agrees to defend the title to the property against any adverse claimant with a superior interest in the land claiming

---

[22] Growall v. Maietta, 931 A.2d 667 (Pa. Super. 2007) (citing Bortz v. Noon, 729 A.2d 555, (Pa. 1999)).
[23] Claire Nelson's brief in support of her motion for partial summary judgment, pp. 9-14.
[24] Nette's brief in opposition to Nelson's motion for partial summary judgment and in support of Nette's cross-motion for summary judgment at ¶ IV B.

through the grantor."[25] In this case, to determine whether Nelson's Special Warranty Deed also contains warranties of seisin and quiet enjoyment, it is necessary to analyze the words "grant, bargain and sell" as contained in the Pennsylvania Consolidated Statutes Annotated, 21 Pa. C.S.A. §§ 1 *et seq*., (the "Statute of Deeds,") and explained by case law.

In Clark v. Steele, the Pennsylvania Supreme Court explained the meaning of the words "grant, bargain and sell" contained in Section 6 of the Act of May 28, 1715, predecessor of our present-day Statute of Deeds. The Supreme Court stated:

> [While] the technical words 'grant, bargain and sell' are not necessary to the creation of a separate estate ... yet where they are used ... **it is to be presumed, unless a contrary intent clearly and affirmatively appears,** that the parties intended them to have their ordinary legal effect, which is to vest in the grantee the entire ownership ... in the land described.[26]

In 1909, the Pennsylvania Legislature codified Section 6 of the Act of May 28, 1715, and enacted the Statute of Deeds, 21 Pa. C.S.A. §§ 1 *et seq*. The pertinent section of the Statute of Deeds states:

> **§ 4 Words grant and convey import covenants of title and quiet enjoyment**
>
> The words "grant and convey," or either of one of said words, in any deed or instrument in writing for conveying land ... shall be adjudged an express covenant to the grantee ... That the grantor was seized of an indefeasible estate in fee simple in the property conveyed ... as also for quiet enjoyment against the grantor ... **unless**

---

[25] Leh v. Burke, 231 Pa. Super. 98, 110; 331 A.2d 755, 761 (Pa. Super. 1974) (emphasis supplied).
[26] Clark v. Steele, 99 A. 1001, 1003 (Pa. 1917) (explaining Section 6 of the Act of May 28, 1715, predecessor of 21 P.a. C.S.A. §6, emphasis supplied).

limited by express words contained in such deed.[27]

To adjudge whether Nelson breached the promise to convey an indefeasible estate in fee simple in the air rights, as well as a covenant for their quiet enjoyment, it is necessary to determine whether Nelson's deed contained language limiting the broad promises presumed under the words "grant, bargain and sell." "It is [a] cardinal rule of construction of deed that no part shall be rejected if it can be given a meaning."[28]

Language limiting the broader promises presumed under the words "grant, bargain and sell" are found in Section 6 of the Statute of Deeds. That portion of the Statute of Deeds states:

> **§ 6 "Warrant specially" construed**
>
> A covenant ... by the grantor ... in any deed or instrument in writing for conveying or releasing land that he ... "will warrant specially the property hereby conveyed" shall have the same effect as if the grantor ... had covenanted that he ... will forever warrant and defend the said property ... unto the said grantee ... **against the lawful claims and demands of the grantor ... and all persons claiming ... by, through, or under him**....[29]

Finally, a reading of the Nelson deed to Nette establishes whether that instrument shields Nelson from liability, except for claims arising by, through or under, Nelson herself. The Nelson deed states:

> Claire Nelson (hereinafter the Grantor) ... for and in consideration of the sum of ONE MILLION EIGHT HUNDRED THOUSAND AND 00/100 DOLLARS ... by these presents does grant, bargain and sell, release .... All that certain lot or piece of ground ... BEING KNOWN as

---

[27] 21 Pa. C.S.A. § 4 (1909) (emphasis supplied).
[28] Nevling v. Natoli, 434 A.2d 187, 190 Pa. Super. 1981).
[29] 21 Pa. C.S.A. § 6 (1909) (emphasis supplied).

> 1822 and 1822—A Spring Garden Street.... AND BEING the same premises [the air rights] which Franklin Town Corporation granted and conveyed upon Claire Nelson in fee....
> And the said Grantor ... **against all and every person and persons whosoever lawfully claiming or to claim the same or any part thereof, by, from, or under him, her it, or any of them, shall and will WARRANT and FOREVER DEFEND.**[30]

Nelson's deed is clear and unambiguous: while the words "grant, bargain and sell" promise Nette an indefeasible estate in fee simple and quiet enjoyment of the air rights, the words "against all and every person ... lawfully claiming ... by, from, or under him," protects Nette only against any claims arising under Nelson herself for any defect in title created while she was owner of the Property. Nelson did not create any defect in the title while she owned the Property because she never owned the air rights thereto. Nelson did not breach the Special Warranty Deed, and Nette may not maintain the claim of breach of warranty asserted in Count II of the complaint.

III. RECOVERY, IF ANY, IS LIMITED TO THE PRICE FIXED BY THE PARTIES, PLUS COSTS AND INTERESTS.

"In the absence of fraud, the consideration fixed by the parties limits the amount of recovery whether the contract be executed or executory." Clark v. Steele, 99 A. 1001, 1004 (Pa. 1917). In Pennsylvania, "[t]he majority rule has been thus stated: where the vendor, without fraud on his part, is unable to convey a good title and the defect was unknown to him at the time the contract was made, the purchaser is not entitled to damages for the loss of his bargain, but can recover only the purchase money paid, with interest and expenses incurred...." Seidlick v. Bradley, 142 A. 914, 916 (Pa. 1928).

---

[30] Indenture between Claire Nelson and Nette Properties, LLC, Exhibit 1 attached to the motion for partial summary judgment of Claire Nelson (emphasis supplied).

In this case, the parties executed the contract and Nette paid $ 1.8 million for the land and air rights to the Property. Nelson failed to convey title to the air rights without fraud on her part, and Nette asserts that the value of the Property without air rights, as of September 21, 2004, was $1.7 million.[31] Nelson's damages, if any, will be fixed by the consideration of $1.8 million as recited in the contract. Recovery, if any, will be equal to the difference between the consideration of $1.8 million and the Property's retrospective market value of $1.7 million, plus any costs and interest.

BY THE COURT,

***ARNOLD L. NEW*, J.**

[31] Summary Appraisal Report. 1822 and 1822—A Spring Garden Street, as of September 21, 2004. In the Summary Appraisal Report, Nette states that "the retrospective value of the subject property assuming that there are no air rights over the existing building, as of September 21, 2004, was ONE MILLION SEVEN HUNDRED THOUSAND DOLLARS ($1,700,000)."