

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

DCNC NORTH CAROLINA I, LLC,	:	AUGUST TERM, 2008
DILSHEIMER COMMUNITIES OF	:	
NORTH CAROLINA, LLC, et al.,	:	NO. 01188
	:	
Plaintiffs,	:	COMMERCE PROGRAM
	:	
v.	:	
	:	
WACHOVIA BANK, N.A.,	:	
	:	
Defendant.	:	

OPINION

Plaintiffs have filed two appeals from three of this court’s Orders. In the first Order, dated January 21, 2009, the court denied plaintiffs’ Petition for Preliminary Injunction and refused to order defendant Wachovia Bank, N.A. (“Wachovia”) to loan an additional \$2.5 million to plaintiffs. In the second Order, dated April 21, 2009, the court sustained Wachovia’s Preliminary Objections to plaintiffs’ Second Amended Complaint and dismissed all of plaintiffs’ claims under North Carolina law. The court issued an Opinion in support of its April 21st Order, which is attached hereto. In the third Order, dated May 14, 2009, the court refused to reconsider its April 21st Order.¹ For the following reasons, and for those contained in the annexed Opinion, the court respectfully requests its Orders be affirmed on appeal.

Plaintiffs brought this action seeking to have the court order Wachovia to provide additional funding for a residential development project in North Carolina called “The Villages at Turtle Creek” (“the Project”). Wachovia loaned plaintiffs approximately \$10 million (the “Loan”) to complete Phases 1 and 2 of the Project, but refused to lend an additional \$2.5 million

¹ “The refusal of a court to reconsider, rehear or permit reargument of a final decree is not reviewable on appeal.” In re Estate of Merrick, 432 Pa. 450, 454, 247 A.2d 786, 787 (1968).

for Phase 3. The borrower on the Loan documents was plaintiff DCNC North Carolina 1, LLC (the “Borrower”). The Loan was guaranteed by certain entities related to the Borrower, plaintiffs Dilsheimer Communities LLC, Dilsheimer Communities, Inc., and Dilsheimer Communities North Carolina, LLC, and by two principals of the Borrower and the related entities, individual plaintiffs, Richard Dilsheimer and Robert Dilsheimer.

Plaintiffs filed this action in August, 2008, after Wachovia refused to fund Phase 3 of the Project. In their Second Amended Complaint, plaintiffs asserted a claim for declaratory judgment requiring Wachovia to fund Phases 3, 4, and 5 of the Project under “the various written and unwritten agreements between the parties.”² Plaintiffs also asserted claims for fraud and negligent misrepresentation based on the following events:

1. Wachovia’s promise that “it would commit to funding” Phase 3, 4, and 5 of the Project.³
2. Wachovia’s failure to inform plaintiffs Wachovia was having severe financial problems in 2007 and 2008.
3. Wachovia’s failure to inform plaintiffs Wachovia had internally downgraded plaintiffs’ credit rating in December 2007.

In October, 2008, when it appeared the Loan was in imminent danger of going into default due to plaintiffs’ inability to repay it, plaintiffs filed a Petition for Preliminary Injunction. In their Petition, plaintiffs requested the court: 1) order Wachovia to fund Phases 3, 4, and 5 of the Project; and 2) enjoin Wachovia from exercising any remedies against the Project and the plaintiffs until the Project is completed with the additional funding from Wachovia or the Project

² Second Amended Complaint, ¶ 93.

³ *Id.*, ¶ 95.

fails to generate sufficient sums to pay off the Loan and the additional funding from Wachovia. A hearing on the Petition for Preliminary Injunction was scheduled for January 13, 2009, and the parties undertook discovery for the next two months regarding the issues to be addressed at the hearing. After hearing plaintiffs' evidence and arguments, the court denied the Petition for Preliminary Injunction because plaintiffs had failed to satisfy the requirements for an injunction.

[T]he prerequisites for issuing a preliminary injunction are: first, that it is necessary to prevent immediate and irreparable harm which could not be compensated by damages; second, that greater injury would result by refusing it than by granting it; and third, that it properly restores the parties to their status as it existed immediately prior to the alleged wrongful conduct. Even more essential however, is the determination that the activity sought to be restrained is actionable, and that the injunction issued is reasonably suited to abate such activity. And unless the plaintiff's right is clear and the wrong is manifest, a preliminary injunction will not generally be awarded.⁴

In order to obtain their injunction, plaintiffs had to show they were likely to prevail on the merits of their claims against Wachovia for breach of contract, fraud, and negligent misrepresentation.⁵ As demonstrated by the court's dismissal of such claims at the Preliminary Objection stage, plaintiffs' claims lack all merit, so plaintiffs necessarily could not show any likelihood of succeeding on such claims.

The court applied North Carolina law in dismissing plaintiffs' claims because it is the law the parties chose to govern their Loan agreement and it is the law of the state where the Project is being built. On appeal, plaintiffs complain the court should have applied Pennsylvania law to their claims because the personal guarantees executed by Mssrs. Dilsheimer are governed by Pennsylvania law. Plaintiffs did not assert any claim for breach of the guarantees in this action, so the choice of law provisions in the guarantees were never implicated. However, even if Pennsylvania law does govern plaintiffs' claims, such claims have no merit.

⁴ Wilksburg Educ. Ass'n v. Sch. Dist. of Wilksburg, 542 Pa. 335, 338, 667 A.2d 5, 6 (1995).

⁵ Warehime v. Warehime, 580 Pa. 201, 210, 860 A.2d 41, 47 (2004).

Under Pennsylvania's Statute of Frauds, "an oral agreement to lend money to a borrower in consideration for a mortgage must be in writing."⁶ Since none of the documents proffered by plaintiffs contain an express written promise by Wachovia to fund Phases 3, 4, and 5 of the Project, plaintiffs have not satisfied the Statute of Frauds. As a result, their claim for a declaratory judgment to enforce the alleged contract to lend additional monies was properly dismissed.⁷

Plaintiffs' claims for fraud and negligent misrepresentation also lack merit under Pennsylvania law. "A promise to do something in the future, which promise is not kept, is not fraud."⁸ Therefore, Wachovia's alleged oral promise to provide Phase 3, 4, and 5 funding in the future cannot serve as the basis for misrepresentation claims against Wachovia.

Likewise, Wachovia's failure to inform plaintiffs when Wachovia began experiencing financial problems and when it came to view plaintiffs as increased credit risks does not give rise to a meritorious misrepresentation claim. In Pennsylvania, as in North Carolina, "mere silence without a duty to speak will not constitute fraud."⁹ Wachovia's relationship with plaintiffs was one of commercial lender to experienced real estate developer.¹⁰ As such, Wachovia had no duty to inform plaintiffs of the growing crisis in the financial and real estate markets which negatively affected all parties.

⁶ Bozzi v. Greater Delaware Valley Sav. & Loan Asso., 255 Pa. Super. 566, 569, 389 A.2d 122, 124 (1978).

⁷ Strausser v. PRAMCO, III, 944 A.2d 761, 766 (Pa. Super. 2008) (dismissing claim for breach of agreement on Statute of Frauds grounds where documents attached to Complaint did not contain or reflect such an agreement.)

⁸ Krause v. Great Lakes Holdings, Inc., 387 Pa. Super. 56, 67, 563 A.2d 1182, 1187 (1989).

⁹ Viguers v. Philip Morris USA, Inc., 837 A.2d 534, 540 (Pa. Super. 2003).

¹⁰ Second Amended Complaint, ¶ 3.

In addition to failing to show a likelihood of success on the merits, plaintiffs also failed to show the relief they requested would restore the *status quo ante*. “The purpose of a preliminary injunction is to preserve the status quo by restoring it to the last peaceable status which preceded the alleged wrongful conduct.”¹¹ Ordering Wachovia to lend additional sums to plaintiffs does not restore the parties to any previous status they held; instead, it would radically alter their previously existing status by increasing Wachovia’s level of investment in, and potential loss from the failure of, the Project.

For all the foregoing reasons, this court’s Orders of January 21st and April 21st should be affirmed on appeal.

ARNOLD L. NEW, J.

Dated: June 17, 2009

¹¹ Records Center, Inc. v. Comprehensive Management, Inc., 363 Pa. Super. 79, 82, 525 A.2d 433, 434 (1987).