

**IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY**

JOSEPH TAUBER,)

Plaintiff,)

v.)

VIRGINIA E. RODRIGUEZ ,)
PATRICIA A. RODRIGUEZ,)
and NICHOLAS H. RODRIGUEZ,)

Defendants.)

C.A. No.: CPU6-13-000313

Submitted: July 10, 2014
Decided: August 8, 2014

Joseph Tauber
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Self-represented Plaintiff

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DECISION AFTER TRIAL

Plaintiff Joseph Tauber (“Tauber”) brings this fraud action to recover monies allegedly invested in real property. Trial was held on May 20, 2014. The Court heard testimony from four witnesses, and documents were received into evidence.¹ At the conclusion of trial, the Court reserved decision and ordered supplemental briefing. This is the Court’s final decision after trial.

It is undisputed that Tauber and Defendant Virginia Rodriguez (“Virginia”) discussed and sought out property to purchase as an investment, and that Virginia was the sole individual present at closing on a property located at 609 South Spinnaker Court in Milton, Delaware (the “Property”). It is also undisputed that the Property was ultimately deeded to Harrington Walker,

¹ Plaintiff’s Exhibits 1 through 22 and Defendants’ Exhibits 1 through 8 were received into evidence.

LLC (“Harrington Walker”). The Court is called upon to determine whether Defendants fraudulently obtained title to the Property and what damages, if any, Tauber incurred as a result.

PROCEDURAL HISTORY

The relevant procedural facts are as follows: on March 21, 2013, Plaintiff Joseph Tauber brought this action for fraud against Defendants Virginia E. Rodriguez, Patricia A. Rodriguez (“Patricia”) and Nicholas H. Rodriguez (“Nicholas”) (collectively “Defendants”), for alleged fraud perpetrated by Defendants in the course of the purchase and subsequent rental of the Property. In the Complaint, Tauber alleged that in 2009, he and Virginia formed JT Enterprises Group, LLC (“JT Enterprises Group”), and agreed to purchase the Property, to be titled to JT Enterprises Group, as an investment. Tauber alleged that, unbeknownst to him, the Defendants secretly formed and deeded the Property to Harrington Walker, to the exclusion of Tauber. Tauber sought to recover damages for his monetary contribution towards the purchase of the Property plus rental income generated by the Property, totaling \$49,000.00.²

On April 12, 2013, Defendants filed an Answer and Counterclaim seeking to recover damages in the amount of \$47,004.80. In its counterclaim, Defendants alleged that, by way of fraudulent misrepresentations, Tauber collected rental income from the Property; Tauber failed to pay rent to Defendants when he resided at a separate property owned by Defendants; and, Tauber unlawfully retained and used a vehicle belonging to Virginia.³

² Tauber specified that he contributed \$44,586.61 towards the purchase of the Property, however, he did not specify any figures relating to the rental income he sought to recover.

³ Specifically, Defendants sought to recover \$7,004.80 for rental income fraudulently obtained by Tauber; \$36,000.00 for rent from Tauber when he resided at a different property owned by Defendants; and, \$2,500.00 for Tauber’s wrongful possession and use of Virginia’s vehicle.

On May 9, 2013, Tauber filed a motion to amend and to transfer case to Superior Court, seeking to add a claim for intentional infliction of emotional distress and punitive damages, ultimately increasing the amount of damages sought by \$1,500,000.00.

On July 9, 2013, Commissioner Maybee entered a Proposed Finding of Fact and Recommendation, in which he recommended that the motion to amend and to transfer be denied. On July 18, 2013, Tauber filed a Motion for Reconsideration of Commissioner's Order. On August 2, 2013, the Court sent a letter advising the parties that Sussex County Court of Common Pleas Judicial Officers recused themselves from the matter, and the case was assigned to this Judicial Officer.⁴ On November 22, 2013, this Court entered an order denying Tauber's motion to amend and to transfer.⁵

Trial was held on May 20, 2014. At trial, the Court heard the testimony of four witnesses: Tauber, Virginia, Nicholas, and Patricia. At the conclusion of trial, the Court requested supplemental briefing on the specific cause of action, legal theories, and applicable measure of damages.

FACTS

The rendition of events conflicted between the parties and at times within a given party's own account. Based on the testimony and evidence presented at the hearing, the Court finds the following facts:

⁴ In the August 2, 2013 letter, the Court explained that Commissioner Maybee had presided over all pre-trial issues for this case. However, when Tauber filed an appeal of Commissioner Maybee's decision to permit joinder of Harrington Walker, LLC, as a defendant, the appeal was presented before the Honorable Kenneth S. Clark, Jr. Upon learning that a member of the downstate Bar was a party-defendant, the Judicial Officers of Sussex County recused themselves from the matter, and the case was assigned to a judicial officer from the New Castle County Court of Common Pleas.

⁵ At the Court's request, the parties stipulated that the Motion to Amend would be heard and considered *de novo*.

In 2009, Tauber and Virginia were in a romantic relationship when the pair decided to create JT Enterprises Group, LLC. A joint checking (the “Joint Checking Account”) and money market account (the “Money Market Account”) was set up for JT Enterprises Group, LLC (collectively as the “JT Account”). Tauber and Virginia used both accounts, and frequently utilized the JT Account for personal transactions, paying bills and living expenses therefrom.

The couple began searching for an investment property for JT Enterprises Group to purchase. Eventually, they made an offer on behalf of JT Enterprises Group to purchase the Property, located at 609 South Spinnaker Lane in Milton, DE. On June 22, 2009, they entered an Agreement of Sale for the Property, with JT Enterprises Group identified as the Principal Buyer.⁶

From June 19, 2009 through July 20, 2009, Tauber made a number of deposits into the Joint Checking Account.⁷ As of July 20, 2009, the Joint Checking Account bore a balance of \$41,062.41.⁸ Virginia made no deposits into the Joint Checking Account during the month of July.

Virginia sought to secure \$100,000.00 of the \$122,500.00 purchase price. Faced with the impending settlement and having not successfully secured the required funding, Virginia asked her parents, Nicholas and Patricia, for the outstanding \$100,000.00. Concerned that Virginia would be subject to embarrassment if she could not proceed with the transaction, Nicholas and Patricia obliged.

The remaining \$22,500.00 of the purchase price came from the JT Account. On July 21, 2009, Virginia transferred \$40,000.00 from the Joint Checking Account to the Money Market

⁶ Plaintiff’s Exhibit 1.

⁷ Defendant’s Exhibit 2.

⁸ Defs’ Ex. 2. From June 19, 2009 through July 20, 2009, Tauber made a total of \$51,857.61 deposits into the Joint Checking Account, and \$10,795.20 withdrawals and charges were made on the account during that period.

Account. A check was then issued from the Money Market Account for the settlement in the amount of \$22,500.00, leaving a balance of \$17,528.27 in the Money Market Account.⁹

Only Virginia attended settlement on the Property, which took place on July 21, 2009.¹⁰ Virginia went to the settlement with a JT Enterprises Group check and she signed the settlement sheet on behalf of JT Enterprises Group. Shortly after closing, Virginia learned that the deed to the Property identified the owner as JT Enterprises, LLC instead of JT Enterprises Group, LLC. The deed was rectified on July 22, 2009, however, an entirely different entity was identified in the deed: Harrington Walker, LLC.

Curiously, Harrington Walker was not created until August 10, 2009, nearly three weeks after it was identified in the deed to the Property. Harrington Walker's certificate of formation indicates that the only members of the entity are Virginia, Nicholas, and Patricia.

Tauber and Virginia did not live at the Property; rather, they lived at a separate property owned by Nicholas and Patricia. There was no rental agreement between the parties during the approximately three years that the couple resided at Nicholas and Patricia's property. Tauber and Virginia lived there; however, Tauber and Virginia routinely paid the utility expenses at the residence.

Virginia's sister, Laura, entered a lease agreement with Harrington Walker to rent the Property from March 2010 through April 2011.¹¹ During that period, monthly rental payments in the amount of \$900.00 were made to Harrington Walker.¹² Tauber did not object.¹³

⁹ Defs' Ex. 1.

¹⁰ None of the parties could determine if the exact date of Settlement was July 21 or July 22, 2009. At one point, Nicholas asserted that settlement took place on July 29, 2009.

¹¹ Defs' Ex. 3.

¹² Tauber testified that he knew the property was leased for \$900 per month, but he was not aware that Laura was the tenant. Tauber also testified that he trusted Virginia with the rental dealings. For the reasons discussed herein, the Court finds that this testimony is not credible.

On August 1, 2011, JT Enterprises Group entered a rental listing agreement with Re/Max Realty Group for rental property management services. A Re/Max Realty Group agent secured another tenant to occupy the Property for the term of one year commencing on November 1, 2011.¹⁴ The lease agreement called for monthly payments in the amount of \$995.00 per month to be made to JT Enterprises Group.¹⁵ For the first eight months of the lease, rental payments were made to JT Enterprises Group, until Patricia learned that the payments were no longer being made to Harrington Walker. Patricia contacted the Re/Max agent and rental payments were restored to Harrington Walker in July 2012.

Shortly thereafter, Tauber and Virginia terminated their relationship. Tauber began making demands on Nicholas to have his financial contribution to the Property returned or, alternatively, to have Tauber's name put on the deed. When Nicholas refused to do so, Tauber initiated this litigation.

PARTIES POSITIONS

It is Tauber's position that he contributed \$40,000.00 to the purchase of the Property under the promise that the Property was being purchased for JT Enterprises Group, and Defendants fraudulently procured title to the Property by listing Harrington Walker on the deed. Specifically, Tauber argues that Virginia fraudulently took his \$40,000.00, used \$22,500.00 for the purchase of the house, and kept the remaining balance for herself. Tauber seeks to recover his initial investment in the Property, plus additional damages for repairs made thereto.

¹³ It is Tauber's position that he was unaware of the fact that the monthly rental checks were going to Harrington Walker for the entire rental period. For the reasons discussed herein, the Court finds this testimony is not credible.

¹⁴ Defs' Ex. 6.

¹⁵ Defs' Ex. 6.

Defendants contend that liability cannot be imposed on Nicholas and Patricia because they had no knowledge of the funds supplied by JT Enterprises Group or Tauber's involvement in the transaction. Defendants also argue that the funds deposited into the JT Account by Tauber were for the purchase of a different property, which JT Enterprises Group had entered a contract to purchase on June 16, 2009, but was later terminated by mutual release.

DISCUSSION

In civil actions, the party asserting the claim must prove each element of the claim by a preponderance of the evidence.¹⁶ The Supreme Court has described the preponderance of evidence standard as follows:

[t]he side on which the greater weight of the evidence is found is the side on which the preponderance of the evidence exists. If the evidence is in even balance then the side having the burden of proving a fact by a preponderance of the evidence has failed to prove it by such preponderance.¹⁷

As the finder of fact in a bench trial, "it is the Court's role to resolve the conflicts in witnesses' testimony and weigh their credibility."¹⁸ The Court found substantial issues with the credibility of each witness. The rendition of facts as presented by Tauber and Virginia was consistently inconsistent.

Virginia testified that she had no participation in the \$40,000.00 transfer from the Joint Checking Account to the Money Market Account on July 21, 2009. Virginia noted that the transfer was done online, and she claimed that she did not even know the account password to conduct transactions online. However, Virginia later conceded that she conducted online transfers for the purchase of a vehicle in June.

¹⁶ *Sullo v. Kousournas*, 2010 WL 718666, at *6 (Del. Super. Feb. 3, 2010).

¹⁷ *Fletcher v. Shahan*, 2002 WL 499883 (Del. Super. March 6, 2002) (quoting *Barnett v. Division of Motor Vehicles*, 514 A.2d 1145, 1147 (Del. 1986) (citations omitted)).

¹⁸ *Pencader Associates, LLC v. Synergy Direct Mortg. Inc.*, 2010 WL 2681862, at *3 (Del. Super. June 30, 2010).

Virginia's explanation of the financial transactions leading up to the purchase of the Property was riddled with illogical gaps. At her last admitted interaction with the JT Account prior to settlement, she left the balance below \$100.00.¹⁹ However, despite claiming no knowledge of the origin or amount of any subsequent relevant deposits, Virginia apparently knew that the JT Account contained at least the \$22,500.00 requisite for settlement.

Tauber's testimony was likewise convoluted and refutable. Tauber testified that he had no knowledge of the existence of the Money Market Account. This assertion was of particular importance because Tauber sought to recover the \$40,000.00 transferred to the Money Market Account by Virginia – despite the fact that she only withdrew \$22,500.00 for settlement – on the premise that he did not know the location of or have access to the entire \$40,000.00. However, the evidence presented reflects that Tauber had knowledge of, and in fact utilized, the Money Market Account.²⁰

On cross examination, Tauber testified that JT Enterprises did not enter any other real estate contracts prior to the purchase of the Property. However, confronted with documentation of a release from a land sale contract of a different property, Tauber acknowledged an agreement to purchase a different property on the same street entered into by JT Enterprises on June 16, 2009.²¹ Tauber explained that the contract was voided because the couple determined that they could not afford two properties.

Tauber's position on when he learned Harrington Walker was on the Property deed was inconsistent. In opening statements, Tauber stated to the Court that he discovered rental

¹⁹ Virginia issued a check for the purchase of the vehicle on June 16, 2009, leaving the balance of the account at \$95.18.

²⁰ For example, on October 28, 2009, Tauber cashed a \$300.00 check written to himself from the Money Market Account.

²¹ Defs' Ex. 5.

payments on the Property were going to Harrington Walker in 2013. On cross examination, Tauber testified that he made demands for his name to be put on the deed when he learned of Harrington Walker's involvement in July of 2012. In the Complaint, Tauber alleged that he discovered his exclusion from the deed in May of 2012.²²

I. Tauber's Fraud Claim

On a claim for fraud, the burden is on the plaintiff to prove, by a preponderance of the evidence, the following elements: (1) a false representation of fact made by the defendant; (2) the defendant knew or believed that the representation was false, or it made with reckless indifference to the truth; (3) an intent to induce the plaintiff to act or to refrain from acting; (4) the plaintiff acted or refrained from acting in justifiable reliance upon the representation; and (5) damage to the plaintiff as a result of such reliance.²³ The first element – a false representation of fact made by the defendant – can be established by defendant's deliberate concealment, and failure to disclose, provided there is a duty to do so.²⁴

a. Virginia is liable for fraud

This case hinges on whether Virginia made a false representation to Tauber, either affirmatively or by failing to disclose, that his monies were being used to secure the Property to be titled to JT Enterprises Group. Tauber claims that she did, while Virginia maintains that she did not.

²² Tauber's credibility was further called into question when he testified regarding the monies deposited for the purchase of the Property. Tauber testified he obtained the funds deposited into the JT Account for the purchase of the Property from withdrawals from his Individual Retirement Account ("IRA"). The documentary evidence submitted by Tauber himself indicates that four of the withdrawals were redeemed due to disability. Tauber, who testified he had not been disabled, claimed he did not know why the redemptions were listed as due to disability.

²³ *Stephenson v. Capano Development, Inc.*, 462 A.2d 1069 (Del. 1983).

²⁴ *Id.*

As discussed above the credibility of the parties was minimal at best. However, the evidence adduced at trial establishes that Virginia took \$22,500.00, which had been deposited by Tauber, from the JT Account for the purchase of the Property. On direct-examination during Tauber's case-in-chief, Virginia reluctantly admitted that she went to settlement on behalf of JT Enterprises Group and fulfilled the settlement with the check issued by JT Enterprises Group. Virginia later testified that JT Enterprises Group did contribute to the purchase price of the Property, as represented by the \$22,500.00 check; however, she and Tauber never discussed who would finance that check. It is clear from the record that Tauber contributed the entirety of \$22,500.00 that was used at the settlement.

Virginia's testimony concerning the post-settlement alteration of the deed is also of great importance. Virginia testified that the discrepancy in the deed was that entity identified was JT Enterprises, LLC, instead of JT Enterprises Group, LLC. Virginia then testified that she could not in "clear conscience" rectify the deed to show JT Enterprises Group, LLC, as the owner of the property since she borrowed \$100,000.00 from Nicholas for its purchase.

Based on the evidence presented, Court finds that Virginia went to settlement as an agent of JT Enterprises Group, armed with a check issued from JT Enterprises Group, and thereafter she deliberately concealed or failed to disclose that she subsequently altered the deed to reflect any entity other than JT Enterprises Group as the owner. The Court finds that Virginia knowingly committed this act of concealment or nondisclosure with the intent to secure funds from JT Enterprises Group contributed by Tauber, while simultaneously denying Tauber any legal interest in the Property. Tauber acted to provide access to the funding in justifiable reliance on JT Enterprises Group's expectation of a legal interest in the property. The only remaining

element as to Tauber's claim against Virginia is what damages he may recover for Virginia's fraudulent actions.

b. Patricia and Nicholas are not liable for fraud

Tauber also seeks to recover from Nicholas and Patricia for fraud. Both parties conceded that their knowledge of the involvement of the others was limited at best. Virginia testified that she concealed Tauber's involvement because she believed that if Nicholas was informed, he would not loan her the \$100,000.00. There is nothing in the record to suggest that Nicholas or Patricia owed any duty of disclosure to Tauber. The Court finds that Tauber has failed to prove, by the preponderance of the evidence, that Nicholas or Patricia made any representation to Tauber, let alone a fraudulent representation. Accordingly, there is no basis for Tauber to recover from Nicholas or Patricia.

c. Damages

Delaware courts have recognized two measures of damages for fraud: benefit of the bargain and out of pocket measure.²⁵ Under the former, which is the most common and accepted measure, a plaintiff benefits from precisely what he would have earned had the misrepresentation been true.²⁶ On the latter, a plaintiff is restored to his financial position as if the transaction had never occurred.²⁷ The facts of this case warrant an award under the out of pocket measure.

Examining the financial records, which is the clearest indicator of fact given the credibility issues of both parties, there is a minimum expenditure of \$22,500.00 that went toward the purchase of the property. The funds used in that expenditure were contributed exclusively by Tauber. To place Tauber in the position he would have been in had the transaction never

²⁵ *Capano Development, Inc.*, 462 A.2d 1069.

²⁶ *Id.*

²⁷ *Id.*

occurred, an award of damages in the amount of \$22,500.00 is required. However, those damages must be reduced by the amount of rental income obtained by Tauber; for if the transaction had never occurred, Tauber would have had no legal interest in the Property or the income generated therein. The record indicates that Tauber collected rental income in the amount of \$875.66²⁸ per month for eight months commencing in November 2011, for a total of \$7,005.28. Accordingly, the Court finds that Tauber is entitled to an award of damages in the amount of \$15,495.24 from Virginia.²⁹

II. Defendants' Counterclaim

At trial, Defendants proceeded on their counterclaim for Tauber's alleged failure to pay rental income on the property he resided at with Virginia, which was owned by Nicholas and Patricia (the "South Shore Property"). Defendants seek to recover payment in the amount of \$18,000.00 for the roughly three year period the couple resided at the South Shore Property. In support of their request for damages, Defendants suggest that the property could have been rented in excess of \$2,000.00 per month during the three-year period, and they argue that Tauber, as one of two tenants, is liable for half of that amount.

Tauber contends that he never signed a lease agreeing to any rental terms, and he maintains that Defendants did not demand any rental payment during his period at the South Shore Property.

²⁸ This figure represents the amount collected after the Re/Max agent's monthly percentage payment.


²⁹ Tauber also sought to recover for improvements allegedly made to the Property and he alluded to a deposit he made on the Property. Tauber has failed to prove these damages by the preponderance of the evidence. Therefore, there is no basis for Tauber to recover for the alleged repairs or deposit.

The Defendants have not set forth any basis on which they could recover the damages they seek. Nothing in the record suggests that there was ever an agreement between the parties for the rental of the property, and Defendants conceded that they had no intention of evicting Tauber due to his relationship with Virginia. Furthermore, Defendants offered nothing to substantiate their claim that the property could be rented for \$2,000.00 per month, and no other basis for calculation of damages was presented. Accordingly, the Court finds that Defendants did not prove, by a preponderance of the evidence, that Tauber is liable for rental payments associated with the South Shore Property.

CONCLUSION

For the foregoing reasons, the Court enters judgment in favor of Plaintiff Joseph Tauber and against Defendant Virginia Rodriguez only in the amount of \$15,495.24. The Court finds in favor of Defendants Nicholas Rodriguez and Patricia Rodriguez and against Plaintiff Joseph Tauber on Tauber's fraud claim. On Defendants' counterclaim, the Court finds in favor of Plaintiff Joseph Tauber. Each party shall bear its own costs.

IT IS SO ORDERED this 8th day of August, 2013.



Robert H. Surles,
Judge