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

SCUDERI REAL ESTATE GROUP, LLC, ZOUBEK PROPERTIES, LLC Plaintiffs, v. EARL V. ROSS, JR., EARL V. ROSS, III IN TRUST FOR RONALD C. ROSS, EARL V. ROSS, III, C&K ENTERPRISES CO., LLC, and KEVIN DUGGAN Defendants.	:	OCTOBER TERM 2021 No. 02429 COMMERCE PROGRAM Control Nos. 25023952, 25024219

ORDER

AND NOW, this 11th day of April 2025, upon consideration of the post-trial motions of defendants C&K Enterprises Co., LLC and Kevin Duggan and defendants Earl V. Ross, III in trust for Ronald C. Ross and Earl V. Ross, III, and the responses, and after oral argument, it is **ORDERED** that both post-trial motions are **DENIED**.

BY THE COURT:

ABBE F. FLETMAN, J.

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OPINION

Fletman, J. **April 11, 2025**

After a three-day bench trial in February 2024 and the issuance of findings of fact and conclusions of law in February 2025, defendants C&K Enterprises Co., LLC ("C&K") and Kevin Duggan filed a post-trial motion (Control No. 25024219) seeking the entry of judgment in their favor, and defendants Earl V. Ross, III, in trust for Ronald C. Ross and Earl V. Ross, III, filed a post-trial motion (Control No. 25023952) seeking vacation of the judgment and the entry of judgment in their favor. For the reasons discussed below, the motions are denied.

FACTS

The facts of this case are set forth in the Court's Revised Findings of Fact and Conclusions of Law, which are being filed contemporaneously with this opinion. Revised

Findings of Fact and Conclusions of Law ("Revised Findings and Conclusions") at Findings of Fact ¶¶ 1-136, Trial Court Docket ("Dkt.") at 4/11/25.[1]

A. Procedural History

a. Filing of Action

Plaintiffs Scuderi Real Estate Group, LLC and Zoubek Properties, LLC (collectively, "Scuderi and Zoubek"), brought this action on October 29, 2021, against defendants Earl V. Ross, Jr. ("Ross Jr."), Earl V. Ross, III, in trust for Ronald C. Ross, Earl V. Ross, III ("Ross III") (collectively, the "Rosses"); C&K Enterprises Co., LLC ("C&K"), and Kevin Duggan. Complaint ("Compl."), Dkt. at 10/29/21.

Scuderi and Zoubek sought specific performance of an agreement (the "Agreement") to buy a property located at 4724-28 Parkside Avenue (the "Parkside Property" or the "Property") for the originally contracted amount or the lost profits including interest for breach of contract, abuse of process, tortious interference with contract, declaratory judgment, fraud, and civil conspiracy action. *See* Scuderi and Zoubek's Proposed Findings of Fact and Conclusions of Law, Dkt. at 6/13/24.

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[1] In the Findings of Fact and Conclusions of Law, the Court erroneously found that the lawyer for C&K and Mr. Duggan, Henry Clinton, did not ask Richard Slavin, a lawyer for plaintiffs Scuderi Real Estate Group, LLC and Zoubek Properties, LLC, for a copy of his clients' agreement of sale to buy the subject property. Findings of Fact ¶ 96, Dkt. at 2/10/25. To the contrary, the record supports that Mr. Clinton did request to see a copy of the agreement from Mr. Slavin. 2/23/24 Trial Tr. at 172:8-24 (Clinton testimony). In conjunction with this opinion, the Court is issuing the Revised Findings and Conclusions correcting this error, which is immaterial to the outcome of the case. Dkt. at 4/11/25. The Court has also changed ¶ 33 of the Conclusions of Law to clarify its determination that C&K and Mr. Duggan had actual notice of Scuderi and Zoubek's agreement to buy the property at issue. Revised Findings and Conclusions at Conclusions of Law ¶ 33, Dkt. at 4/11/25. All factual citations in this opinion reference the Revised Findings and Conclusions.

b. Pre-Trial Motions

On January 2, 2024, the Court granted C&K and Mr. Duggan's motion to deem facts admitted. Order, Dkt. at 1/2/24. One of the admitted averments is: "Mr. Duggan was authorized to file the Lis Pendens." Miscellaneous Motion § 10(g), Dkt. at 11/20/23.

c. Trial

The Court held a three-day bench trial on February 20, 21, and 23, 2024. During the trial, C&K, Mr. Duggan, and the Rosses moved for a directed verdict, which the Court identified as a motion for nonsuit, on Scuderi and Zoubek's claims for abuse of process, tortious interference with contract, declaratory judgment, fraud, and civil conspiracy. 2/23/24 Trial Tr. at 115:116:5. The Court granted a nonsuit on the civil conspiracy claim after the close of the plaintiffs' case. *Id.* at 147:15-25. The Court also granted a nonsuit on the fraud claim, but only as to Mr. Duggan and C&K. *Id.*

d. Findings of Fact and Conclusions of Law

The Court issued Findings of Fact and Conclusions of Law on February 7, 2025, which were docketed on February 10, 2025. Findings of Fact and Conclusions of Law, Dkt. at 2/10/25. Revised Findings of Fact and Conclusions of Law were issued on April 11, 2025. Revised Findings and Conclusions, Dkt. at 4/11/25.

e. Post-Trial Motions

On February 19, 2025, the Ross defendants filed a motion for post-trial relief. Rosses' Post-Trial Motion, Dkt. at 2/19/25. On February 20, 2025, defendants C&K and Mr. Duggan also filed a motion for post-trial relief. C&K and Duggan's Post-Trial Motion, Dkt. at 2/20/25. The motions were fully briefed as of March 19, 2025, and the Court held oral argument on March 27, 2025.

DISCUSSION

I. Standard of Review

Post-trial relief is granted only if grounds for relief were raised in pre-trial proceedings or at trial and the issue is specified in the motion. Pa.R.C.P. 227.1(b). Any grounds not specified are deemed waived. Pa.R.C.P. 227.1(b)(2).

In a bench trial, the trial judge is the finder of fact and the sole judge of credibility. *In re Funds in Possession of Conemaugh Tp. Sup'rs*, 753 A.2d 788, 790 (Pa. 2000). The trial judge "is free to believe all, part, or none of the evidence, as the finder of fact." *Williams v. Taylor*, 188 A.3d 447, 450 (Pa. Super. 2018). The appellate court cannot substitute its judgment for that of the finder of fact as to credibility and evidentiary weight determinations made by the trial judge. *Davis v. Borough of Montrose*, 194 A.3d 597, 605 (Pa. Super. 2018). The trial judge's findings after a bench trial "must be given the same weight and effect on appeal as the verdict of a jury." *Levitt v. Patrick*, 976 A.2d 581, 589 (Pa. Super. 2009). "The [trial] court's findings are especially binding on appeal, where they are based upon the credibility of the witnesses, unless it appears that the court abused its discretion or that the court's findings lack evidentiary support or that the court capriciously disbelieved the evidence." *Medlock v. Chilmark Home Inspections, LLC*, 195 A.3d 277, 288 (Pa. Super. 2018) (citation omitted). Thus, the trial court's authority to grant or deny a post-trial motion after a bench trial "is enhanced and the appellate court's authority to override the trial court's decision is proportionately diminished." *Spang & Co. v. United States Steel Corp.*, 545 A.2d 861, 866 (Pa. 1988).

II. The Court Did Not Err or Abuse Its Discretion When It Awarded Specific Performance Based on Evidence That Scuderi and Zoubek Had Sufficient Funds to Close on the Property

Under Pennsylvania law, "[f]rom the moment an agreement of sale of real estate is executed and delivered it vests in the grantee what is known as an equitable title to the real estate." *Payne v. Clark*, 187 A.2d 769, 770 (Pa. 1963) (*citing Ladner on Conveyancing in Pennsylvania*, § 5:26 (3d ed. 1961)). "Hence, if the terms of the agreement are violated by the vendor, the vendee may go into a court of equity seeking to enforce the contract and to compel specific performance." *Id.* at 770-71 (*citing Borie v. Satterthwaite*, 37 A. 102 (Pa. 1897); and *Agnew v. Southern Ave. Land Co.*, 53 A. 752 (Pa. 1902)). While courts "have the power to grant specific performance, the exercise of the power is discretionary. In other words, such a decree is of grace and not of right." *Id.* at 771 (*citing Mrahunec v. Fausti*, 121 A.2d 878 (Pa. 1956)). Thus, such relief "should only be granted where the facts clearly establish the plaintiff's right thereto; where no adequate remedy at law exists; and, where the [judge] believes that justice requires it." *Id.* (*citing Roth v. Hartl*, 75 A.2d 583 (Pa. 1950); and *Mrahunec*, 121 A.2d at 878).

Defendants C&K, Duggan, and the Rosses argue that the Court erred or abused its discretion when it awarded specific performance without requiring documentary evidence that Scuderi and Zoubek had sufficient funds to close on the Property. C&K and Duggan's Brief at § II(A)(1), Dkt. at 3/5/25; Rosses' Brief at §§ I-II, Dkt. at 3/5/25. To support this assertion, the Rosses cite a nonprecedential case, *Davis v. Panarella*, 285 A.3d 938, 2002 WL 4298659 (Pa. Super. Sept. 19, 2022). *Davis* does not bind the Court and is distinguishable because, in that case, the plaintiffs' testimony contradicted their assertions that they were ready, willing, and able to close on the contracted date and they sought an extension, which defendants rejected. *Id.* at *16

("Plaintiffs admitted they were unable to close in the time period required and sought a six month extension.")

In this case, there is sufficient evidence to show that Scuderi and Zoubek were ready, willing, and able to close on the Parkside Property. Mr. Zoubek testified without contradiction that they were ready, willing, and able to close on the Property on the extension date of November 1, 2021, and that they would have closed in cash even if the Rosses had not approved the extension. 2/21/24 Trial Tr. at 219:13-22; 220:8-13 (Zoubek testimony). He further testified, again without contradiction, that he previously had closed in cash many times, including on projects with costs up to $5,000,000. *Id.* at 193:25-195:6. Mr. Scuderi testified that he had developed about a dozen real estate development projects, all in Philadelphia, with the worth of the last eight projects totaling $24,000,000. 2/20/24 Trial Tr. at 19:23-25; 118:21-24 (Scuderi testimony). The Court found the testimony of both Mr. Zoubek and Mr. Scuderi credible.

Other evidence supported their testimony. Both Mr. Scuderi and Mr. Zoubek waived all contingencies when initially contracting to buy the Parkside Property, including the contingency of securing financing before closing. Revised Findings and Conclusions at Findings of Fact ¶ 21, Dkt. at 4/11/25. Mr. Scuderi satisfied the requirement of the Agreement that Scuderi and Zoubek make two deposits of $10,000 in advance of closing. *Id.* at Findings of Fact ¶¶ 32, 34. On October 28, 2021, Mr. Scuderi sent an email to Ross Jr., Ross III, and Ronald Ross asking to close on November 1, 2021, even though Mr. Duggan had filed a *lis pendens* on the Property (the "*Lis Pendens*"), which foreclosed financing options to Mr. Scuderi and Mr. Zoubek. 2/20/24 Trial Tr. at 81:20-84:23 (Scuderi testimony). Mr. Zoubek testified:

> Q. So once the lis [pendens] was filed, did you have a different plan for closing than had been your intention at the beginning of this?

A. No. We were always prepared to close in cash. . . .

2/21/24 Trial Tr. at 220:8-12 (Zoubek testimony).

Furthermore, Ross Jr. never asked for any proof from Mr. Scuderi or Mr. Zoubek of their ability to close, whereas Ross Jr. required assurances from C&K and Duggan. *See* 2/20/24 Trial Tr at 40:14-41:1 (Scuderi testimony); Revised Findings and Conclusions at Findings of Fact ¶ 99, Dkt. at 4/11/25. Ross Jr. would not sell the Property to C&K and Duggan unless they placed the full $625,000 purchase price into escrow before closing. Revised Findings and Conclusions at Findings of Fact ¶ 99, Dkt. at 4/11/25.

The other cases cited by C&K, Mr. Duggan, and the Rosses do not involve buyers that were prepared to close in cash and are accordingly not on point.[2] In *City of Philadelphia v. F.A. Realty Investors Corp.*, the Pennsylvania Commonwealth Court affirmed that a landowner did not show it was ready, willing, and able to pay the redemption price on a property that had been sold at sheriff's sale where the landowner testified that he was unable to obtain from lenders the redemption cost determined by the trial court. 146 A.3d 287, 299 (Pa. Cmwlth. 2016). The

[2] None of the cases defendants C&K, Duggan, and the Rosses cite to support their assertion that documentary evidence is required to prove that a party is ready, willing, and able to buy property bind this Court. *See e.g., McMahon v. Pierce*, 55 Pa. D. & C.2d 499 (Pa. Com. Pl. 1972) (where plaintiff broker introduced to the seller some proposed buyers who did not accept the terms and made a counteroffer that the seller rejected, plaintiff broker did not produce a purchaser who was ready, willing, and able to contract); *Drennan v. Casanave*, 48 Pa. D. & C.2d 527 (Pa. Com. Pl. 1969) (where plaintiff broker failed to introduce testimony of the proposed purchaser's ability to procure sufficient financing to buy the property and only plaintiff testified to the proposed purchaser's good credit and considerable assets, plaintiff broker failed to show that the proposed purchaser was ready, willing, and able to perform);*Meyers v. Epstein*, 37 Pa. D. & C.2d 549 (Pa. Com. Pl. 1965). In *Meyers*, the plaintiff had the burden of showing that he was ready, willing, and able to perform, but the letter of commitment he produced was secured only a few days before the hearing, written on a defunct law firm's stationery, and signed by a secretary who lacked authority. 37 Pa. D. & C.2d at 565 ("Plaintiff's case fails for . . . he falls within the well established principle, viz., where plaintiff has the burden of proving certain facts he cannot recover if his evidence is so uncertain or inadequate or equivocal or ambiguous or contradictory as to make findings or legitimate inferences therefrom a mere conjecture.")

Pennsylvania Commonwealth Court held that the landowner failed to show its readiness to pay the redemption price when it presented no documentation demonstrating sufficient funding. *Id.*

In re Bradstreet is also not binding on the Court. 2002 WL 1349588 (Bkrtcy. E.D.Pa. June 3, 2002). The United States Bankruptcy Court for the Eastern District of Pennsylvania held that a buyer failed to establish he was ready, willing, and able where his testimony that he had a financing arrangement to buy a property and could execute on the purchase was uncorroborated as there was no evidence of the financing arrangement, his business partners testified they would cover only up to $700,000 of the $900,000 purchase price, and the evidence showed that the business partners intended to contribute only $75,000 each and have the buyer take on the majority of the debt. *Id.* at *5. The buyer also had three years to buy the property and never did. *Id.* at *16. Thus, unlike in this case, where the buyers provided uncontradicted testimony, which was corroborated by other evidence, that they were ready, willing and able to close in cash, the buyer in *Bradstreet* failed to close during a three-year period and lacked both the cash and financing to close.

Thus, the Court committed no error and did not abuse its discretion when it awarded Scuderi and Zoubek specific performance based on Mr. Scuderi's and Mr. Zoubek's credible testimony and other supporting evidence.

III. The Court Did Not Err or Abuse its Discretion When It Awarded Specific Performance to Buy a Unique Piece of Real Estate

Defendants C&K and Duggan assert that the Court erred or abused its discretion when it awarded specific performance where, by the Court's own admission, an adequate remedy at law existed. C&K and Duggan's Brief at § II(A)(2), Dkt. at 3/5/25. Defendants C&K and Mr. Duggan argue that Scuderi and Zoubek are not entitled to specific performance because they

sought a remedy in money damages, which proves that there is an adequate remedy that does not warrant specific performance. *Id.*

There is longstanding Pennsylvania case law that a party seeking specific performance of a contract to buy real property need not make any factual showing because specific performance is an appropriate equitable remedy as a matter of law. As the Pennsylvania Superior Court has stated:

> Pennsylvania courts consistently have determined that specific performance is an appropriate remedy to compel the conveyance of real estate where a seller violates a realty contract and specific enforcement of the contract would not be contrary to justice. This is so because a specific tract of land has long been regarded as unique and impossible of duplication by the use of any amount of money.

CM Goat, LLC v. Valdez, 318 A.3d 392, 399 (Pa. Super. 2024) (internal citations omitted).

In *Beech v. Ragnar Benson, Inc.*, the Superior Court held that in an action where the plaintiff sought specific performance or in the alternative, money damages, the action was primarily for specific performance. 587 A.2d 335, 338-39 (Pa. Super. 1991).

> While we appreciate that the instant case involved a request for money damages, a prayer for alternative forms of relief will not defeat an equity action. ("[r]emedies at law and in equity may coexist and be concurrent. . . . [o]nce a party makes an election and files an action, that party cannot pursue that alternate remedy. . . .)"

Id. (citations omitted). The Supreme Court of Pennsylvania has held that "the filing of a complaint in trespass for damages does not oust equity of its jurisdiction, or prove that plaintiffs have a complete and adequate remedy at law." *Fountain Hill Underwear Mills v. Amalgamated Clothing Workers' Union of America*, 143 A.2d 354, 359 (Pa. 1958).

C&K and Mr. Duggan argue that: the Court credited Scuderi and Zoubek's damages expert; as a result, it implicitly found that Scuderi and Zoubek had an adequate remedy at law; and the Court consequently erred by awarding an equitable remedy. C&K and Duggan's Post Trial Motion at ¶ 67, Dkt. at 2/20/25 ("Here, the Court credited Plaintiffs' expert's testimony that Plaintiffs do, in fact, have an adequate remedy at law—money damages as against the Rosses according to the detailed calculations the expert provided. (Court's COL ¶¶ 128–136 (detailing expert testimony) (citing to record).)") The Court, however, did not credit the testimony of Scuderi and Zoubek's expert. Revised Findings and Conclusions at Findings of Fact § M, Dkt. at 4/11/25. To the contrary, the Court held that Scuderi and Zoubek had provided an insufficient basis to award damages because specific performance provided them with the full benefit of their bargain and they can recover any lost profits when they develop the Property. *Id.* at Findings of Fact ¶¶ 53-54.

Additionally, Scuderi and Zoubek sought these damages in relation to the tort claims and as an alternative to specific performance. *See* Scuderi and Zoubek's Proposed Findings of Fact and Conclusions of Law at Conclusions of Law § VI, Dkt. at 6/13/24. Thus, the Court did not err or abuse its discretion by awarding specific performance to enforce a contract to buy a unique piece of real estate.

IV. The Court Did Not Commit Reversible Error Where Duggan and C&K Had Actual Notice of Scuderi and Zoubek's Interest in the Property

Defendants C&K and Mr. Duggan argue that the Court committed reversible error by ignoring material facts and failing to apply long-standing case law under which general claims, vague reports of strangers, and mere rumors do not give rise to legally sufficient notice under the bona fide purchaser doctrine. "Mere rumors are not notice, nor do they impose upon a purchaser the duty of inquiry." *Satterfield v. Malone*, 35 F. 445, 453 (C.C.W.D. Pa. 1888) (*citing* Kerns v.

Swope, 2 Watts 75 (Pa. 1833); *Churcher v. Guernsey*, 39 Pa. 84 (Pa. 1861); and *Hottenstein v. Lerch*, 12 W.N.C. 4 (Pa. 1882)). That case also states, "As to what is sufficient notice to a purchaser of real estate of an unrecorded title, or adverse claim, the settled rule is that the information must come to him from some one who is interested in the estate, or from some authoritative source." *Id.*

Mr. Scuderi, Mr. Zoubek, Ross Jr., Ross III, and Mr. Slavin all informed Mr. Duggan and/or his lawyer and agent, Mr. Clinton, that the Parkside Property was under contract. Revised Findings and Conclusions at Conclusions of Law ¶ 28, Dkt. at 4/11/25. These are not mere rumors. This is information coming from nearly all interested parties to that Agreement.

Additionally, the subsequent actions Mr. Duggan took demonstrate that he did not believe that these were mere rumors. After Mr. Scuderi and Mr. Zoubek introduced themselves as the purchasers of the Property on October 12, 2021, Mr. Duggan offered Mr. Scuderi and Mr. Zoubek $100,000 to walk away from their deal with the Rosses so he could buy the Property instead. *Id.* at Findings of Fact ¶¶ 48, 49, 52. Mr. Duggan would not make such an offer to someone he suspected was a mere prospective buyer. After Mr. Scuderi and Mr. Zoubek rejected his offer, Mr. Duggan took further action. On October 15, 2021, just three days after meeting Mr. Scuderi and Mr. Zoubek at the Property, Mr. Duggan asked his business partner if a letter (the "Rent Letter") that Ross Jr. had sent him, informing Mr. Duggan about rent collection and Ross Jr.'s intent to sell the Property, could be of any use. *Id.* at Findings of Fact ¶ 80. Mr. Duggan later used the Rent Letter to argue that he has a right of first refusal to buy the Property. *Id.* at Conclusions of Law ¶ 18. On October 18, 2021, Mr. Duggan filed the *Lis Pendens* on the Parkside Property claiming to protect his purported right of first refusal. *Id.* at Findings of Fact ¶ 81. That same day, Mr. Clinton sent an email to Ross Jr. and Mr. Scuderi stating that any

executed agreement will be declared void because Mr. Duggan has a legitimate interest in the Property. *Id.* at Findings of Fact ¶ 83. These are all the actions of a man who knew the Property was under contract to someone else and wanted to block that sale and buy the Property himself.

Mr. Duggan made Ross Jr. an offer of $650,000 that Ross Jr. accepted, and Mr. Duggan rushed to closing on October 25, 2021, without title insurance. *Id.* at Findings of Fact ¶ 106. To obtain title insurance, a seller typically must represent to the title company that there are no outstanding agreements of sale. 2/23/24 Trial Tr. at 217:20-218:21 (McAleer testimony). This is significant, because C&K could not honestly make that representation as it had notice of Scuderi and Zoubek's outstanding agreement of sale. Additionally, Mr. Duggan required Ross III and Ronald Ross to sign an indemnification agreement (the "Indemnification Agreement") to protect himself and C&K from any lawsuits involving the Property. Revised Findings and Conclusions at Findings of Fact ¶¶ 111-14. Mr. Duggan's conduct shows the lengths he went to buy the Property from under Mr. Scuderi and Mr. Zoubek after learning of their Agreement.

The Court determined in ¶ 28 of the Conclusions of Law that Ross III, among others, "told Mr. Duggan or Mr. Clinton that the Parkside Property was under contract for sale before the C&K Agreement was signed." Revised Findings and Conclusions at Conclusions of Law ¶ 28, Dkt. at 4/XX/25. C&K and Mr. Duggan argue that conclusion is wrong because Ross III's testimony did not provide legally sufficient notice to C&K and Mr. Duggan that the Property was under contract. C&K and Duggan's Brief at § II(B)(2)(c), Dkt. at 3/5/25.

The Court, however, found credible that Ross III told Mr. Duggan about a contract with "Scott" to buy the Property a week or two before October 18, 2021. *Id.* at 69:14-71:12; Revised Findings and Conclusions at Conclusions of Law ¶ 28, Dkt. at 4/11/25. Even if that finding was

incorrect, there is ample other evidence of Mr. Duggan's knowledge of Scuderi and Zoubek's interest in the Property before he bought it.

C&K and Mr. Duggan also argue that the Court improperly relied on hearsay in ¶¶ 36, 47, and 52 of the Findings of Fact and Conclusions of Law. C&K and Duggan's Brief at fn. 8, Dkt. at 3/5/24. The Court determined in ¶ 36 that in August 2021, Ross Jr. told Mr. Scuderi that he would speak to Mr. Duggan about Scuderi and Zoubek's Agreement on the Property in September 2021. Revised Findings and Conclusions at Findings of Fact ¶ 36. Paragraph 47 of the Findings of Fact found that on October 11, 2021, two days before Mr. Scuderi and Mr. Zoubek met with Mr. Duggan at the Property, Ross Jr. "told Mr. Scuderi that Mr. Duggan would offer Scuderi and Zoubek $100,000 to give him the rights to buy the Parkside Property, which Mr. Scuderi relayed to Mr. Zoubek via text message." *Id.* at Findings of Fact ¶ 47.

C&K and Mr. Duggan did not object to the trial testimony cited in ¶ 36, and any such objection is therefore waived. *Takes v. Metro. Edison Co.*, 695 A.2d 397, 400 (Pa. 1997) ("[I]n order to preserve a trial objection for review, trial counsel is required to make a timely, specific objection during trial.")

C&K and Mr. Duggan did object to the trial testimony cited in Findings of Fact ¶ 47, but the Court properly overruled this objection because that testimony is not hearsay but rather the admission of Ross Jr., a party opponent. Revised Findings and Conclusions at Findings of Fact ¶ 47, Dkt. at 4/11/25; 2/20/24 Trial Tr. at 60:9-22 (Scuderi testimony); Pa.R.E. 803(25). Moreover, after Exhibit 42 – which the Court cited in Finding ¶ 47 – was partially redacted, C&K and Mr. Duggan did not object to its admission and therefore waived any objection.

In ¶ 52 of the Findings of Fact, the Court relied on Ross Jr.'s statement to Mr. Scuderi that Mr. Duggan would offer at least $100,000 in exchange for the Property. Revised Findings

and Conclusions at Findings of Fact ¶ 52, Dkt. at 4/11/25. This does not amount to hearsay because it is again an admission of Ross Jr., a party opponent. Pa.R.E. 803(25); *see* 2/20/24 Trial Tr. at 60:9-22 (Scuderi testimony).

Thus, the Court did not commit reversible error when it held that Mr. Duggan and C&K had actual notice of Scuderi and Zoubek's interest in the Parkside Property and did not improperly rely on hearsay to reach this holding.

V. The Court Did Not Apply the Wrong Standard When Evaluating C&K's Bona Fide Purchaser Defense

A. Actual Notice

C&K and Mr. Duggan argue that the Court used the wrong standard in evaluating C&K's bona fide purchaser defense by omitting any discussion of the due diligence component of the analysis. C&K and Duggan's Brief at §§ II(B)(1), (3), Dkt. at 3/5/25. For several reasons, the Court did not apply the wrong standard: 1) due diligence applies only to constructive notice, and the Court held that Mr. Duggan and C&K had actual notice of Scuderi and Zoubek's interest in the Property; 2) even if constructive notice were relevant, Mr. Duggan and C&K failed to meet the due diligence requirement; and 3) regardless of whether Mr. Duggan and C&K proved due diligence, they did not meet the good faith requirement of the bona fide purchaser defense.

A due diligence inquiry is not relevant for actual notice. Mr. Duggan and C&K had actual notice of Scuderi and Zoubek's interest in the Property. There was credible testimony that Mr. Scuderi and Mr. Zoubek told Mr. Duggan about their interest in the Property. Revised Findings and Conclusions at Findings of Fact ¶ 49, Dkt. at 4/11/25. Mr. Duggan admitted that Mr. Scuderi and Mr. Zoubek had introduced themselves to him as the buyers of the Property. *Id.* at Conclusions of Law ¶ 28. There is also credible evidence that Ross Jr., and Ross III informed Mr. Duggan that the Property was contracted for, and Mr. Slavin told his agent, Mr. Clinton. *Id.*

Armed with this information, Mr. Clinton emailed Ross Jr. seeking to enforce Mr. Duggan's claimed right of first refusal to buy the Property. *Id.* at Conclusions of Law ¶ 31. Subsequently, C&K rushed to close on the Property without title insurance and required Ronald Ross and Ross III to sign the Indemnification Agreement, with the knowledge that the Property may be subject to litigation. *Id.* at Findings of Fact ¶¶ 106, 111-16. C&K paid $650,000 for the Property, a sum that surpasses what Scuderi and Zoubek contracted to pay by $125,000. *Id.* at Findings of Fact ¶ 106 and Conclusions of Law ¶¶ 3-4. Based on this evidence, the Court did not err in finding that C&K had actual notice of Scuderi and Zoubek's interest in the Parkside Property.

B. Due Diligence Requirement

Constructive notice or knowledge has been defined as what a party "could have learned by inquiry of the person in possession and of others who, they had reason to believe, knew of facts which might affect title. . . . " *Volunteer Fire Co. v. Hilltop Oil Co.*, 150, 602 A.2d 1348, 1352 (Pa. Super. 1992) (citation omitted).

Defendants C&K and Mr. Duggan rely on *Ohio River Junction R. Co. v. Pennsylvania Co.* for the assertion that constructive notice has a due diligence requirement that Mr. Duggan and C&K satisfied by attempting to ascertain the contents of the Agreement. 72 A. 271, 273 (Pa. 1909); C&K and Duggan's Brief at p. 17, Dkt. at 03/05/25. The bona fide purchaser defense requires that the party claiming the defense acted in good faith, with due diligence, and without notice of others' rights. *Sergeant v. Ingersoll*, 7 Pa. 340, 345 (1847) ("A purchaser without notice must appear to have acted, not only with good faith, but with extreme vigilance, for equity refuses to protect the careless and the slothful.")

Ohio River Junction R. Co. is a case in which a landlord tried to eject a tenant. 72 A. at 271. In *Ohio River*, a nonparty seller, as in this case, contracted to sell the same plot of land to two different parties. *Id.* at 273. The first buyer was the plaintiff and the second buyer was the tenant that the plaintiff sought to eject. *Id.* The tenant produced an agreement of sale between the seller and an agent of the tenant. *Id.* The plaintiff also had an agreement of sale with the seller that preceded the tenant's agreement of sale by more than two months. *Id.* The tenant nonetheless proceeded with the purchase, relying on the seller's word that the agreement of sale with the plaintiff had expired. *Id.* The tenant asked to see the contract, but the seller said it was in the plaintiff's possession. *Id.* The Supreme Court of Pennsylvania held that the tenant did not adequately investigate the title and that it is always the duty of the purchaser to do so. *Id.* "Had the defendant or its agent inquired through the agreement itself, of the existence of which it admittedly had notice of or the party holding it, the fact that there was an outstanding equitable title in the plaintiff must have appeared." *Id.* at 274. The Supreme Court of Pennsylvania held that asking to see the agreement from the seller, who was not in possession of it, did not constitute due diligence. *See id.*

After Mr. Scuderi and Mr. Zoubek informed Mr. Duggan on October 12, 2021, that they were buying the Property and would become his new landlord, C&K had notice of the Agreement through Mr. Duggan, one of C&K's principals. Revised Findings and Conclusions at Findings of Fact ¶ 49, Dkt. at 4/11/25. Not only was Mr. Duggan informed by Mr. Scuderi and Mr. Zoubek, but Mr. Duggan was also informed by Ross Jr. and Ross III. Revised Findings and Conclusions at Findings of Fact ¶¶ 39, 45 and Conclusions of Law ¶ 28, Dkt. at 4/11/25. Ross Jr. notified Mr. Duggan about the Agreement on September 28, 2021. *Id.* at Findings of Fact ¶¶ 38-

39. Mr. Slavin also informed Mr. Clinton that the Property was under contract. *Id.* at Conclusions of Law ¶ 96.

On October 18, 2021, Mr. Duggan filed the *Lis Pendens*. 2/23/24 Trial Tr. at 172:25-174:3 (Clinton testimony). Later that same day Mr. Clinton asked Ross Jr. in an email to see a copy of the Agreement. *Id.*; P-7 (Email Clinton to e_ross50@yahoo.com Dated 10-19-21 CK57-58). Mr. Slavin called Mr. Clinton and Mr. Clinton asked to see a copy of the Agreement. 2/23/24 Trial Tr. at 190:21-191:8 (Clinton testimony). This does not constitute due diligence. Mr. Clinton did not request to see a copy of the Agreement from Ross Jr. until after he thought he could argue Mr. Duggan's claimed right of first refusal was legitimate. Mr. Duggan did not ask to see a copy of the Agreement from Mr. Scuderi, Mr. Zoubek, Ross III, or Ronald Ross. 2/21/24 Trial Tr. at 238:17-21 (Zoubek testimony); 2/23/24 Trial Tr. at 71:13-17 (Ross III testimony); 2/20/24 Trial Tr. at 240:7-11 (Ronald Ross testimony). Mr. Clinton did not ask to see a copy of the agreement from Mr. Rand, Scuderi and Zoubek's attorney. 2/23/24 Trial Tr. at 224:22-225:7 (Clinton testimony). Mr. Duggan and Mr. Clinton never asked Ronald Ross whether the Property was under contract. 2/20/24 Trial Tr. at 240:12-17 (Ronald Ross testimony).

Furthermore, the case law does not require that the inquiring party see the agreement to know of its existence. *Ohio River Junction R. Co.*, 72 A. at 274 ("Had the defendant or its agent inquired through the agreement itself, . . . or of the party holding it . . . .") C&K did not meet the due diligence requirement for constructive notice and it did not act with extreme vigilance as required by the Pennsylvania Supreme Court. Therefore, the Court did not err or abuse its discretion in holding that C&K did not satisfy the due diligence requirement of constructive notice.

C. Good Faith Requirement

Even if C&K had met the due diligence requirement of constructive notice, it did not meet the good faith requirement. A buyer asserting a bona fide purchaser defense must establish they acted in good faith. The Supreme Court of Pennsylvania states that good faith can be shown only if the purchaser is without constructive or actual notice of others' rights. *Boggs v. Varner,* 1843 WL 5179 at *4 (Pa. 1843) ("The subsequent purchaser can only acquire an equity in good faith without knowledge of the former title either constructive or express.") C&K, however, fails to meet the good faith requirement because it had notice, through Mr. Duggan, of Scuderi and Zoubek's rights in the Parkside Property. Mr. Duggan's conduct after receiving notice from multiple sources demonstrates that C&K was not acting in good faith, a requirement of the bona fide purchaser defense. After Mr. Scuderi and Mr. Zoubek rejected Mr. Duggan's offer, Mr. Duggan attempted to buy the Property from the Rosses with an offer of $650,000, $125,000 more than the Scuderi and Zoubek purchase price. Revised Findings and Conclusions at Findings of Fact ¶ 74. Mr. Duggan also used his Rent Letter as a claimed right of first refusal to justify the filing of the *Lis Pendens*. *Id.* at Findings of Fact ¶ 81. With the filing of the *Lis Pendens* and the claimed right of first refusal, Mr. Clinton emailed Mr. Scuderi and Ross Jr. that any existing agreement will be declared void. *Id.* at Findings of Fact ¶ 83. When Ross Jr. accepted the $650,000 offer, C&K rushed to closing without title insurance and with the Indemnification Agreement because he knew that there would probably be a lawsuit over the Property. *Id.* at Findings of Fact ¶¶ 106, 111-14. Therefore, C&K did not buy the Property in good faith and is consequently not a bona fide purchaser.

D. Waiver of Constructive Notice Argument

C&K and Mr. Duggan also argue that Scuderi and Zoubek waived arguing constructive notice as they did not raise the issue until after the trial. C&K and Duggan's Brief at p. 10, Dkt. at 3/5/25. This assertion is incorrect because Scuderi and Zoubek did raise constructive notice in their pretrial memorandums:

> Either actual or constructive notice is sufficient to prevent [the Duggan Defendants] from acquiring the status of a bona fide purchaser. Because constructive notice is not limited to instruments of record, a subsequent purchaser may be bound by constructive notice of a prior unrecorded agreement...This is true because the subsequent purchaser could have learned of facts that may affect his title by inquiry of persons in possession or others who the purchaser reasonably believes to know such facts.

Scuderi and Zoubek's Pretrial Memorandum at § II(A) Specific Performance, Dkt. at 9/20/23 and 11/20/23 (internal citations omitted).

VI. The Court Did Not Commit Reversible Error By Concluding That Duggan Improperly Filed the *Lis Pendens* Despite Having Previously Deemed Admitted that Duggan was Authorized to File the Lis Pendens

C&K and Mr. Duggan argue that the Court committed reversible error by concluding that Mr. Duggan improperly filed the *Lis Pendens* on October 18, 2021, despite previously deeming admitted C&K and Mr. Duggan's averment that Mr. Duggan was authorized to file the *Lis Pendens*. C&K and Duggan's Brief at § II(C), Dkt. at 3/5/25. "An admission is not conclusively binding when the statement is indeterminate, inconsistent, or ambiguous." *John B. Conomos, Inc. v. Sun Co., Inc. (R&M)*, 831 A.2d 696, 713 (Pa. Super. 2003). "For an averment to qualify as a judicial admission, it must be a clear and unequivocal admission of fact. Judicial admissions are limited in scope to factual matters otherwise requiring evidentiary proof, and are exclusive of legal theories and conclusions of law." *Id.*

The admitted averment that "Mr. Duggan was authorized to file the Lis Pendens" is ambiguous because it is unclear who or what authorized Mr. Duggan to file the *Lis Pendens*. Mr. Duggan's business partner Cormac McAleer testified that he authorized Mr. Clinton to file the *Lis Pendens*. 2/23/24 Trial Tr. at 149:9-14 (McAleer testimony). If that is what the admission means, it is irrelevant to the Court's holding that the filing of the *Lis Pendens* based on a nonexistent right of first refusal was improper.

During the post-trial motion oral argument, Mr. Duggan and C&K argued that the admission means that the *Lis Pendens* was authorized under the law. Oral Argument Tr. at 37:25-39:9. Under the Pennsylvania Rules of Civil Procedure, however, a party may only request that the opposing party admit "statements or opinions of fact or of the application of law to fact." Pa. R. Civ. P. 4014(a). An assertion that an action was authorized by law is neither. Thus, the Court did not commit reversible error by concluding that Mr. Duggan improperly filed the *Lis Pendens*.

VII. The Court Did Not Err or Abuse Its Discretion by Not Drawing an Adverse Inference Against Scuderi and Zoubek That They Did Not Have the Funds to Buy the Property

Finally, the Rosses argue that the Court erred or abused its discretion in its February 7, 2025, order by failing to draw an adverse inference against Scuderi and Zoubek as they provided no documentary proof of funds to buy the Parkside Property. Rosses' Brief at § III, Dkt. at 3/5/25. "'Where evidence which would properly be part of the case is within the control of the party whose interest it would naturally be to produce it, and without satisfactory explanation, he fails to do so,' an adverse interest may be drawn against that party." *Thorson v. EDDW, LLC*, 309 A.3d 141, 150 (Pa. Super. 2024), *reargument dismissed* (Feb. 14, 2024), *appeal denied*, 327 A.3d 611 (Pa. 2024) (*citing Haas v. Kasnot*, 92 A.2d 171, 173 (Pa. 1952)).

The granting of an adverse inference is within the discretion of the trial court. *Clark v. Philadelphia College of Osteopathic Med.*, 693 A.2d 202, 204 (Pa. Super. 1997) ("The decision whether to tell the jury an unfavorable inference may be drawn from the failure of a party to produce some circumstance, witness, or document is also one which lies within the sound discretion of the trial court and which will not be reversed absent manifest abuse.")[3] Defendants C&K, Mr. Duggan, and the Rosses have not shown that documentary evidence is required by Pennsylvania case law to show that a party is ready, willing, and able to close in a real property dispute. There are many pieces of evidence to support that Scuderi and Zoubek were ready, willing, and able to close on the Parkside Property on November 1, 2021. *See* 2/21/25 Trial Tr. at 193:25-195:6 (Zoubek testimony); Revised Findings and Conclusions at Findings of Fact ¶¶ 21, 32, 34, Dkt. at 4/11/25. Just as it is within the Court's discretion to determine credibility, it is within the Court's discretion not to draw an adverse inference. *In re Funds in Possession of Conemaugh Tp. Sup'rs*, 753 A.2d at 790; *Clark*, 693 A.2d at 204. Thus, the Court did not err or abuse its discretion by not drawing an adverse inference against Scuderi and Zoubek.

[3] If any adverse inference were to be taken, it would be against the Rosses for failing to produce their text messages during discovery. 2/21/24 Trial Tr. at 87:16-90:20 (Ross Jr. testimony). The Court found it incredible that all the texts were lost when Ross Jr. and Ross III changed their phones. *Id.* at 90:15-20.

CONCLUSION

For the foregoing reasons, the motions for the entry of judgment in favor of defendants C&K Enterprises Co., LLC and Kevin Duggan and defendants Earl V. Ross, III in trust for Ronald C. Ross and Earl V. Ross, III are denied.

BY THE COURT:

Abbe F. Fletman

ABBE F. FLETMAN, J.