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

ROBERT BANKS, SR.	:	January Term 2005
Plaintiff,	:	No. 2807
v.	:	Commerce Program
HANOVERIAN, INC., et al.	:	Control No. 030683
Defendants.	:	

ORDER and MEMORANDUM

AND NOW, this 10th day of March 2006, upon consideration of Defendants' Motion for Summary Judgment, the response in opposition, the respective memoranda, all matters of record, and in accordance with the Memorandum Opinion being filed contemporaneously with this Order, it hereby is **ORDERED** as follows:

1. Defendants' Motion for Summary Judgment is **granted** as to Counts I (breach of contract), II (fraud) and III (premises liability) and these counts are **dismissed**.

2. Defendants' Motion for Summary judgment is **denied** as to Count IV (unjust enrichment).

BY THE COURT:

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HOWLAND W. ABRAMSON, J.

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MEMORANDUM OPINION

HOWLAND W. ABRAMSON, J.

Currently before the court is the Motion for Summary Judgment of Defendants Hanoverian, Inc., Donald Metzger, M.M. Collins Real Estate Co., Inc. and Matthew M. Collins, III. For the reasons fully set forth below, said Motion is granted in part and denied in part.

I. Background

This action concerns an agreement of sale for certain commercial real estate located at 4301 N. Delaware Avenue, Philadelphia, Pennsylvania (the "Property"). The agreement of sale was executed on June 2, 2004 (the "Agreement") by and between Defendant Hanoverian, Inc., as seller ("Hanoverian") and Plaintiff, Robert J. Banks, Sr., as the buyer. Defendant Ronald Metzger ("Metzger") is the sole shareholder and chief executive officer of Hanoverian. Compl. ¶ 6. Hanoverian retained Defendants M.M. Collins Real Estate Co., Inc. and Matthew M. Collins (the "Collins Defendants") to help execute the sale of the Property.

According to the Agreement, Plaintiff agreed to purchase the Property "as is", "with all faults" and not in reliance on any representations of the seller or its agents. Def. Exh. B at ¶ 30.

However, the Agreement made specific representations concerning outstanding health or safety violations. Id. at ¶ 10. It further provided that Plaintiff had the right to a Phase I and/or Phase II Environmental Assessment of the Property within 35 days of execution of the Agreement with the ability to terminate for a full return of deposit money. Id. at ¶ 31. The Agreement did not contain a mortgage contingency clause. There was an integration clause which stated that the Agreement encompassed the entire agreement between the parties in connection with the sale and that the parties were "not bound by any other agreements, understandings, representations, warranties or conditions in connection therewith." Id. at ¶ 30.

Plaintiff paid $50,000.00 towards the purchase price of the Property. To complete the purchase, Plaintiff attempted to obtain financing through Wachovia Bank ("Wachovia") in order to secure a Small Business Association guarantee for the loan. As a condition of the financing, Wachovia required that Plaintiff conduct an environmental survey of the Property and also make certain improvements to the land. At the request of Wachovia, Plaintiff expended money and manpower to clear debris from the Property, however the value of this work is disputed by the parties.

On or about July 28, 2004, the Agreement was amended by the parties to allow additional time for completion of an environmental study, until September 14, 2004. Def. Mtn. Exh. E. Following an inspection which took place between August 25 and August 27, 2004, CES Environmental prepared an environmental survey of the Property (the "Environmental Report"). Def. Mtn. Exh. L. Due to delays connected with Plaintiff's financing, the Agreement was amended a second time on September 14, 2004, extending the closing date to September 30, 2004 (the "Second Amendment"). Def. Mtn. Exh. G. The Second Amendment provided that no further extensions would be granted to Plaintiff. Id.

By September 30, 2004, Plaintiff was still unable to secure financing with Wachovia and, as a result, the settlement did not take place as contemplated. On or about October 6, 2004, counsel for the Plaintiff wrote to Defendants requesting an additional two months for environmental testing, which was denied. Def. Mtn. Exhs. H and I. When denying this request, Defendants informed Plaintiff that he was in default of the Agreement and that the $50,000.00 deposit had been forfeited under its terms. Def. Mtn. Exh. I. A meeting was held on October 14, 2004 between the parties in an attempt to resurrect the deal, however such efforts were unsuccessful.

Thereafter, Plaintiff instituted this action against Hanoverian, Metzger and the Collins Defendants asserting various claims. Subsequent to several rulings by this court at the preliminary objection stage, the following claims currently remain and are the subject of the instant motion for summary judgment: 1) breach of contract (against Hanoverian); 2) fraud (against all Defendants); 3) premises liability (against Hanoverian) and; 4) unjust enrichment (against Hanoverian).

I. Hanoverian Is Entitled To Summary Judgment As To Count I - Breach of Contract

In his breach of contract claim (Count I), Plaintiff contends that Hanoverian breached the Agreement by: 1) failing to allow Plaintiff to complete Phase I and Phase II Environmental Studies; and 2) "concealing known past environmental violations and the presence of hazardous and toxic materials on the subject property such that seller has at all times been unable to convey good and marketable title." Compl. ¶ 35. Additionally, Plaintiff claims that the Agreement is null and void because it was induced by the fraudulent misrepresentation that the Property did not contain toxic or hazardous substances and was free from violations. Id. at ¶ 36.

Before it can be determined whether Hanoverian breached the Agreement, as a threshold issue, this court first must determine whether the alleged misrepresentations are barred under the express terms of the Agreement, and consequently, the parole evidence rule. Where the alleged prior or contemporaneous oral representations concern a subject that is specifically dealt with in the written contract which is purported to cover the entire agreement of the parties, the law is well settled that the alleged oral representations are merged into and/or superseded by the subsequent written contract; parole evidence to vary, modify or supersede the written contract is inadmissible. Myers v. McHenry, 398 Pa. Super. 100, 580 A.2d 860, 863 (1990) (*citing* Phillips Gas and Oil Co. v. Kline, 368 Pa. 516, 519, 84 A. 2d 301 (1951);). Under these circumstances, such representations only may be admitted where it is alleged that the terms at issue were omitted (or included) in the complete written contract by fraud, accident or mistake, in other words, where it is alleged that there was fraud in the execution of the contract. Bardwell v. The Willis Co., 375 Pa. 503, 100 A.2d 102 (1953).

With respect to the issue of defects, the Agreement is clear and specifically states that the Property:

> …is and has been purchased as a result of such inspection of all defects, whether latent or patent, and not in reliance upon any representation, inducement or promises, either oral or written, made by the Seller, or any Selling agent, or any other Agent or Seller, except as expressly stated in this agreement, that the Property shall be conveyed "as is" and that the Seller shall not be responsible or liable for any agreement, condition or stipulation not set forth herein relating to or affecting said premises. Buyer acknowledges that Seller has informed Buyer that Seller purchased the Property without an environmental audit.

Def. Exh. B at ¶ 30. The Agreement contains an integration clause which states that this encompasses the entire agreement between the parties in connection with the sale and that the parties "are not bound by any other agreements, understandings, representations, warranties or conditions in connection therewith." Id.

As aptly stated by the court in Bardwell: "what is the use of inserting such clauses in agreements if one of the parties thereto is permitted to prove by oral testimony that he didn't examine and wasn't familiar with the premises or their condition, or that they would not meet the standards which plaintiffs require?" Bardwell, 375 Pa. at 508. To allow parole evidence that the Defendants made representations regarding the condition of the property, where the contract specifically states that Plaintiff agreed that no such representations were made or were to be relied upon, would render the contract obsolete. Such a resolution would make a mockery of the parole evidence rule. Id.; *see also* Youndt v. First National Bank, 2005 Pa. Super. 42, 868 A.2d 539 (2005).

At bar, Plaintiff has not claimed that ¶ 30 was inserted by fraud, accident or mistake or that the Agreement did not contain the entire contract between the parties. If Plaintiff intended to rely on any understanding, promises or representations made prior to the execution of the Agreement, he should have protected himself by incorporating the representations upon which he now purports to rely. In light of the integration clause, Hanoverian can not be bound by any representations other than those expressly contained within the Agreement. Accordingly, Plaintiff's claims concerning the presence of toxic and hazardous materials and any other matters expressly precluded by the Agreement are barred.

That being said, to sustain a claim for breach of contract, Plaintiff must demonstrate: (1) the existence of a contract, including its essential terms; (2) a breach of a duty imposed by the contract; and (3) resultant damages. CoreStates Bank, Nat'l Assn. v. Cutillo, 1999 Pa. Super. 14, 723 A.2d 1053 (1999). This court finds that the record does not support Plaintiff's breach of contract claim. "Summary judgment is proper when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits demonstrate that there exists no genuine issue

of material fact and the moving party is entitled to judgment as a matter of law." Pa.R.C.P. 1035.2; Horne v. Haladay, 1999 Pa. Super. 64, 728 A.2d 954 (1999). This burden rests with the moving party and the court is required to examine the entire record in a light most favorable to the non-moving party. First Wisconsin Trust Co. v. Strausser, 439 Pa. Super. 192, 198, 653 A.2d 688, 691 (1995). The simple fact that Defendants bear the burden as the moving party does not mean that Plaintiff is entitled to a trial simply based on the allegations of his complaint. To withstand summary judgment, Plaintiff must actually produce evidence of facts which would entitle him to a jury trial; he may not just claim that such evidence exists in opposition to summary judgment and expect his claims to survive. Pa.R.C.P. 1035.2 ; *see also* Fennell v. Nationwide Mut. Fire Ins. Co., 412 Pa. Super. 534, 540, 603 A.2d 1064, 1067 (1992).

With respect to Plaintiff's contention that Defendant did not permit him to conduct. Phase I and II Environmental Studies, this court finds the record to be devoid of evidence to support such an allegation. The Agreement clearly provided that Plaintiff would have the right to an environmental assessment of the Property within 35 days of the execution of the Agreement – which was June 2, 2004 - with the ability to terminate the Agreement for a full refund of deposit money. Def. Exh. B. at ¶ 31. The record is clear that Plaintiff did not submit a report within 35 days, as mandated by the Agreement, but instead did nothing until his lender required him to get an environmental report, which was generated in September 2004, months after Plaintiff had any right to inspect or survey under the Agreement. Despite this language, it is clear from the Environmental Report that Defendants not only granted Plaintiff and his environmental experts access to the Property, but also cooperated with the investigations. Def. Mtn. Exh. L. Plaintiff has produced no evidence to the contrary. The same is true with respect to Plaintiff's allegations relating to Defendant's ability to convey good and marketable title.

Plaintiff has failed to present any evidence to support such a claim. In fact, this allegation is belied by the record, which demonstrates that the Property was conveyed to another buyer shortly after the Agreement was terminated. Def. Mtn. Exhs. M at 43-4 and Q. Again, Plaintiff has produced no evidence to the contrary.

The court then turns to whether Defendant breached any of the specific representations contained in the Agreement pertaining to Defendants' alleged concealment of Code violations. Such representations are contained in ¶ 10:

> Representations and Warranties of the Seller: To seller's knowledge, there are [*sic*] no knowledge of claims, actions or suits or proceedings in law or equity pending or threatened arising from or relating to the Premises…
>
> Notwithstanding the above…Seller has received no notice of any legal requirement of deficiency concerning the Premises nor any notice requiring any work, repairs, construction or alteration of the Premises, which have not been satisfied.
>
> Seller has received no notices that the Premises are not in compliance with all applicable laws, ordinances, rules, regulations and requirements of all applicable governmental and regulatory authorities having jurisdiction thereof, including without limitation, those pertaining to zoning, building, building setbacks, subdivision, safety, fire, electricity, planning and health.
>
> No assessments or notices thereof have been received by Seller which have not been paid in full, nor to the Seller's knowledge, are any threatened or proposed against the Premises or any part thereof.

Id. at ¶ 10. Thus, Hanoverian can only be liable for failing to disclose violations of which it had notice. Along these same lines, ¶ 12 of Agreement required Hanoverian to provide a "Certification Statement from the City of Philadelphia, Department of Licenses and Inspections, disclosing any uncorrected violation of the Housing, Building, Safety or Fire Ordinances of the City." Def. Exh. B at ¶ 12. Paragraph 12 further stated that Hanoverian had no obligation to cure any violations, "it being understood that Buyer is purchasing the Premises in its 'as is', 'where is' condition." Id.

The record makes it clear that Hanoverian complied with these obligations. The deposition testimony of Matthew M. Collins, which Plaintiff purports to rely on to demonstrate a breach, actually indicates that Defendants applied for and received the Certification and that it was supplied to Plaintiff. Def. Exh. M. at 43-44. Plaintiff does not dispute that he received the Certification. In light of these uncontroverted facts and the specific language of the Agreement, this court finds that Plaintiff has failed to demonstrate a breach of the Agreement.

Another problem with Plaintiff's claim is causation. In order to recover damages for breach of contract, the plaintiff must show a causal connection between the breach and the claimed loss. Exton Drive-In, Inc. v. Home Indemnity Co., 436 Pa. 480, 261 A.2d 219 (1969); Logan v. Mirror Printing Co. of Altoona, Pa., 410 Pa. Super. 446, 600 A.2d 225 (1991). The court finds that Plaintiff has failed to demonstrate such a connection here. Plaintiff has failed to present any evidence to demonstrate a causal connection between the alleged breach – failure to disclose Code violations which existed prior to Hanoverian's ownership of the Property - and the claimed loss presented. The record clearly demonstrates that the reason the deal fell through was because Plaintiff could not obtain financing and the Agreement did not contain a mortgage contingency. There has been no allegations that Plaintiff was unable to obtain financing as result of Defendant's alleged concealment or that these pre-existing violations were the reason the deal fell through. In fact, even as late as October 18, 2004, Plaintiff indicated that he still wanted to purchase the Property. Def. Mtn. Exh. K.

Based on the foregoing, this court finds that Plaintiff has failed produce specific facts to demonstrate the existence of a genuine issue for trial with respect to its breach of contract claim. Accordingly, summary judgment is granted in favor of Hanoverian as to Count I.

II. Plaintiff's Fraud Claim Fails As A Matter of Law

Count II of the Complaint purports to state a claim for fraud, based on almost identical allegations as those set forth in Count I. As such, Count II likewise fails because the oral representations that are the basis of Defendants' fraud claim have been merged into and are superseded by the Agreement, so parole evidence to vary, modify or supersede its terms is inadmissible.

Plaintiff's fraud claim against Hanoverian is also barred by the gist of the action doctrine which "precludes plaintiffs from re-casting ordinary breach of contract claims into tort claims." Etoll, Inc. v. Elias/Savion Advertising, Inc., 2002 Pa. Super. 347, 811 A.2d 10, 14 (2002). Such a claim is barred where, as here, "the duties allegedly breached were created and grounded in the contract itself . . .[or] the tort claim essentially duplicates a breach of contract claim or the success of [the tort claim] is wholly dependent on the terms of the contract." Id. As pled, Plaintiff's fraud claim is based upon the breach of representations specifically contemplated by the Agreement and barred as parole evidence. Accordingly, such claims fail as a matter of law as to Hanoverian.

Since Count II fails as to Hanoverian, it necessarily fails as to its agents Metzger and the Collins Defendants under the plain language of the Agreement which provides that the Property was "…purchased as a result of [an] inspection of all defects, whether latent or patent, and not in reliance upon any representation, inducement or promises, either oral or written, made by the Seller, or any Selling agent, or any other Agent or Seller…" Def. Exh. B at ¶ 30.

Accordingly, summary judgment granted in favor of all Defendants as to Plaintiff's fraud claim and Count II is dismissed.

III. Hanoverian Is Entitled To Summary Judgment As To Count III - Premises Liability

In Count III of the Complaint, Plaintiff contends that "…shortly prior to October 25, 2004…" he suffered "a toxic reaction to concealed hazardous substances which were located and concealed" within a building on the Property. Compl. ¶ 28. He claims that his injuries occurred as a result of Hanoverian's negligence in "failing to warn him of the danger." Compl. ¶¶ 52-3.

A viable cause of action for negligence must demonstrate four elements: 1) a duty or obligation recognized by the law that requires an actor to conform his actions to a standard of conduct for the protection of others against unreasonable risks; 2) failure on the part of the defendant to conform to that standard of conduct, *i.e.,* a breach of duty; 3) a reasonably close causal connection between the breach of duty and the injury sustained; and 4) actual loss or damages that result from the breach. Ney v. Axelrod, 1999 Pa. Super. 8, 723 A.2d 719, 721 (1999)(*emphasis added*). The test for proximate causation is whether the defendant's acts or omissions were a substantial factor in bringing about plaintiff's harm. First v. Zem Zem Temple, 454 Pa. Super. 548, 686 A.2d 18 (1996).

As a preliminary matter, Plaintiff has failed to establish facts to demonstrate that Hanoverian was negligent by storing the chemicals at issue on the Property in the manner in which they did so, nor has there been in evidence of the proper standard of care in such circumstances. Furthermore, Plaintiff has proffered no evidence to demonstrate that the drums actually contained aluminum oxide or that the substance inside was toxic. The court also finds that Plaintiff has failed to establish the requisite causal link between his complained injury and any conduct by Hanoverian. First, Plaintiff's own deposition testimony belies his claims, as he admits that he never actually handled or attempted to clean up the chemicals, only that he simply entered and exited a building where the chemicals were stored. Def. Mtn. Exh. D at 125-134. Plaintiff has also failed to demonstrate that the substance in the drums could cause the injuries he

allegedly suffered in the manner in which he claims to have suffered them. The bald and conclusory expert report submitted by Plaintiff, which consists of little more than a physician's note, does not establish that Plaintiff's alleged injuries – described vaguely as "strongly compatible with irritant contact dermatitis" – could be contracted the manner claimed by Plaintiff. Def. Mtn. Exh. R. As Plaintiff has failed to prove the requisite elements necessary for a negligence claim, summary judgment is entered in favor of Hanoverian with respect Count III.

IV. Factual Issues Exist In Connection With Plaintiff's Unjust Enrichment Claim

In support of his unjust enrichment claim, Plaintiff contends that he spent in excess of $100,000.00 "…in order to put the Property in a condition whereby Plaintiff could obtain financing for the purchase of the Property, expended various manpower on equipment and manpower to clean up the extensive debris on the Property to make it presentable for to a perspective lender." Compl. ¶ 57. Plaintiff claims that such actions made the Property more marketable for sale and allowed for a portion of the Property to be leased to a tenant for $6,000.000 in monthly rent, which was paid to Hanoverian. Id. at ¶ 59.

A claim for unjust enrichment requires that plaintiff demonstrate the following elements: 1) benefits conferred on defendant by plaintiff; 2) appreciation of such benefits by defendant; and 3) acceptance and retention of such benefits under circumstances in which it would be inequitable for defendant to retain the benefit without payment of value. Schneck v. K.E. David Ltd., 446 Pa. Super. 94, 97-8, 666 A.2d 327, 328-9 (1995). The court finds that factual issues exist in connection with Plaintiff's unjust enrichment claim, particularly whether a benefit was conferred upon Hanoverian as a result of Plaintiff's clearing of the land, including the value, if any, of this work. Accordingly, summary judgment is denied as to Count IV.

CONCLUSION

Based on the foregoing, this court finds as follows:

1. Defendants' Motion for Summary Judgment is **granted** as to Counts I (breach of contract), II (fraud) and III (premises liability) and these counts are **dismissed**; and

2. Defendants' Motion for Summary judgment is **denied** as to Count IV (unjust enrichment).

BY THE COURT:

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HOWLAND W. ABRAMSON, J.