

SUMMARY

Betty Thorpe (“Plaintiff”) filed this action in February 1997, alleging breach of a conditional sales agreement (“Agreement”). Plaintiff seeks the return of \$20,000 and a 1.3 acre parcel that she paid to *Pro Se* Defendants William and Margaret Anne Ingram (herein “Defendant”) as a down payment on the Agreement. The questions presented are: 1) whether Defendant breached the Agreement by failing to accept the proffered cure from Plaintiff, and 2) whether Plaintiff is entitled to summary judgment under the doctrine of collateral estoppel. Plaintiff’s Motion for Summary Judgment is **GRANTED**, since Defendant rejected Plaintiff’s proffered cure on an inadequate basis. Additionally, Plaintiff is entitled to summary judgment under the doctrine of collateral estoppel. Plaintiff’s Motion to Strike Defendant’s Counterclaim is also **GRANTED**, because Defendant’s counterclaim was not filed in a timely fashion.

PROCEDURAL POSTURE

On July 10, 1997, the Delaware Real Estate Commission (“Commission”) issued an Opinion and Order, which found that 1) Defendant had failed to apply to the balance of the loan the difference between the \$35,000.00 value placed on the 1.3 acre parcel at the time of the down payment and the \$39,000.00 price for which the 1.3 acre parcel was sold and, 2) Defendant had failed to provide Plaintiff with a Seller’s Disclosure of Condition of Real Property form as required by 6 Del. C. Section 2573.¹ On September 23, 1998, this Court granted summary

¹ 6 Del. C. Section 2573. The agent, subagent or seller, as applicable, shall give a copy of the Seller's Disclosure of Real Property Condition Report to all

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judgment in favor of Plaintiff on the basis that Plaintiff was entitled to void the agreement pursuant to 25 Del. C. Section 314 (c)². The Court granted the motion, for reasons including Defendant's failure to provide Plaintiff with an amortization schedule. On March 7, 2000, the Delaware Supreme Court reversed, remanding the case for consideration of the Plaintiff's claim that the seller financing was voidable. The Supreme Court held that the agreement was voidable only until the transaction was finalized and equitable ownership of the property passed to the Plaintiff and her husband.

The Supreme Court found that the action should be remanded to the Superior Court for further action on Plaintiff's remaining claims. In June 2000,

prospective buyers or prospective buyer's agent prior to the time the buyer makes an offer to purchase. This written disclosure form, signed by buyer and seller, shall become a part of the purchase agreement.

² 25 Del. C. Section 314 c). No contract for the sale of consumer purpose property under which the seller or sellers agree to provide any financing for the purchaser or purchasers, unless specifically permitted by preempting Federal law or regulation, shall remain executory for a period exceeding 6 months. The parties may renew the executory contract, by written agreement, for a period not exceeding more than an additional 6 months. The time between execution and final settlement of such a contract shall be no longer than those combined time periods. For purposes of this subsection "final settlement" shall mean a transaction wherein the seller conveys or sellers convey a deed to the residential real estate to the buyers in return for payment amounting to the purchase price, which may include a mortgage in the amount of any financing extended by the seller or sellers. For purposes of this subsection "consumer purpose property" shall mean 1-to-4-family residential real property used primarily for personal, family or household purposes, and shall not include any other property, including multi-unit residential property such as an apartment building, office property, commercial property or industrial property.

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Defendant entered bankruptcy. One year later, this action was dismissed. In June 2003, the dismissal was vacated by this Court. In June 2008, Defendant's bankruptcy action was closed. In 2009, this case was removed from the dormant docket to the active docket.

Since that time in 2009, the Plaintiff has attempted to conduct discovery, but the Defendant has been uncooperative. Most recently on October 4, 2012, this Court issued an order for Defendant to appear for depositions on October 24, 2012, after having failed to appear for depositions scheduled on August 21, 2012. On October 16, 2012, Defendant filed a Motion for Summary Judgment. Plaintiff filed a Response on October 26, 2012. Defendant again failed to appear for depositions on October 24, 2012. On July 15, 2013, Plaintiff filed a Cross-Motion for Summary Judgment. Then, Defendant filed a Response on September 5, 2013. Defendant filed a Counterclaim in this action on August 14, 2013. Plaintiff filed a Motion to Strike Defendant's Counterclaim on August 21, 2013 with Defendant's Response filed on September 5, 2013.

FACTS

On December 22, 1994, Plaintiff and her husband at the time, Marvin E. Thorpe, entered into the Agreement with Defendant. Pursuant to the agreement, Plaintiff made a down payment to Defendant consisting of \$20,000 in cash and a conveyance to Defendant of a 1.3 acre tract of land ("Property"). The Court previously determined the value of the down payment to be \$59,900.00. On December 6, 1995, Defendant sent Plaintiff a 60-day notice of default based upon the alleged failure to make the November and December payments as well as to

pay delinquent taxes. On February 6, 1996, Plaintiff's attorney forwarded Defendant a check for the November and December payments as well as monies demanded for insurance. Plaintiff's attorney did not enclose the payment previously demanded for taxes, as the 1995 taxes had been paid and previous taxes were the responsibility of the Defendant. On February 7, 1996, Defendant acknowledged receipt of the letter and check the previous day, returning the check on the basis that it was a non-negotiable out-of-state check.

STANDARD OF REVIEW

In a Motion for Summary Judgment, the burden is on the moving party to show, with a reasonable degree of certainty, that no genuine issue of material fact exists and judgment as a matter of law is permitted. When considering a Motion for Summary Judgment, the facts must be construed in the light most favorable to the non-moving party. Further, if the record indicates that a material fact is disputed, or if further inquiry into the facts is necessary, summary judgment is not appropriate.³

Where a Court or administrative agency has decided a fact essential to its decision, collateral estoppel precludes re-litigation of the issue in a subsequent action involving a party to the first action. In determining whether collateral estoppel applies, a court must consider whether:

- (1) The issue previously decided is identical with the one presented in the action in question, (2) the prior action has been finally adjudicated

³ R. Civ. P. 56 c).

on the merits, (3) the party against whom the doctrine is invoked was a party or in privity with a party to the prior adjudication, and (4) the party against whom the doctrine is raised had a full, fair opportunity to litigate the issue in the prior action.⁴

Plaintiff's Motion for Summary Judgment

First, Plaintiff argues that there is no requirement in the Agreement that a payment to cure a default be made by in-state check or cash. Therefore, Defendant breached the Agreement by failing to accept the proffered cure from Plaintiff. As indicated, when Plaintiff's attorney forwarded a check to Defendant, he returned the check on the basis that it was a "non-negotiable out-of-state check." During his deposition, Defendant acknowledged that the reason he did not accept the check as a cure for the alleged default was because it was an out-of-state check. However, the Agreement says nothing about a payment to cure a default having to be made by an in-state check or cash. That, therefore, was an inadequate basis for Defendant to reject Plaintiff's proffered cure.

Second, Plaintiff is also entitled to summary judgment under the doctrine of collateral estoppel. This Court uses the four factors listed above⁵ to determine whether collateral estoppel applies. Regarding the first factor, the issues decided by the Commission are identical to those addressed in the Complaint: 1) whether

⁴ *Betts v. Townsends, Inc.*, 765 A.2d 531, 534 (Del. 2000).

⁵ *See* Standard of Review

Defendant failed to credit Plaintiff with the amount in excess of \$35,000.00 for which the 1.3 acre parcel was sold, and 2) whether Defendant failed to provide Plaintiff with a Seller's Disclosure Statement.

Turning to the second factor, the Commission was subject to an appeal pursuant to 29 Del. C. Section 10142.⁶ Because the decision was never overturned on appeal, it constitutes a final adjudication on the merits. With regard to the third factor, Defendant was a party to the prior proceeding. Turning to the fourth factor, Defendant had a full and fair opportunity to litigate these issues before the Commission.

In response to Plaintiff's Motion, Defendant argues that Plaintiff never cured the default. Defendant bases that assertion on his reading of the Delaware Supreme Court decision, *Ingram v. Thorpe*.⁷ In that case, the Court held that the Agreement was not voidable pursuant to Section 314, because Thorpe did not attempt to rescind it before the settlement, thereby reversing the Superior Court decision granting summary judgment to the Plaintiff. That is the only issue that the Delaware Supreme Court addressed in that decision. That decision does not address the issues that Plaintiff presents to this Court on the instant motions, as Defendants purport. Therefore, Plaintiff's Motion for Summary Judgment is

⁶ (c) The appeal shall be on the record without a trial de novo. If the Court determines that the record is insufficient for its review, it shall remand the case to the agency for further proceedings on the record.

(d) The Court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted. The Court's review, in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency.

⁷ 747 A.2d 545 (Del. 2000).

GRANTED on the Plaintiff's position that Defendant's rejection of the out-of-state check was invalid, as described above.

Plaintiff's Motion to Strike Defendant's Counterclaim

Defendant failed to file the Counterclaim in a timely fashion. Defendant filed the counterclaim on August 14, 2013, whereas Plaintiff filed her Complaint on February 6, 1997. Pursuant to Super. R. Civ. P. 13 (a)⁸, Defendants were required to include their Counterclaim with their Answer filed on February 26, 1997. Defendant's Counterclaim concerns events that allegedly occurred prior to the filing of Plaintiff's Complaint, of which Defendant had knowledge prior to the filing of Plaintiff's Complaint.

Moreover, Defendant's Counterclaim arises out of the occurrences that are the Subject of Plaintiff's Complaint, dealing with allegations of transferral equity from the Property that is the subject of the Complaint. Defendant argues that they

⁸ Super. R. Civ. P. 13(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the Court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon the claim by attachment or other process by which the Court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule.

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are permitted to file the Counterclaim pursuant to Super. R. Civ. P. 13(b)⁹, (e)¹⁰ and (f).¹¹ Defendant's Counterclaim, however, did not mature after Defendant served its pleading, nor was Defendant's failure to file the Counterclaim a result of oversight or neglect. Therefore, Plaintiff's Motion to Strike Defendant's Counterclaim is **GRANTED**.

Because of the foregoing, Defendant's Motion for Summary Judgment is **MOOT**.

IT IS SO ORDERED.

/s/ Robert B. Young
J.

RBV/lmc

oc: Prothonotary
cc: Mr. Primos, Esq.
Mr. & Mrs. Ingram
Opinion Distribution
File

⁹ Super. R. Civ. P. 13(b) Permissive Counterclaims. A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

¹⁰ Super. R. Civ. P. 13(e) Counterclaim Maturing or Acquired After Pleading. A claim which either matured or was acquired by the pleader after serving a pleading may, with the permission of the Court, be presented as a counterclaim by supplemental pleading

¹¹ Super. R. Civ. P. 13(f) Omitted Counterclaim. When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, the pleader may by leave of court set up the counterclaim by amendment.