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

PAUL HILLIER and	:	
LOUISE HILLIER, h/w	:	JANUARY 2004
	:	
v.	:	
	:	NO: 0513
M.I.S.I., LP, P.I.S.I., INC., STEPHEN IZZI, and	:	
NORTHEAST EXECUTIVE ABSTRACT	:	
AGENCY, INC.	:	COMMERCE PROGRAM
v.	:	
	:	
STAHL CAMPBELL REALTY	:	

JUDGMENT

AND NOW, this 27th day of January, 2006, the Court finds in favor of plaintiff Louise Hillier and against M.I.S.I., LP, P.I.S.I., Inc., and Northeast Executive Abstract Agency, Inc. in the amount of $50,000. Plaintiff may collect a single judgment of $50,000 from any one or all of these defendants.

.

BY THE COURT:

_____

HOWLAND W. ABRAMSON, J.

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

PAUL HILLIER and	:	
LOUISE HILLIER, h/w	:	JANUARY 2004
	:	
v.	:	
	:	NO: 0513
M.I.S.I. LP, P.I.S.I., INC., STEPHEN IZZI, and	:	
NORTHEAST EXECUTIVE ABSTRACT	:	
AGENCY, INC.	:	COMMERCE PROGRAM
v.	:	
	:	
STAHL CAMPBELL REALTY	:	

FINDINGS OF FACT

1-55. The Joint Stipulation of Facts is incorporated herein by reference. (See Court Exhibit).

56. A standard agreement (the "Agreement") for the sale of the property at 1801 County Line Road, Southampton, PA (the "Property") was entered into between Louise M. Hillier as the seller ("seller") and M.I.S.I. Limited Partnership (MISI) as the buyer ("buyer"). Exh. P-1; Stipulated Facts, at ¶ 5. It was signed by Louise M. Hillier for the seller and Stephen Izzi ("Izzi") for the buyer, who signed his name with the word "partner" after his signature. Exh. P-1; N.T. vol. 2, 8:1-5 (Aug. 23, 2005).

57. P.I.S.I., Inc. ("PISI") is the general partner of MISI. See Stipulated Facts, at ¶ 1. Izzi is a limited partner of MISI and a shareholder of PISI. See Stipulated Facts, at ¶ 2. Izzi is the shareholder of Northeast Executive Abstract Agency, Inc. ("Northeast"). Izzi is also an officer of PISI and Northeast. Id.

58. The Agreement was entered into by the parties on August 30, 2003. Exh. P-1; Stipulated Facts, at ¶ 5.

59. The Agreement stated that settlement was to occur on or before November 30, 2003. Exh. P-1; Stipulated Facts, at ¶ 10.

60. The Agreement contained a "time is of the essence" provision. That provision specifically stated that "the said date for settlement, and all other dates and times referred to for the performance of any of the obligations of this Agreement are agreed of the essence of this Agreement and are binding." Exh. P-1; Stipulated Facts, at ¶ 10.

61. Paragraph 29(B) of the Agreement stated:

> BUYER SHALL HAVE FIFTEEN (15) DAYS AFTER THE WRITTEN APPROVAL OF THIS AGREEMENT, BY SELLER, TO INSPECT THE PROPERTY. IF, FOR ANY REASON, BUYER FINDS ENVIRONMENTAL PROBLEMS THAT WOULD COST IN EXCESS OF FIVE THOUSAND DOLLARS ($5,000) THEN BUYER HAS THE RIGHT TO TERMINATE THIS AGREEMENT OF SALE WITH ALL DEPOSIT MONIES RETURNED TO THE BUYER. Exh. P-1.

62. Keating Environmental Management, Inc. ("Keating"), the environmental engineering company retained by buyer, performed an environmental inspection on the Property on September 5, 2003. N.T. vol. 1, 154:1-7 (Aug. 22, 2003).

63. After its environmental inspection, Keating issued a report on September 13, 2003. The report stated, in part:

> It is Keating Environmental's recommendation that the UST system be closed by excavation and removal. At that time, further investigation of potential subsurface soils or groundwater contamination can be performed. In the interim, the remaining fuel oil in the tank should be removed and properly disposed of in accordance with applicable environmental regulations. The estimated cost to remove the UST and perform assessment sampling is approximately $5,000. This cost does not include any remediation activities that may be necessary. Exh. P-2.

64. Buyer received the Keating report on or around September 13, 2003. N.T. vol. 2, 24:6-16 (Aug. 23, 2005). Seller received the Keating report on or around September 16, 2003. N.T. vol. 1, 45:10-17 (Aug. 22, 2005).

65. Following Keating's September 13, 2003 report, a settlement date of Friday, November 28, 2003 was agreed upon by the parties. Stipulated Facts, at ¶ 18.

66. At no time between the receipt of the Keating report and November 26, 2003 did buyer indicate to seller that buyer was going to cancel the Agreement because of environmental problems. N.T. vol. 1, 50:17-22 (Aug. 22, 2003).

67. On November 26, 2003, two days before the scheduled settlement, buyer wrote to seller requesting a one week extension of the settlement date (until December 5, 2003). The letter stated that the extension was being requested because "of environmental and termite issues" on the Property. Exh. P-3.

68. Seller rejected buyer's request to extend the settlement date by letter dated November 26, 2003. The letter stated that "seller is ready and able to complete settlement on Friday, November 28, 2003." Exh. P-4; N.T. vol. 1, 55:2-13 (Aug. 22, 2003).

69. On November 27, 2003, in response to seller's rejection of buyer's request, buyer notified seller by letter that buyer was electing its right to terminate the Agreement under Paragraph 29(b) of the Agreement. Exh. P-5.

70. On December 1, 2003, buyer's attorney called Keating to ask for clarification of the costs set out in the September 13, 2003 environmental report. N.T. vol. 2, 48:13-17 (Aug. 23, 2003).

71. This request for clarification occurred after seller had brought it to buyer's attention that the September 13, 2003 report did not say that costs were in excess of $5,000. N.T. vol. 2, 49:8-13 (Aug. 23, 2003); Stipulated Facts, at ¶ 20.

72. After Keating received the request from buyer's attorney for clarification of its September 13, 2003 report, Keating issued a second report dated December 1, 2003. Stipulated Facts, at ¶ 20.

73. Keating's second report stated, in part:

> The cost to perform the initial environmental investigation activities at the two identified areas of recognized environmental concern was $2,663.76...As was stated in our 13 September 2003 letter, the estimated cost to remove the UST system and perform the necessary soil assessment activities is $5,000…In summary, the minimum cost to address environmental conditions at the site will be in excess of $7,600, and could be significantly higher if contaminated soils are encountered. Exh. P-9.

74. Settlement did not occur on November 28, 2003 or any other day. Stipulated Facts, at ¶ 23.

75. Paragraph 27 of the Agreement, entitled "Default," provides that "Seller has the option of retaining all sums paid by Buyer, including the deposit monies, should Buyer: 1) fail to make any additional payments as specified in paragraph 3; or 2) furnish false or incomplete information to Seller, Broker(s), or the mortgage lender, if any, concerning Buyer's legal or financial status…or 3) violate or fail to fulfill and perform any other terms or conditions of this Agreement." Exh. P-1; Stipulated Facts, at ¶ 24.

76. Paragraph 3(B) of the Agreement of Sale states: "Deposit to be held at title co. of buyer's choice." Exh. P-1. Buyer chose Northeast as the title company to hold the deposit. N.T. vol. 2, 12:3-9 (Aug. 23, 2005).

77. Paragraph 21 of the Agreement states:

> (A) Deposits, regardless of the form of payment and the person designated as payee, will be paid in U.S. Dollars to Broker or party identified in paragraph 3(B), who will retain them in an escrow account until consummation or termination of this Agreement in conformity with all applicable laws and regulations. Any uncashed check tendered as deposit monies may be held pending the

acceptance of this offer.
(B) Upon termination of this Agreement, the Broker holding the deposit monies will release the deposit monies in accordance with the terms of a fully executed written agreement between Buyer and Seller. Exh. P-1.

78. MISI drew a check for $50,000 for deposit into escrow with Northeast, and delivered that $50,000 check to Northeast. Stipulated Facts, at ¶ 13. However, that check was never cashed or deposited into an escrow account. Stipulated Facts, at ¶ 13; N.T. vol. 2, 20:4-25 to 21:1-10 (Aug. 23, 2005).

79. On September 17, 2003, Northeast sent to James Neidhardt ("Neidhardt"), the broker for seller, a copy of a deposit slip showing a $50,000 deposit into Northeast's settlement account, bearing the handwritten notation "1801 County Lane." Northeast sent this deposit slip in response to the request made by Neidhardt for confirmation that the deposit had been made by buyer under the Agreement. Unbeknownst to either Neidhardt or seller until after December 3, 2003, when seller through counsel made a demand upon Northeast for a turnover of the $50,000 deposit, the $50,000 check for the deposit given by Izzi to Northeast was never deposited. Stipulated Facts, at ¶ 26.

80. The $50,000 check that MISI wrote to Northeast is still in existence and is being held by Northeast in the file. N.T. vol. 2, 42:7-10, 44:9-13 (Aug. 23, 2005).

81. The Property was never re-listed for sale by seller after the subject transaction fell through. N.T. vol. 1, 137:14-18 (Aug. 22, 2003).

82. Paul Hillier is not, and has never been, on the deed to the Property. N.T. vol. 1, 123:9-16 (Aug. 22, 2005).

83. The current fair market value of the Property is stipulated by the parties to be $615,000. N.T. vol. 2, 61:20-25 to 62:1-10 (Aug. 23, 2005). The fair market value at the time of the breach was not shown.

CONCLUSIONS OF LAW

1. Time may be made of the essence of the performance of a contract for the sale of realty by an express provision to that effect, and such a provision is valid and enforceable. See 1 P.L.E. Sales of Realty § 59 ("Time as of the Essence"), citing Jeffrey v. Pennsylvania Mining Co., 204 Pa. 213, 53 A. 772 (1902).

2. The Agreement contained an express clause stating that time was of the essence for the "date for settlement, **and all other dates and times referred to** for the performance of any of the obligations of this Agreement." See P-1, at ¶ 5 (emphasis added).

3. Under Paragraph 29(B) of the Agreement, buyer had fifteen days after the Agreement was approved by seller to inspect the Property. This inspection was a prerequisite to buyer's decision on whether or not buyer would elect to terminate the Agreement based on environmental problems in excess of $5,000. The fact that there was a time limit (fifteen days) for the inspection to take place, coupled with the fact that the contract contained the "time is of the essence" clause, shows that the parties intended that buyer had to elect its right to terminate within a reasonable period of time after the inspection.

4. Buyer received the Keating report on September 13, 2003. Buyer attempted to terminate the Agreement based on the environmental problems on November 27, 2003, one day before settlement was scheduled to take place. See P-5. This was a period of over two months. During this period, the Property was tied up by this contract, and seller could not offer the Property for sale to any other potential buyers.

5. Buyer breached the contract by allowing an unreasonable amount of time to elapse before notifying seller that buyer was terminating the contract based on the environmental problems. It was unreasonable for buyer to cancel the Agreement the day before the settlement date when buyer had knowledge of the environmental problems for over two months beforehand. Seller had no indication that buyer was not going to go through with the Agreement until she received notice on the day before the settlement. **Seller was ready, willing, and able to settle on the Property on November 28, 2003.**

6. According to Paragraph 27 of the Agreement, seller is entitled to the deposit money based on buyer's default. Therefore, seller is entitled to the $50,000 as a result of buyer's breach of the Agreement. MISI, as the named buyer in the contract, is liable for this amount.

7. Buyer is liable to Louise Hillier only, because she was the named seller in the Agreement. Paul Hillier has no standing to assert claims for breach of contract or fraud.

8. "A limited partnership in Pennsylvania is an entity in which one or more persons, with unlimited liability, manage the partnership, while one or more other persons only contribute capital; these latter partners have no right to participate in the management and operation of the business and assume no liability beyond the capital contributed." See Freedman v. Philadelphia Tax Review Board, 212 Pa. Super. 442, 446, 243 A.2d 130, 133 (1968). The limited partner "is in a position analogous to that of a corporate shareholder, an investor who likewise has limited liability and no voice in the operation of an enterprise." Id. at 134.

9. A limited partner "is not liable for the obligations of the limited partnership." See Commonwealth, Dept. of Revenue for Bureau of Accounts Settlement v. McKelvey, 526 Pa. 472, 476, 587 A.2d 693, 695 (1991), citing Freedman, 212 Pa. Super. 442, 243 A.2d 130.

10. MISI is a limited partnership. Izzi, as a limited partner of MISI, is not personally liable for the obligations of MISI.

11. The law in Pennsylvania is that "all general partners of a Pennsylvania limited partnership are liable for the debts and obligations of the partnership." See TPS Technologies, Inc. v. Rodin

Enterprises, Inc., 816 F. Supp. 345, 350 (E.D. Pa. 1993); see also 15 Pa.C.S. § 8533.

12. The general partner in the limited partnership is ordinarily exposed to unlimited personal liability for the debts of the partnership. When the general partner is itself a corporation, this exposure to unlimited personal liability is avoided. See In re Estate of Hall, 517 Pa. 115, 121, 535 A.2d 47, 50 (1987).

13. PISI, as the general partner of MISI, is subject to the liabilities of MISI.

14. Izzi is not personally liable as a general partner. See Findings of Fact, at ¶ 57. The Agreement clearly stated that the buyer in the contract was a limited partnership. Seller did not testify that she only signed the Agreement with buyer because she believed that Izzi was a general partner with personal liability. Therefore, seller may not raise an estoppel argument to convert a limited partner into a general partner on the basis of a misnomer.

15. Northeast is not liable to seller under the breach of contract claim. Northeast was not a party to the contract, but was a fiduciary stakeholder that was supposed to hold the escrow money.[1]

16. The gist of the action doctrine "precludes plaintiffs from re-casting ordinary breach of contract claims into tort claims." See Etoll, Inc. v. Elias/Savion Advertising, Inc., 2002 Pa. Super. 347, *P14, 811 A.2d 10, 14 (2002).

17. The gist of the action doctrine seeks to uphold the conceptual difference between breach of contract claims and tort claims, in that "tort actions lie for breaches of duties imposed by law as a matter of social policy, while contract actions lie only for breaches of duties imposed by mutual consensus agreements between particular individuals." Id., citing Bash v. Bell Tel. Co., 411 Pa. Super. 347, 601 A.2d 825 (1992).

18. Pennsylvania courts have held that the gist of the action doctrine bars tort claims: (1) arising solely from a contract between the parties; (2) where the duties allegedly breached were created and grounded in the contract itself; (3) where the liability stems from a contract; or (4) where the tort claim essentially duplicates a breach of contract claim or the success of which is wholly dependent on the terms of a contract. See Hart v. Arnold, 2005 Pa. Super. 328, *P43, 884 A.2d 316, 340 (2005), citing Etoll, 2002 Pa. Super. at *28.

19. Seller's claims for fraudulent misrepresentation and negligent misrepresentation against defendants MISI and PISI are barred by the gist of the action doctrine. All of the fraudulent and negligent acts that are alleged by seller arose in the course of the parties' contractual relationship and stem from duties that were imposed by the contract itself. Therefore, these claims against MISI and PISI are barred.

20. Seller's claims for fraudulent misrepresentation and negligent misrepresentation against

[1] See Janson v. Cozen & O'Connor, 450 Pa. Super. 415, 676 A.2d 242 (1996), citing Kreuer v. Union National Bank of McKeesport, 276 Pa. 201, 119 A. 921 (1923) ("The depositary (of an escrow or) under an escrow agreement is generally considered to be an agent (or trustee) for both parties").

defendants Izzi and Northeast are not barred by the gist of the action doctrine because Izzi and Northeast were not parties to the contract.

21. The elements of fraudulent misrepresentation 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) resulting injury proximately caused by the reliance. See Porreco v. Porreco, 571 Pa. 61, 69, 811 A.2d 566, 570 (2002). The party alleging fraud must prove these elements by clear and convincing evidence. Id.

22. The elements of negligent misrepresentation are: 1) a misrepresentation of a material fact; (2) made under circumstances in which the misrepresenter ought to have known its falsity; (3) with an intent to induce another to act on it; and (4) which results in injury to a party acting in justifiable reliance on the misrepresentation. See Heritage Surveyors & Engineers, Inc. v. Nat'l Penn Bank, 2002 Pa. Super. 194, *P13, 801 A.2d 1248, 1252 (2002).

23. Izzi is not liable for fraudulent misrepresentation, which must be proven by clear and convincing evidence. There was no evidence or argument that Izzi directed that the false deposit slip be sent to seller or knew that such was the plan and did nothing to prevent it.

24. There is insufficient evidence of negligent misrepresentation on the part of Izzi.

25. Northeast is liable to seller for fraudulent misrepresentation. Northeast's actions in making out a false deposit slip in response to a specific inquiry regarding the escrow deposit and sending it to seller (under circumstances where the deposit had in fact not been made, the check was in its file, there was no bank receipt for the deposit, and no bank statement could have reflected the deposit), were at least reckless, if not intentional.

26. The standard under which punitive damages are measured in Pennsylvania requires analysis of the following factors: (1) the character of the act; (2) the nature and extent of the harm; and (3) the wealth of the defendant. See Reading Radio, Inc. v. Fink, 2003 Pa. Super. 353, P43, 833 A.2d 199, 214 (2003). The Court will not award punitive damages because there is no evidence regarding the wealth of Northeast as a means of determining what would constitute punishment or deterrence. Northeast should derive no solace from this, however, because this issue will likely recur if the conducts recurs.

27. Seller has not produced sufficient evidence showing that seller is entitled to damages for lost profit. Seller has failed to show the fair market value of the Property at the time of the breach of the Agreement. See Bafile v. Borough of Muncy, 527 Pa. 25, 29-30, 588 A.2d 462, 464 (1991).

FINDING

The Court finds in favor of plaintiff Louise Hillier and against defendants MISI, PISI, and Northeast in the amount of $50,000. Plaintiff may collect a single judgment for $50,000 from any one or all of these defendants. An Order consistent with this judgment will be issued.

BY THE COURT:

Dated: January 27, 2006

HOWLAND W. ABRAMSON, J.