COURT OF COMMON PLEAS OF PHILADELPHIA
ORPHANS' COURT DIVISION
O.C. No. 807 DE of 2006
Control No. 067141
Control No. 064909

Estate of Mary Nedwood, Deceased

O P I N I O N

Introduction

The grandchildren of Mary Nedwood, deceased, and the administratrix of her estate filed a complaint against the decedent's surviving husband, Benjamin Nedwood, the prior administrator of her estate, as well as against a title company and the purchasers of real property located at 907 North 5th Street in Philadelphia that belonged to the decedent. In their complaint, plaintiffs claim that through fraud, undue influence and negligence the property was purchased at a price that was "at least fifty percent below the fair market value." They therefore seek to set aside the conveyance, to enjoin the buyers from disposing of the premises, and to order the buyers to reconvey the property back to the estate. The purchasers and the title company have responded by filing preliminary objections, which are granted in part and overruled in part for the reasons set forth below.

Procedural Background

This action was initially filed in the civil trial division. After plaintiffs filed a second amended complaint (hereinafter "second complaint"), the matter was transferred to the Orphans' court division by decree dated June 22, 2006. After this transfer, preliminary objections were filed by two groups of defendants: 1) the title company, First

Partners Abstract company ("title company"), and 2) the purchasers, CPH Properties, L.P., David Perlman and Tom Cohen (collectively "the purchasers").

The second complaint was filed by Ikishia Purnell, the administrator of the Estate of Mary Nedwood, and Elouise Nedwood, parent and natural guardian of the decedent's minor grandchildren, Dana Nedwood and Ebony Nedwood. Ms. Purnell is also a granddaughter of the decedent.[1]

The second complaint alleges that at the time of her death, Mary Nedwood owned property located at 907 North 5th Street in Philadelphia.[2] It also states that defendant Benjamin Nedwood, who "held himself out as being the widower of Mary Nedwood," resides at the 907 North 5th Street Premises.[3] No deed was attached to the second complaint to document the title of the premises at the time of Ms. Nedwood's death.

Sometime in late 2003, the second complaint alleges, Tom Cohen, as agent of CPH Properties, became interested in acquiring the 907 North Street property and contacted Benjamin Nedwood. The plaintiffs assert that Tom Cohen pressured Benjamin Nedwood over a nine to ten month period into selling the 907 North Street property.[4] In so doing, Tom Cohen "knew " that Benjamin Nedwood "had to establish an estate and he informed defendant Benjamin Nedwood to establish an estate and have himself appointed Administrator as the sole heir of Mary Nedwood, deceased."[5] Significantly, plaintiffs assert:

> Plaintiffs believe and so aver that defendant Tom Cohen learned early on that there were other heirs to the Estate of Mary Nedwood and in order to solidify

[1] According to the Second Complaint, Mary Nedwood had two children, Benjamin Wayne Nedwood, who was the father of Ikishia Purnell, and Lamont Nedwood, the father of minors Dana and Ebony Nedwood. Both Benjamin Nedwood and Lamont Nedwood are deceased. Second Complaint, ¶¶ 1-3, 5.
[2] Second Complaint, ¶ 15.
[3] Second Complaint, ¶ 13-14.
[4] Second Complaint, ¶ 18-19, 26.
[5] Second Complaint, ¶ 20.

> defendant Benjamin Nedwood's authority to transfer title to the property to CPH Properties, L.P., without interference, defendant Tom Cohen directed defendant Benjamin Nedwood to declare himself to be the sole heir of Mary Nedwood, deceased, which he did by filing in the Office of the Register of Wills a Certification of Notice under Rule 5.6(a) on September 8, 2004. Second Complaint, ¶ 28.

On January 9, 2004, Benjamin Nedwood applied for letters of administration for the Estate of Mary Nedwood "as her only intestate heir thus eliminating the need for renunciation by the other heirs."[6] The plaintiffs attached to the Second Complaint as Exhibit B a certification of notice listing Benjamin Nedwood as "ONLY HEIR." Second Complaint, Ex. B.

According to the plaintiffs, Tom Cohen, in consultation with David Perlman eventually offered Benjamin Nedwood $65,000 for the rear portion of 907 North 5th Street -- a price which they "knew" was "at least fifty percent below the fair market value."[7] On September 2, 2004, Benjamin Nedwood executed an agreement of sale. Plaintiffs allege that "Tom Cohen knew that defendant Benjamin Nedwood did not understand the legality of what he was signing, and that the Benjamin Nedwood was under the influence of alcohol" when he signed the agreement.[8] Moreover, approximately six months later, Tom Cohen allegedly took further advantage of Benjamin Nedwood by unilaterally changing—and lowering--the selling price on the Agreement of Sale to $63,000. To formalize this change, he took Benjamin Nedwood to a Notary Public before whom the Agreement of Sale was re-signed on March 19, 2005.[9]

---

6 Second Complaint, ¶ 21.
7 Second Complaint, ¶ 24.
8 Second Complaint, ¶ 26.
9 Second Complaint, ¶ 29.

According to the plaintiffs, Benjamin Nedwood "was visibly intoxicated, and only agreed to go with him to the Notary after Tom Cohen gave him $100.00 to do so."[10]

Plaintiffs assert that they did not learn until August 19, 2005 of these efforts to sell a portion of decedent's property. Moreover, they had not been informed that Benjamin Norwood had been named Administrator and sole heir of Mary Nedwood's Estate. At about this time, Ikishia Purnell met with Tom Cohen and informed him of the other heirs to Mary Nedwood's estate. David Perlman was likewise informed of these heirs.[11] Around August 26, 2005, counsel for plaintiffs notified First Partners Abstract Company, the title company that was to participate in the settlement, that there were heirs to estate who had never been informed that Benjamin Nedwood had been appointed Administrator of the Estate of Mary Nedwood.[12] Counsel for plaintiff also sent a letter to CPH Properties, L.P., David Perlman and First Partners Abstract Company informing them that Benjamin Nedwood did not have authority to enter into an Agreement of Sale or convey clear title because there were other heirs of the estate who had not received proper notice.[13]

On August 30, 2005, plaintiffs allege, Tom Cohen picked Benjamin Nedwood up and drove him either to a Notary Public or to the Weichert Real Estate office where First Partners Abstract Company conducts closings so that Mr. Nedwood could sign some settlement papers in advance of the actual settlement even though he was visibly intoxicated.[14] The settlement took place the next day on September 1, 2005 and the property was sold to defendant CPH Properties L.P., and is now known as 908 Saint John

[10] Second Complaint, ¶ 30.
[11] Second Complaint, ¶¶ 32 -35.
[12] Second Complaint, ¶ 36-37.
[13] Second Complaint, ¶ 38 & Ex. D.
[14] Second Complaint, ¶ 40.

Neumann's Place. Not until October 25, 2005 did Plaintiffs file a petition with the Register of Wills to have Benjamin Nedwood removed as Administrator. That petition was granted on November 23, 2005.[15]

The complaint is divided into 6 counts:

> Count I – Lack of Capacity – Plaintiffs v. CPH Properties, L.P., David Perlman, Tom Cohen and Benjamin Nedwood
>
> Count II – Undue Influence- Plaintiffs v. CPH Properties, L.P., David Perlman and Tom Cohen
>
> Count III – Conspiracy/Fraud – Plaintiffs v. All Defendants
>
> Count IV – Negligence/Accounting- Plaintiffs v. First Partners Abstract Co.
>
> Count V – Plaintiffs v. Benjamin Nedwood
>
> Count VI – Breach of Covenant of Good Faith and Fair Dealing- Plaintiffs v. CPH Properties, L.P., David Perlman, and First Partners Abstract Co.

The Plaintiffs claim a monetary loss of approximately $87,000 based on their assertion that the property had a fair market value of $150,00 but was sold to defendants for $63,000.[16]

Analysis

Defendant Benjamin Nedwood filed no response to plaintiff's Second Complaint. Accordingly, he is ordered to file an account of his administration of the Estate of Mary Nedwood. This account will serve several vital purposes. It will present the issues raised in the civil complaint in a procedural context appropriate for Orphans' Court. It will give all heirs an opportunity to file objections and raise whatever issues are appropriate. It

[15] Second Complaint, ¶ 42.
[16] Second Complaint, ¶ 74-75 & 80.

will provide a factual context, after a hearing if mandated, for the imposition of any surcharge that may be appropriate on Benjamin Nedwood.

A. Standard of Review for Preliminary Objections

The remaining defendants have filed preliminary objections in the nature of the demurrer asserting that various counts of the Second Complaint should be dismissed for failure to set forth a viable cause of action. See Pa.R.C.P. 1028(a)(4). These preliminary objections raise different issues. Consequently, the preliminary objections raised by the title company will be analyzed separately from the preliminary objections of the purchasers.

The standard of review of these objections, however, is the same. In reviewing preliminary objections in the nature of a demurrer, a court must accept as true all material facts set forth in the complaint as well as inferences reasonably deduced there from. R.W. v. Manzek, 585 Pa. 335, 339, 888 A.2d 740, 742 (2005). A demurrer raises the question of whether, on the facts set forth in the complaint, "the law says with certainty that no recovery is possible." Elias v. Lancaster Gen. Hosp., 710 A.2d 65, 67 (Pa. 1998). Given this standard, if there is any doubt as to whether the demurrer should be sustained, "this doubt should be resolved in favor of overruling" the demurrer. Id.

In analyzing the preliminary objections of all the defendants, certain key factual and legal points bear emphasis. Under the PEF code, Benjamin Nedwood as administrator of the Estate of Mary Nedwood had absolute authority to convey estate property:

> Except as otherwise provided by the will, if any, the personal representative may sell, at public or private sale, any personal property whether specifically bequeathed or not, and any real property not specifically devised, and with the joinder of the specific devisee real property specifically devised.

20 Pa.C.S. §3351

Since the parties agree there was no will in this case, the property at issue was not specifically devised; consequently, under section 3351 the administrator of the estate thus would have authority to sell it. Moreover, the statute provides that a "personal representative shall have the right to and shall take possession of, maintain and administer all the real and personal estate of the decedent, except real estate occupied at the time of death by an heir or devisee with the consent of the decedent." 20 Pa.C.S. § 3311. In their complaint, the plaintiffs state that Benjamin Nedwood resides at the premises at issue, so that under section 3311 his authority as both administrator and heir to his wife's property is clear.

By their own admission, the plaintiffs made no effort to remove Benjamin Nedwood as Administrator of the Estate of Mary Nedwood until nearly two months after the sale of the property. Not until October 25, 2005 did they file a petition with the Register of the Wills for his removal as administrator.[17] Moreover, the mere removal of Benjamin Nedwood would not "impeach" his sale of property to CPH Properties so long as that transaction occurred in "good faith" under the PEF code:

> No act of administration performed by a personal representative in good faith shall be impeached by the subsequent revocation of his letters….
> 20 Pa.C.S. §3329.

In addition, the sale of the property cannot be revoked merely because of the inadequacy of the price absent fraud:

> INADEQUACY OF CONSIDERATION OR BETTER OFFER
> When a personal representative shall make a contract not requiring approval of court….neither inadequacy of consideration, nor the receipt of an offer to deal on other terms shall, except as otherwise agreed by the parties, relieve the personal representative of the obligation to perform his contract or shall constitute ground

[17] Second Complaint, ¶ 42.

> for any court to set aside the contract, or to refuse to enforce it by specific performance or otherwise: Provided, That this subsection shall not affect or change the inherent right of the court to set aside a contract for fraud, accident or mistake. Nothing in this subsection shall affect the liability of a personal representative for surcharge on the ground of negligence or bad faith in making a contract.
> 20 Pa.C.S. §3360

Under this authority, therefore, Count I of the complaint averring that at the time the agreement of sale was executed in September 2, 2004, "Benjamin Nedwood in fact lacked the legal capacity and authority to bind the Estate of Mary Nedwood" cannot withstand the preliminary objections and is stricken. The same reasoning applies as to the agreement of sale executed by Benjamin Nedwood on March 19, 2005.[18] As for the other claims set forth in the Second Complaint, the claims against the Title Company shall be dismissed, while certain claims against the purchasers shall remain, to be tested in a hearing on the merits. An explanation of this result necessitates a somewhat detailed analysis of the complaint allegations and relevant precedent.

B. <u>The Preliminary Objections of the Title Company Are Sustained While the Preliminary Objections of the Purchasers Are Sustained in Part and Overruled in Part</u>

<u>1. Count IV: The Negligence Claim Against the Title Company</u>

The Title Company asserts that the counts in the second complaint premised on negligence, fraud, conspiracy and breach of the covenant of good faith should be dismissed as to it for failure to set forth a valid claim.

In Count IV plaintiffs assert that First Partners Abstract Company was negligent in conducting the settlement of 908 Saint John Neumann Place on September 1, 2005 and clearing title to the property with resulting loss to the plaintiffs. To establish a claim for

[18] Second Complaint, ¶ 45.

negligence, a plaintiff must establish 4 elements: "(1) the existence of a duty or obligation recognized by law, requiring the actor to conform to a certain standard of conduct; (2) a failure on the part of the defendant to conform to that duty, or breach thereof; (3) a causal connection between the defendant's breach and the resulting injury; and (4) actual loss or damage" to the plaintiff. Atcovitz v. Gulph Mills Tennis Club, Inc., 571 Pa. 580, 586, 812 A.2d 1218, 1222 (2002). In the present case, the plaintiffs have failed to establish the first element of a claim for negligence: that the Title Company owed a duty to them as heirs to the seller.

The plaintiffs concede that to maintain a negligence action against the title company, they must show that the defendant owed them a duty. To establish this duty, they begin by invoking general public policy considerations. They emphasize, for instance, that duty "consists of one party's obligation to conform to a particular standard of care for the protection of another. This concept is rooted in public policy."[19] Plaintiffs emphasize five factors that courts use in determining the existence of a duty of care:

> The legal concept of duty of care is rooted in often amorphous public policy considerations, which may include our perception of history, morals, justice and society. The determination of whether a duty exists in a particular case involves the weighing of several discreet factors which include: (1) the relationship between the parties; (2) the social utility of the actor's conduct; (3) the nature of the risk imposed and foreseeability of the harm incurred; (4) the consequences of imposing a duty upon the actor; and (5) the overall public interest in the proposed solution.[20]

Plaintiffs, however, cite no precedent that would specifically impose a duty on a title company as to the sellers of real estate. Instead, they invoke the Statute of Frauds as reflecting the general social concern in "protecting the transfer of title to real property

---

[19] Plaintiffs' 8/22/2006 Memorandum of Law at 10 (quoting R. W. Martzek, 888 A.2d 740, 746 (Pa. 2005).

[20] Plaintiffs' 8/22/2006 Memorandum at 10 (quoting Althaus v. Cohen, 756 A.2d 1166, 1168 (Pa. 2000)).

from one person to another,"[21] even though they do not—and cannot-- argue that the transfer would be invalid under that statute. More specifically, they also assert that the title company's duty to the plaintiffs is based on the relationship between the sellers and the title company as well as upon "the unique nature of the business of the title company."[22] To flesh out this argument, the plaintiffs invoke the Title Insurance Act as a basis of the title insurance company's duty to them, and reference, more specifically, the section requiring "Title Examination:"

> No policy of title insurance….shall be written unless and until the title insurance company, either through its own employees, agents, or approved attorneys has conducted a reasonable examination of the record title or has caused a reasonable examination of title to be conducted.[23]

This general argument is undercut, however, by the plaintiffs' concession that they "are not claiming that they are the ultimate beneficiaries of the title insurance policy."[24] Moreover, the title company argues that at the time of their examination of the title, Benjamin Nedwood was administrator of the Mary Nedwood estate, and as such, had absolute authority to sell the decedent's property as a matter of public record.[25] Consequently, in conducting its title investigation, the title company properly relied on the public records, especially where the plaintiffs made no effort to initiate formal legal action to change those records by removing Benjamin Nedwood as administrator until months after the sale was consummated.

---

[21] Plaintiffs' 8/22/2006 Memorandum at 11.
[22] Plaintiffs' 8/22/2006 Memorandum at 12. 710 A.2d 65 (Pa.Super.).
[23] Plaintiffs' 8/22/2006 Memorandum at 14, quoting 40 Pa.C.S. § 910-7.
[24] Plaintiffs' 8/22/2006 Memorandum at 15, n. 5.
[25] First Partners Abstract Company's Preliminary Objections, Brief at 2 (citing 20 Pa.C.S. § 3351; § 3357(a); §3311.

Finally, the petitioners further undercut their own argument that the title company owed a duty to them as relatives of the sellers when they outline the general parameters of the title company's duty, which--they suggest-- is to the buyer of the property:

> When a title company is informed by a reliable source prior to conducting a settlement (in this case six days before the settlement) that there is a defect in the transfer process, that the seller administrator does not have the authority to bind the Estate, and that there will be a problem in insuring the title such as occurred in the instant case, the defendant title company assumes the risk of thereafter conducting a settlement whereby ownership of the seller's property passes to the buyer. The risks are imposed on the defendant title company if they ignore the warnings of the defect in title, specifically as in this case the Administrator's inability to transfer title, and there is a clear foreseeability of the consequences, which will be harm and loss to the party when property has been conveyed under these circumstances, and when the defendant assumed the risk of conducting a settlement knowing of the defect in title, so that title of the Estate property passed to the buyer.[26]

Under this analysis, the title company would be liable to the buyer for any negligent search of title, but not to the seller or the seller's heirs in failing to assure the conveyance of clear title.

Another potential basis for imposing a duty is contractual. Elias v. Lancaster General Hospital, 710 A.2d 65, **8 (Pa. Super. 1998)("Generally, the law does not impose affirmative duties absent the existence of some special relationship, be it contractual or otherwise"). Plaintiffs do not allege that they had entered into a contract with the title company. Instead, the title company was retained by the buyer to act as the title agent.[27] Pragmatically, the purpose of the title insurance is to protect the buyers from any defect in the title of real property they purchased, and not to thwart a sale based on protestations by heirs of the seller who fail to take the appropriate legal steps to

[26] Plaintiffs' 8/22/2006 Memorandum at 12 (emphasis added).
[27] First Partners Abstract Company's Preliminary Objections, Brief at 3. In fact, Plaintiffs specifically disclaim any claim as beneficiaries of the title insurance policy. Plaintiffs' 8/22/2006 Memorandum at 15, n.5.

protect their interests and prevent the sale. Hence, plaintiffs have failed to establish their claim of negligence against the title company.

2. The Fraud/Conspiracy Claims in Count III

A. The Fraud/Conspiracy Claims Against the Title Company, First Partners Abstract Company, Are Stricken

In Count III, plaintiffs assert a claim for fraud and conspiracy against all defendants. To establish a claim for fraud, a plaintiff must establish "(1) a misrepresentation, (2) a fraudulent utterance thereof, (3) an intention by the maker that the recipient will thereby be induced to act, (4) justifiable reliance by the recipient upon the misrepresentation and (5) damage to the recipient as the proximate result." Borelli v. Barthel, 205 Pa. Super. 442, 446, 211 A.2d 11, 13 (1965). In addition, in Pennsylvania fraud must be pleaded in a complaint with particularity. Kern, Administratrix v. Kern, 2005 Pa. Super. 422, 892 A.2d 1, 8 (Pa. Super. 2005). See also Pa.R.C.P. 1019(b).

The plaintiffs argue that the title company—together with the other defendants—conspired to commit a fraud by conducting a settlement after they had received written notice by the heirs of the estate challenging the authority of Benjamin Nedwood as the proper administrator of the Estate. They fail to allege, however, any misrepresentation by First Partners Abstract Company—an essential element of any fraud claim. Instead, the crux of their fraud claim against the title company is that it conducted a settlement with knowledge of the heirs' accusations against Benjamin Nedwood, the Administrator. In so explaining their claim, however, plaintiffs fail to pinpoint any misrepresentation.[28] Moreover, at the time of the settlement, Benjamin Nedwood had full authority to conduct

[28] See, e.g., Plaintiffs' 8/22/2006 Memorandum at 20.

the sale. Plaintiffs failed to take any formal, legal actions to strip Benjamin Nedwood of his authority to sell the property until 2 months after the sale was completed.

In failing to allege a viable fraud claim, plaintiffs thus also fail to establish the elements of their conspiracy claim against the title company. To establish a civil conspiracy, it is necessary to establish that "two or more persons combined or agreed with intent to do an unlawful act or to do an otherwise lawful act by unlawful means." Reading Radio, Inc. v. Fink, 2003 Pa. Super. 353, 833 A.2d 199, 212 (2003). An essential element of this cause of action is "proof of malice, i.e. an intent to injure." Id. In paragraph 58 of their second complaint, plaintiffs allege that "Defendant First Partners Abstract Company was actively a part of the conspiracy to defraud plaintiffs when, after they received written notice that the rights of the heirs had been violated, and that they were challenging the legal authority of Benjamin Nedwood to convey clear title to the property, they did, only several days thereafter schedule and conduct a settlement of the property giving clear title of the property to defendant CPH Properties, L.P." Second Amended Complaint, ¶ 58. These allegations, however, do not constitute civil conspiracy where the plaintiffs failed to establish the underlying "unlawful act" or fraud claim. Count III of the Second Amended Complaint is therefore stricken as to defendant First Partners Abstract Company.

B. The Conspiracy/Fraud Claims Against CPH Properties, L.P., Tom Cohen, and David Perlman Are Sustained for the Purposes of a Demurrer

A preliminary objection "in the nature of a demurrer admits every well-pleaded fact and all inferences reasonably deducible there from" and its purpose is to "test the legal sufficiency of the challenged complaint." Creeger Brick & Bldg Supply, Inc. v. Mid-State Bank, 385 Pa. Super. 30, 32, 560 A.2d 151, 152 (1989). Preliminary objections

should not be granted, therefore, unless it is clear that the plaintiff has failed to set forth a claim for which relief may be granted, and any doubt must be resolved in favor of overruling the demurrer. Id.

Under this standard, it cannot be concluded with certainty that plaintiffs have failed to set forth a claim that defendants Benjamin Nedwood, Tom Cohen, and CPH Properties, L.P. conspired in the fraudulent procurement of Letters of Administration for the Estate of Mary Nedwood for the purpose of selling and/or buying 907 North 5th Street at a price "at least fifty percent below the fair market value." The following allegations in the Second Complaint set forth this fraud/conspiracy claim:

> 10. At all times relevant herein defendants David Perlman and Tom Cohen were acting as individuals, as partners of defendant CPH Properties, L.P. and also as agents for or on behalf of CPH Properties, L.P., and to profit financially individually and for defendant CPH Properties, L.P. to profit from the transaction which gives rise to this cause of action.
> 18. Sometime in late 2003, defendant Tom Cohen, individually and acting as agent for and on behalf of defendant CPH Properties became interested in acquiring the rear portion of 907 North 5th Street and, in researching ownership of then property, learned that the property was titled to Mary Nedwood.
> 19. At that time, defendant Tom Cohen went to 907 North 5th Street for the sole purpose of soliciting the owner to sell him the rear of 907 North 5th Street, met with defendant Benjamin Nedwood and learned from him that Mary Nedwood was deceased and that he, Benjamin Nedwood was Mary Nedwood's husband.
> 20. Plaintiffs believe and so aver that defendant Tom Cohen knew that in order for defendant Benjamin Nedwood to have any legal authority to sell the property, he had to establish an estate and he informed defendant Benjamin Nedwood to establish an estate and have himself appointed Administrator as the sole heir of Mary Nedwood, deceased.
> 28. Plaintiffs believe and so aver that defendant Tom Cohen learned early on that there were other heirs to the Estate of Mary Nedwood and in order to solidify defendant Benjamin Nedwood's authority to transfer title to the property to CPH Properties, L.P., without interference, defendant Tom Cohen directed defendant Benjamin Nedwood to declare himself to be the sole heir of Mary Nedwood, deceased, which he did by filing in the Office of the Register of Wills a Certification of Notice under Rule 5.6(a) on September 8, 2004. (See Exhibit "B").

Second Complaint (emphasis added).

These allegations of fraud perpetrated on the Register of Wills is further buttressed by the Certification of Notice attached as Exhibit B, in which Benjamin Nedwood characterized himself as "Only Heir." Second Complaint, Ex. B. At a hearing, of course, plaintiffs must present evidence to support both its allegations of fraud and damage.

3. Count VI- The Breach of the Covenant of Good Faith and Fair Dealing Claim as to All Defendants

Count VI of the Second Complaint asserts a claim for breach of the "covenant of good faith and fair dealing" against all of the defendants. The defendants' preliminary objections to this count assert that under Pennsylvania law there is no separate cause of action for breach of a "covenant of good faith and faith;" instead, any covenant of good faith arises within the context of a contractual relationship. This court agrees, and Count VI is stricken as to all defendants.

In presenting their conflicting arguments, the parties rely on the same cases. Upon analysis, however, this precedent undermines the plaintiffs' arguments and supports dismissal of Count VI. In a recent opinion, the Pennsylvania Superior Court emphatically stated: "We begin by observing that in Pennsylvania there is no general common law cause of action in tort solely for 'bad faith.'" Gorski v. Smith, 2002 Pa. Super. 334, 812 A.2d 683, 710 (2002). Rather, where "a duty of good faith arises, it arises under the law of contracts, not under the law of torts." Id. Historically, Pennsylvania courts have recognized the duty of good faith in limited contractual situations, such as franchisors dealing with franchisees or insurers and their insureds. Creeger Brick & Bldng Supply Inc. v. Mid-State Bank and Trust Co., 385 Pa. Super. at

34, 560 A.2d at 153. The tortuous appellate history of whether a covenant of good faith is present in every contract was exhaustively analyzed by Judge Sheppard in Academy Indus., Inc. v. PNC Bank, 2002 Phila. Ct. Com. Pl. Lexis 94, *17-*29 (Phila. 2002) -- a case all parties invoke to support their different positions. In Academy, Judge Sheppard convincingly reasoned that the implied covenant of good faith arises in every contractual relationship. This conclusion, however, does not support the plaintiff's assertion that the defendants violated that covenant for the simple reason that the plaintiffs have failed to allege either a contract with the title company or breach of the agreements of sale at issue with defendants CPH Properties, Perlman and Cohen. In his painstaking analysis, Judge Sheppard was careful to note that the implied covenant of good faith does not "override the express terms of a contract. On the contrary, it is axiomatic that the covenant of good faith does nothing more than fill in those terms of a contract that have not been expressly stated." Id. at *27.

In the present case, the petitioners broad objective is to set aside the sale of property located at 907 North 5th Street through a September 2, 2004 Agreement of Sale,[29] as modified by an Agreement dated March 19, 2005,[30] with a settlement on September 1, 2005, after which the property was known as 908 Saint John Neumann's Place.[31] As a threshold issue, the plaintiffs have not alleged that any of the defendants breached the agreements of sale; hence, their allegation of breach of the covenant of good faith is without its necessary prerequisite: a contract that is allegedly breached. More specifically, the plaintiffs have not alleged any contract whatsoever with the defendant title company that would give rise to a covenant of good faith. Consequently,

[29] Second Complaint, ¶26.
[30] Second Complaint, ¶ 29.
[31] Second Complaint, ¶ 41.

any claim as to breach of either a contract or covenant of good faith cannot be sustained as to First Partners Abstract, Co.

An equally serious deficiency with Count VI is that Petitioners fail to allege that the remaining defendants who purchased 907 North 5th Street breached the Agreements of Sale. To maintain a claim for breach of contract, a plaintiff must establish "(1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract and (3) resultant damage." Gorski v. Smith, 812 A.2d at 692. None of the parties dispute the existence of the agreements of sale. Nor do the plaintiffs assert that the defendants failed to satisfy the terms of the Agreement. Instead, they suggest a more tortured theory for recovery:

> Plaintiffs, in the instant case, are not alleging that defendants breached their duty to negotiate in good faith and as a result a contract was never executed. In this case, there was an executed contract and plaintiffs are alleging that the defendants breached their implied duty in the defendants conduct leading up to the execution and performance of that contract.[32]

The ostensible reason why the plaintiffs attempt to distinguish their claim from an assertion that the defendants breached a duty to negotiate in good faith may be that Pennsylvania courts have not yet recognized a duty to negotiate in good faith. See, e.g., GMH Assocs. v. Prudential Realty Group, 2000 Pa. Super. 59, 752 A.2d 889, 903 (2000)("Our courts have not determined whether a cause of action for breach of a duty to negotiate in good faith exists in Pennsylvania"); Jenkins v. County of Schuylkill, 441 Pa. Super. 642, 652, 658 A.2d 380, 385 (1995)("Without determining whether a cause of action for a breach of duty to negotiate in good faith exists in Pennsylvania, it is evident that the facts as pleaded in this matter do not give rise to such a cause of action").

[32] 8/15/2006 Plaintiffs' Answer to Preliminary Objections of CPH Properties, David Perlman and Tom Cohen, Memorandum at 36.

Plaintiffs' argument that defendants somehow "breached their implied duty in the defendants conduct leading up to the execution and performance of that contract"[33] is untenable as a matter of law and facts pleaded. First, as a matter of law, prior to the execution of the contract, there would be no covenant of good faith since that covenant arises from a contractual relationship. Second, although Plaintiffs in their Answer to the buyers' preliminary objections argue that the defendants breached their duty in the "performance of the contract," there are no factual allegations in their Second Complaint to support such an alleged failure to perform. This lack of factual context is fatal since it is axiomatic that in ruling on preliminary objections, under "the Pennsylvania system of fact pleading, the pleader must define the issues; every act or performance essential to that end must be set forth in the complaint. When ruling on preliminary objections, a court must generally accept as true all well and clearly pleaded facts, but not the pleader's conclusions or averments of law." Somers v. Somers, 418 Pa. Super. at 135, 613 A.2d at 1212-13 (citations omitted).

Plaintiffs in their answer to the Preliminary Objections request an opportunity to amend Count VI if "the title is technically insufficient" or if the allegations of a "contract are technically insufficient to establish a cause of action for breach of an implied covenant of good faith and fair dealing."[34] Pennsylvania courts recognize that the right to amend should not be withheld if there is some reasonable possibility that the amendment can be accomplished successfully. Otto v. American Mutual Ins. Co., 482 Pa. 202, 205, 393 A.2d 450, 451 (1978). In light of the precedent and facts alleged, however, in this

[33] 8/15/2006 Plaintiffs' Answer to Preliminary Objections of CPH Properties, David Perlman and Tom Cohen, Memorandum at 36.
[34] 8/15/2006 Plaintiffs' Answer to Preliminary Objections of CPH Properties, David Perlman and Tom Cohen, Memorandum at 40.

case there is no possibility of a successful amendment. Changing the title of Count VI to assert a breach of contract claim—as the essential complement to a breach of the covenant of good faith—would be nonsensical since the plaintiffs claim injury not due to the breach of the sales agreements but because of their existence. Count VI is therefore stricken.

4. The Claim of Undue Influence against CPH Properties, David Perlman and Tom Cohen Remain Despite the Preliminary Objections while the Claim Against David Perlman is Dismissed

In Count II, plaintiffs assert a claim of undue influence against defendants CPH Properties, L.P, David Perlman and Tom Cohen. More specifically, they assert that Tom Cohen, individually and on behalf of CPH Properties, L.P. sought to gain Benjamin Nedwood's trust and "exerted undue influence over him by telling him not to acknowledge the other heirs, and by causing him to execute an Agreement of Sale for a grossly inadequate consideration and then re-executing the Agreement for even less consideration." Complaint, ¶ 52. They also assert that Tom Cohen exerted undue influence over Benjamin Nedwood, "by having him sign documents while he was intoxicated and by taking him on August 30, 2005 to sign the settlement documents when he was in a state of intoxication." Id., ¶53. There are no specific factual allegations, however, as to undue influence exerted by David Perlman, and this count as to him alone is stricken.

The defendants' preliminary objections to Count II are cast in very broad terms that do not explore the subtle issues raised by plaintiffs' claim of undue influence nor by the relevant precedent. Instead, defendants essentially assert that because Benjamin Nedwood, as administrator, had absolute authority to sell decedent's real estate under 20

Pa.C.S. §§ 3351, 3357(a) and 3311, the sole remedy available to the plaintiffs is a surcharge against Benjamin Nedwood.[35] However, the allegations that Tom Cohen schemed over a period of time beginning in late 2003[36] to induce Benjamin Nedwood to sell the 907 North 5th Street property "at a price they knew was at least fifty percent below the fair market value"[37] by establishing a relationship of trust and confidence in order to encourage Nedwood to apply for letters of administration for the estate of Mary Nedwood as the sole heir could set forth a claim for undue influence, especially when linked to the allegations that Cohen induced Nedwood to sign documents while intoxicated.[38]

Although claims of undue influence are most typically raised in the context of will contests, there are numerous cases where plaintiffs have sought to rescind or revoke agreements for the sale of real property based on claims of undue influence. See, e.g., Biddle v. Johnsonbaugh, 444 Pa. Super. 450, 664 A.2d 159 (1995)(Plaintiffs failed to present sufficient evidence for rescission of a contract to transfer real property based on their claim that defendants took advantage of a close and confidential relationship with their mother and stepfather); Christopher v. Hurwitz, 2006 Phila. Ct. Com. Pl. LEXIS 259 (2006)(Buyer's suit to rescind real estate purchase agreement failed to present sufficient evidence of a confidential relationship between the parties).

The claims of fraud and undue influence are close but distinguishable. While fraud may be an element in a scheme to improperly influence another, "it is not the only

[35] Preliminary Objections of CPH Properties, David Perlman & Tom Cohen, Memorandum at 2-3.
[36] Second Complaint, ¶18.
[37] Second Complaint, ¶ 24
[38] Second Complaint, ¶ 53.

means by which a defendant may exercise 'undue influence.'" Kern v. Kern, 2005 Pa. Super. 422, 892 A.2d 1, **8(2005), app. denied, 903 A.2d 1234 (Pa. 2006). As the Pennsylvania Supreme Court has observed, "[r]escinding a contract because of fraud calls into play one set of criteria; rescission based on the breach of a confidential relationship is another proposition." Frowen v. Blank, 493 Pa. 137, 144, 425 A.2d 412, 416 (1981).

The definition of undue influence is fluid and inchoate. Undue influence "is defined as conduct including 'imprisonment of the body or mind, fraud, or threats, or misrepresentations, or circumvention, or inordinate flattery or physical or moral coercion [manifested in] such a degree as to prejudice the mind of the testator, to destroy his free agency and to operate as a present restraint upon him in making a will." Kern, 892 A.2d at **8 (citations omitted). In a case that did not involve the drafting of a will, the court analyzed whether two bank employees exercised undue influence over an elderly customer when they induced him to name them as the sole beneficiaries of his bank account that contained the bulk of his assets. See Owens v. Mazzei, 2004 Pa. Super. 106, 847 A. 2d 700 (2004). In its analysis of these facts, the Owens court likewise emphasized that undue influence is "subtle," "intangible" and "illusive" with a "gradual, progressive" effect whose "manifestation may not appear until long after the weakened intellect has been played upon." Owens, 847 A.2d at 706. Due to the difficulty in establishing undue influence, Pennsylvania courts have recognized a presumption of undue influence based on evidence "(1) that a person or persons in a confidential relationship with a testator or grantor has (2) received a substantial portion of the grantor's property, and (3) the grantor suffers from a weakened intellect." Owens, 847 A.2d 700.

Similarly, courts have concluded that a contract can be rescinded if at the time of the agreement's formation, the parties did not bargain at arms' length. Biddle v. Johnsonbaugh, 444 Pa. Super. 450, 455, 664 A.2d 159, 161 (1995). One way to demonstrate this is to show that the parties were engaged in a confidential relationship. As the Biddle court observed, a "confidential relationship is any relationship existing between parties to a transaction wherein one of the parties is bound to act with the utmost good faith for the benefit of the other party and can take no advantage to himself from his acts relating to the interest of the other party." 444 Pa. Super. at 455, 664 A.2d at 161-62. In a confidential relationship, on "one side of the transaction there is an overpowering influence and, on the other, a weakness, dependence or trust." Id., 444 Pa. Super. at 456, 664 A.2d 162. A confidential relationship may be found as a matter of law, for example between an attorney and client, or as a matter of fact based on evidence presented. Significantly, once "a confidential relationship is found to exist, the law presumes the transaction is voidable. At that point, the party seeking to sustain the validity of the transaction must affirmatively demonstrate that the contract or transaction was 'fair, conscientious and beyond the reach of suspicion." Id., 444 Pa. Super. at 456, 664 A.2d at 162.

Where a confidential relationship is asserted as a matter of fact rather than law as in the present case, it is necessary to analyze carefully the alleged facts when presented with a demurrer. At a subsequent stage in the proceedings, the evidence presented will be crucial for determining the existence of a confidential relationship. The critical importance of this factual analysis is demonstrated by comparing Biddle v. Johnsonbaugh, 444 Pa. Super. 450, 664 A.2d 159 (1995) with Frowen v. Blank, 493 Pa.

137, 425 A.2d 412 (1981). Both of these cases involved efforts to rescind agreements for the sale or transfer of real property based on breach of a confidential relationship. In Frowen, the Supreme Court found that a confidential relationship existed between an 86 year old woman who sold her farm to her neighbors--a young couple. In reaching this conclusion, the court emphasized that the seller was 86, had suffered a loss of hearing and sight, and had no more than 3 years of formal education. The purchasers had a long-standing social relationship with her. Although the seller had discussed the agreement of sale with two attorneys, they never advised her as to the fairness of the price and evidence was presented that the farm's value clearly exceeded the sale price of $15,000. Once the court determined that a confidential relationship existed, it was necessary to determine whether the transfer was "fair, conscientious and beyond the reach of suspicion" since transactions between persons in a confidential relationship are "prima facie voidable." Frowen, 493 Pa. at 149, 425 A.2d at 418.

A different result was reached based on the facts of Biddle v. Johnsonbaugh, 444 Pa. Super. 450, 664 A.2d 159 (1995), where the court concluded that a contract for the transfer of real property could not be rescinded because there was no confidential relationship between two adult children and their elderly mother and stepfather. The court concluded that just because the sellers were old and ill "does not mean that they lose the right to engage in a transaction with their children." Id., 444 Pa. Super. at 458, 664 A.2d at 163.

Based on this precedent, the allegations in the Second Complaint are sufficient to withstand the challenge of a demurrer. The plaintiffs allege, for instance, that "Defendants Cohen and Perlman knew that defendant Benjamin Nedwood did not

know the fair market value of the property and they conspired to take advantage of him because of his age, his lack of sophistication, his lack of knowledge of the fair market value of the property, and because they knew that he was generally intoxicated and was generally in a weakened condition due to the influence of alcohol and Benjamin Nedwood's reliance on them as a result of his trust and confidence in them."[39] Although the complaint makes these broad allegations concerning David Perlman's confidential relationship with Nedwood, the facts subsequently alleged relate solely to Tom Cohen's efforts to induce the actual sale of 907 North 5th Street. See, e.g., Second Complaint, ¶¶ 26-31, 40, & 52-53. Consequently, the essential factual predicate is missing as to David Perlman for the claim of undue influence—and this count is thus stricken as to him.

Whether plaintiffs will be able to produce sufficient evidence to support the remaining allegations of undue influence by Tom Cohen, as agent for CPH Properties will be decided at a later stage in these proceedings.

Conclusion

For all of these reasons, this court concludes as follows as to each count of the Second Complaint:

> Count I - Lack of Capacity is DISMISSED;
>
> Count II -Undue Influence REMAINS as to defendants Tom Cohen and CPH Properties;
>
> Count III - Fraud and Conspiracy is DISMISSED as to defendant First Partners Abstract Company but remains as to all other defendants;
>
> Count IV - Negligence as to First Partners Abstract Company is DISMISSED;

[39] Second Complaint, ¶25.

Count V - as to Benjamin Nedwood remains, due in part, to his failure to respond to the Complaint, and he is ordered to file an account of his administration of the Estate of Mary Nedwood within 30 days;

Count VI - Breach of Covenant of Good Faith and Fair Dealing is DISMISSED as to all defendants;

The defendants shall file an Answer to all remaining claims within twenty (20) days.

BY THE COURT:

_____
John W. Herron, J.