

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

KATHLEEN CHRISTOPHER,	:	October Term 2004
Plaintiff,	:	
v.	:	No. 2449
MICHAEL HURWITZ and MAMI KATO,	:	
Defendants.	:	COMMERCE PROGRAM
	:	
	:	Control Number 102934

MEMORANDUM OPINION

ABRAMSON, J.

This action concerns an agreement of sale for certain commercial real estate located at 18 South 3rd Street, Philadelphia, Pa. Currently before the court is the Motion for Summary Judgment of Defendants Michael Hurwitz and Mami Kato (“Defendants”). For the reasons discussed below, said motion is granted.

BACKGROUND

On or about May 21, 2004, Kathleen Christopher, the plaintiff, (“Christopher”) agreed to purchase 18 South 3rd Street, Philadelphia, Pa. from the defendants for \$950,000.00.¹ In connection with the purchase, Christopher was represented by Marsha Wolf, Esquire. (Exhibit “B” to Dfts. Mt. for SJ- Request for Admissions 9, 10).

According to the Real Estate Purchase Agreement (“Purchase Agreement”) executed by the parties, Christopher agreed to purchase the property “as is” and “where is” with all the faults, on the basis of such inspection, tests and examinations and not in

¹ Prior to May 2004, Christopher leased the first floor and basement to operate her business, a retail eyeglass store selling designer eyewear. (Dfts. Request for Admissions ¶¶ 1-2, 4 attached to Dfts. Mt. for SJ as Exhibit “B”).

reliance upon any representations or warranties of any kind by defendants. (Exhibit “A” to Dfts. Mt. for SJ- Purchase Agreement).

The Purchase Agreement required Christopher to deposit with defendants the sum of one thousand dollars at the time of execution. (Id. p. 4). The Purchase Agreement further required that within ten (10) days of the full execution of the Purchase Agreement, Christopher deposit with defendants forty four thousand dollars (\$44,000). The deposit was nonrefundable and was not required to be held in escrow. (Id.).

The Purchase Agreement contained a mortgage contingency. Specifically, the Agreement provided that Christopher’s obligations were contingent upon her obtaining a mortgage and other financing in the minimum amount of \$800,000.00 at an interest rate not to exceed nine percent per annum within ninety days after the date the Agreement was fully executed. In the event the mortgage contingency was not satisfied or waived in writing by Christopher within ninety days after signing, the Purchase Agreement would become null and void and the parties would be released from their respective obligations without any further liability to the other. In such event the entire deposit and accrued interest would be retained by defendants. (Id.). The closing was scheduled to take place September 23, 2004.

On the same date, Christopher and defendants modified the terms of the Purchase Agreement in a document titled Addendum to the Purchase Agreement. (Exhibit “A” to Dfts. Mt. for SJ- Addendum p. 8, 16). The Addendum required the deposit to be filed within five days of the execution of the Agreement and the Addendum. The Addendum also stated the following:

Buyer shall be permitted to have an inspection of the Property within ten (10) days of the execution of the Agreement and this Addendum, and shall

provide a copy of any inspection report within fourteen (14) days of the execution of the Agreement and Addendum. In the event, that the report is not provided within said fourteen (14) day period, or if it reflects repairs totaling less than TEN THOUSAND DOLLARS (\$10,000.00), in addition to the cost being made by Sellers and Sellers and Buyer outlined in the following paragraphs, Buyers agree to purchase the Property as is and without any reduction in the purchase price. In the event that such repairs exceed TEN THOUSAND DOLLARS (\$10,000.00), Sellers shall inform Buyers, in writing and within ten (10) days of receiving the inspection report, if they will perform the repairs at their sole costs and expense, in which case, Buyer shall accept the Property without any reduction in the purchase price. If Sellers elect not to make the repairs, Buyer shall inform Sellers, in writing and within five (5) days of Sellers election not to repair, whether Buyer will proceed with the purchase or terminate the Agreement and Addendum. In the event that Buyer terminates the Agreement and Addendum under this paragraph 2, all deposit monies shall be returned to Buyer within five (5) days, and the Agreement and Addendum shall be null and void.”(Id.).

Defendants also agreed to make certain repairs to the property including parging the rear (West) wall of the basement, repairing the rainwater drain pipe in the basement and repairing any faulty wiring in the basement, all at no charge to Christopher. It was further agreed that in the event that the present wiring or electrical service was inadequate to operate the store, Christopher and defendants agreed to share the cost of any reasonable modification equally. (Id.).

Additionally, in the Addendum, defendants agreed to finance the purchase of the property by providing conventional financing at prime +5% at the time of closing over fifteen years with a balloon payment 37th month after payment in the event Christopher was unable to obtain a mortgage. As required by the Purchase Agreement and the Addendum, Christopher paid a deposit of \$45,000 to defendants.

On June 1, 2004, Helpful Home Inspectors issued a home inspection report at the request of Christopher. (Exhibit F to the Complaint). The inspection report identified several items which required repair and also noted a material defect. Specifically,

Helpful Home Inspectors noted that the basement of the property showed evidence of moisture penetration. According to the inspector, the moisture penetration was chronic and severe. (Id.).

Christopher did not provide defendants with an inspection report that reflected the cost of any repairs² nor did she terminate the Purchase Agreement and Addendum as required by paragraph 2 of the Addendum.

After receipt of the Inspection Report and before the scheduled closing, Christopher consulted new counsel who allegedly recommended obtaining an appraisal of the property as well as obtaining a Phase I Environmental Study. On September 2, 2004, an appraiser hired by Christopher determined that the fair market value of the property in “as is” condition was \$680,000.00. (Exhibit “G” to the Complaint). On September 9, 2004, Christopher’s new counsel wrote to Defendants demanding rescission of the Purchase Agreement and return of the \$45,000.00 deposit. (Exhibit “I” to the Complaint). On September 17, 2004, counsel for defendants stated that they expected to close on the transaction on September 23, 2004. Christopher did not attend the closing.

On or about October 2004, Christopher instituted suit against defendants. The suit purports to state a claim for fraudulent inducement and undue influence and seeks rescission and restitution of the Purchase Agreement and the Addendum (Count II), states a claim for title as an equitable owner not in possession (Count III) and seeks punitive damages (Count IV).³ In addition to the complaint, Christopher filed a *Lis Pendens*. The *Lis Pendens* was stricken by the court upon motion of defendants.

² The record presented to the court fails to evidence if Christopher provided defendants with a copy of the June 1, 2004 inspection report prepared by Helpful Home Inspectors.

³ The complaint also makes a claim for reimbursement of funds paid under leases and not returned (Count I). Defendants’ motion does not seek summary judgment on this claim.

Defendants answered the complaint with new matter and a counterclaim for breach of the Purchase Agreement and breach of the lease agreement for the first and second floors. Defendants have now filed a motion for summary judgment seeking to dismiss Counts II, III and IV of the complaint.

DISCUSSION

I. Standard of Review

Summary judgment is warranted after the relevant pleadings are closed under the following circumstances:"(1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or (2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury." Pa.R.C.P. 1035.2. Summary judgment is to be granted only in a case that is clear and free from doubt. Washington v. Baxter, 553 Pa. 434, 441, 719 A.2d 733, 736 (1998).

Under Pennsylvania Rule of Civil Procedure 1035.2, the party responding to a summary judgment motion has a significant burden. A non-moving party must adduce sufficient evidence on an issue essential to his case and on which he bears the burden of proof such that a jury could return a verdict in his favor. Failure to adduce this evidence establishes that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Venini v. BKU Inc., 70 Pa. D. & C.4th 120, 123-124 (Pa. D. & C. 2004).

II. Plaintiff has failed to demonstrate sufficient evidence to rescind the agreement of sale on the basis of fraudulent inducement and undue influence.

Christopher seeks to void the Purchase Agreement and Addendum based upon an alleged confidential relationship between herself and Defendant Michael Hurwitz. As will be discussed below, the record does not support such a contention.

A contract that is the product of a confidential relationship is presumptively voidable “unless the party seeking to sustain the validity of the transaction affirmatively demonstrates that it was fair under all of the circumstances and beyond the reach of suspicion.” Paone v. Dean Witter Reynolds, Inc., 789 A.2d 221, 226 (Pa. Super. 2001)(*quoting Frowen v. Blank*, 425 A.2d 421, 416 (Pa. 1981)). The court must determine whether the evidence supports a finding that there is a confidential relationship between the parties.

Confidential relationships may be formed in a variety of circumstances which “cannot be reduced to a catalogue of specific circumstances. Basile v. H. & R Block, Inc., 777 A.2d 95 (Pa. Super. 2001). The essence of such a relationship is trust and confidence on one side, and a corresponding opportunity to abuse that trust for personal gain on the other. Id. Therefore, “a confidential relationship appears when the circumstance make it certain the parties do not deal on equal terms, but on the one side there is an overmastering influence, or, on the other, weakness, dependence or trust, justifiably reposed. Id.

Here, Christopher contends that she confided in defendant Michael Hurwitz, a person she thought of as a friend and someone she could trust. (Plaintiff’s complaint p. 7). She further contends that she was in a weakened state due to stress in her personal

life and financial problems and was therefore “not thinking clearly and susceptible to those who professed to help in advising her as to what to do.” (Id.). The record presented to the court does not support Christopher’s claim of a confidential relationship.

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. Civ. P. 1035.2. The burden rests upon the moving party and the court is required to examine the entire record in a light most favorable to the nonmoving party. Id. The simple fact that defendant bears the burden as the moving party does not mean that plaintiff is entitled to a trial simply based on the allegations of his complaint or plaintiff’s counsels argument contained within its response to the motion for summary judgment.

To withstand summary judgment, plaintiff **must actually produce evidence** of facts which would entitle her to a trial; she may not just claim that evidence exists in opposition to summary judgment and expect her claims to survive summary judgment. *See* Pa. R. Civ. P. 1035.2; *see also*, Fennell v. Nationwide Mut. Fire Ins. Co., 603 A.2d 1064, 1067 (Pa. Super. 1992).

In the case at bar, Christopher failed to produce evidence other than relying upon the allegations contained within the complaint that at the time the Purchase Agreement and Addendum were entered into she was in a so called “weakened state” and that Hurwitz exercised overmastering influence over her in the transaction she now seeks to void.

On the contrary there is ample evidence supporting the finding that there clearly was no disparity of expertise between Christopher and Hurwitz and that the parties were

of equal bargaining power. In Christopher's responses to requests for admissions, Christopher admitted that she was represented by counsel when the Purchase Agreement and Addendum were drafted, negotiated and executed. A review of these documents demonstrates that Christopher and her counsel negotiated a revision to the Purchase Agreement, the right to inspect the subject property and right to walk away from the proposed sale if certain conditions existed. These are terms which were not present in the original Agreement and clearly were added at her request and for her benefit.

Furthermore, Christopher was an independent business owner who operates an upscale optical store selling designer eyewear during the time in question. She had been employed in the optical field for some time and took courses on how to fit and sell eyeglasses. As an independent business owner, Christopher is required to enter into business relationships with vendors and customers to conduct her business. Accordingly, the record does not support the conclusion that Christopher was in a weakened state of mind over which Hurwitz could exercise overmastering influence.

The only evidence relied upon by Christopher to establish undue influence by Hurwitz is the appraisal requested by new counsel which states the property's market value was \$680,000.00, \$270,000.00 less than what she agreed to pay. This price differential however is insufficient to create a genuine issue of material fact that Hurwitz exercised undue influence over Christopher especially in light of the fact that the property sold in January 2006 for \$920,000.00. (Dfts. Mt. for SJ Supplemental Memo Exhibit 2). Even were there to be a greater price to value differential than is the case here, a presumption of mental incapacity does not arise merely because of an unreasonable or unnatural disposition of property. A trip to the auction would instruct the reader as to the

normalcy of overpaying when something unique becomes the object of desire. The real question is the condition of the person at the time she executed the contract. *See Estate of McGovern v. State Employees' Retirement Board*, 517 A.2d 523 (Pa. 1986). Mere mental weakness, if it does not amount to inability to comprehend the contract and is unaccompanied by evidence of imposition or undue influence is insufficient to set aside a contract. *Id.*

Since Christopher failed to establish the existence of a confidential relationship with defendant Hurwitz, the court grants defendants' motion to summary judgment as to Count II.

III. Count III and Count IV are dismissed for failing to state a claim.

In Count III Christopher purports to state a claim to title as an equitable owner not in possession. The court already determined that Christopher does not have an interest in the title of the property when it struck the *Lis Pendens* on March 7, 2005. Moreover, the court finds that Christopher failed to state a claim that she is an equitable owner in the property. As such Count III is dismissed.

Count IV purports to state a claim for punitive damages. Under Pennsylvania law, a request for punitive damages does not constitute a cause of action in and of itself. *Nix v. Temple Univ. of the Commw. Sys. Of Higher Educ.*, 596 A.2d 1132, 1138 (Pa. Super. 1991). Such a request should be made in a clause requesting relief for a viable cause of action that permits recovery of punitive damages. As a result, Count IV is stricken. Notwithstanding the fact that a request for punitive damages does not constitute an independent cause of action, the court finds that Christopher has failed to state a claim for the imposition of said damages. Consequently, Count IV is dismissed.

CONCLUSION

For the foregoing reasons, Defendants Motion for Summary Judgment is granted and Counts II, III and IV are dismissed. Remaining are Christopher's claims for reimbursement of funds paid under leases and not returned (Count I) and Defendants' counterclaim for breach of the Purchase Agreement and breach of the leases for the first and second floors. An order will be issued contemporaneously with this Opinion.

BY THE COURT,

HOWLAND W. ABRAMSON, J.