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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

MAURICE P. FOX, et al., Plaintiffs,	)	
v.	)	CIVIL ACTION NO. 81-0031-A
RUSSELL S. MORGAN, et al., Defendants.	)	

MEMORANDUM OPINION

I. FINDINGS OF FACT

The plaintiffs, Maurice P. Fox and Virginia J. Fox, are citizens of Virginia. The defendants, Russell S. Morgan, Raymond Lassen, and Jerome Golub, are citizens of Maryland. The matter in controversy exceeds $10,000, exclusive of interest and costs.

On January 19, 1979, the Foxes entered into a contract with Morgan to buy from him the property known as 9909 Main Street, Fairfax, Virginia, together with the improvements on the property. The contract price was $175,000. The Foxes gave Morgan a deposit of $10,000 and agreed to pay the balance in cash at settlement. Morgan was to convey the parcel by general warranty deed. He promised to deliver the property free and clear of any encumbrances, except those listed in the contract. The only encumbrance mentioned in the agreement was a lease held by a third party. Morgan was to have a reasonable time in which to correct any title defects.

The parties scheduled settlement on the contract for February 2, 1979. Prior to that date, a survey indicated that a building on the Morgan property encroached upon an adjacent parcel owned by Dr. Joseph Stuart. The Foxes refused to accept the conveyance of the parcel, because of the encroachment. Morgan, in turn, was unwilling to cure the defect. As a consequence, settlement on the property did not take place within the time specified by the contract.

On April 11, 1979, the Foxes brought a bill of complaint against Morgan in the Circuit Court of Fairfax County for specific performance of the January 19, 1979, contract. On the same day, the Foxes filed a memorandum of lis pendens on the property. Morgan responded by demurring to the bill of complaint. The parties have not yet argued this demurrer. As a result, the suit remains pending in the state court.

On April 27, 1979, Analynn Parsons Janovetz brought an action against Morgan in the Circuit Court of Fairfax County. In her bill of complaint, she asked for specific performance of an alleged option to purchase the Morgan property. She also filed a lis pendens in connection with her suit. Morgan thereafter refused to assume liability for the defense or the outcome of this action. He insisted that the Foxes take the property subject to the Janovetz claim.

On February 20, 1980, the Foxes assigned their interest in the Morgan contract to Lassen. The Foxes conditioned this assignment upon Lassen's performance of his promise to purchase two adjacent parcels owned by the Foxes and a third party. Under the terms of the assignment, Lassen was to repay the Foxes their $10,000 deposit with Morgan. Lassen also promised to give the Foxes a note for $50,000, secured by a deed of trust on the Morgan property. Finally, Lassen agreed to pay all expenses associated with clearing up the encroachment and the Janovetz suit. Settlement on this contract never occurred, because Lassen refused to perform his obligation to purchase the adjacent parcels.

On May 3, 1980, Lassen and Morgan entered into a contract for the purchase of the Morgan property. This agreement referred to the earlier Fox-Morgan contract. Among other provisions, it gave Lassen credit on the purchase price for the $10,000 deposited by the Foxes. Morgan sent this new contract to the Foxes for their approval. On May 7, 1980, Maurice Fox noted on the back of the Morgan-Lassen contract that he had "no objection to this 'reworking' of the assigned

contract provided that the terms of the assignment and contract for sale of adjacent property (both dated 2-20-80) are strictly adhered to."

On May 13, 1980, the Circuit Court of Fairfax County dismissed the Janovetz suit. This dismissal occurred as a result of the efforts and expense of Lassen.

On December 10, 1980, Morgan conveyed his property to a limited partnership called Burke Station Road Associates. The general partners of this partnership are defendants Lassen and Golub. On the same date, the partnership conveyed the property to a trustee to secure a purchase-money note given to Morgan. On December 11, 1980, Lassen cured the encroachment of Morgan's building onto the adjacent parcel by acquiring a strip of land from Dr. Stuart.

Lassen has not performed his obligations under the Fox-Lassen assignment. He, moreover, has repudiated his promise to purchase the two parcels adjoining the Morgan property. The Foxes at all times have been willing and able to perform their original contract with Morgan. They have made repeated demands on him to convey the property in accordance with the terms of that agreement, but without success. Lassen's partnership, Burke Station Road Associates, still owns the Morgan property. The partnership, through its general partner, Lassen, had notice of the Fox-Morgan contract at the time that it took title to the property.

On January 14, 1981, the Foxes brought a suit in this court seeking specific performance of the original Fox-Morgan contract. They contend that the court has diversity jurisdiction under 28 U.S.C. § 1332 (1976).

II. CONCLUSIONS OF LAW

The court has jurisdiction over this suit under 28 U.S.C. § 1332 (1976). Complete diversity exists between the parties. In addition, the amount in controversy exceeds $10,000, exclusive of interest and costs. Thus, the case meets both of the requirements for diversity jurisdiction.

The central issue in this action is whether the Foxes have a right to enforce specific performance of the original Fox-Morgan contract. The defendants do not dispute the fact that the Foxes had a valid contract with Morgan. They, instead, attempt to bar an award of specific performance by asserting four defenses. First, the defendants contend that the Foxes released their equitable rights in the Morgan property when they approved the Lassen-Morgan agreement. Second, they argue that the doctrine of laches bars specific performance here. Third, they allege that the Foxes are estopped from obtaining equitable relief, because they acquiesced in the conveyance from Morgan to Lassen's partnership. Finally, the defendants contend that the Fox-Morgan contract is not specifically enforceable, because it lacks mutuality.

The court begins by holding that the Foxes' acquiescence in the Lassen-Morgan agreement did not constitute a release of their rights in the Morgan property. The comments that the Foxes typed on the reverse side of the Lassen-Morgan contract clearly indicate an intention to retain all rights gained under the prior agreements with Morgan and Lassen. The Foxes stated that they would relinquish their rights in the property to Lassen only if he complied with the terms of the earlier assignment. Such a statement is not a release. See Fitzgerald v. Frankel, 109 Va. 603, 610, 64 S.E. 941 (1909).

The court next rules that the doctrine of laches does not bar specific performance in this case. The Foxes' delay in bringing this suit was not unreasonable in view of the complexity of the settlement negotiations that occurred. In addition, no prejudice resulted to any of the defendants, because they were aware of the specific performance suit that the Foxes had filed earlier in the state courts. Thus, the doctrine of laches does not apply here. See Dobie v. Sears, Roebuck & Co., 164 Va. 464, 470, 180 S.E. 289 (1935).

The court also holds that the Foxes are not estopped

from obtaining equitable relief by their behavior at the time of the Morgan-Lassen conveyance. The note typed on the back of the Lassen-Morgan contract gave adequate notice to all parties involved that the Foxes did not intend to relinquish their rights in the Morgan property. In addition, both Lassen and Morgan were aware that the Foxes had filed a suit in state court to enforce specific performance of the original Fox-Morgan contract. As a consequence, neither defendant could have relied on any "acquiescence" by the Foxes. The Foxes, therefore, are not estopped from obtaining specific performance. See Beverage v. Harvey, 456 F. Supp. 1044, 1046-47 (E.D. Va. 1978), aff'd, 602 F.2d 657 (4th Cir. 1979).

The final argument made by the defendants is that the Fox-Morgan contract is not specifically enforceable, because it lacks mutuality. The court agrees that this contract lacked mutuality at the time that the parties entered into it. Under the terms of the agreement, the Foxes could avoid purchasing the Morgan property simply by forfeiting their deposit. The court, however, also rules that the Foxes cured any lack of mutuality by bringing this suit. See Bond v. Crawford, 193 Va. 437, 446-47, 69 S.E.2d 470 (1952); Boston v. Shackelford, 162 Va. 733, 751, 175 S.E. 625 (1934). Thus, the mutuality doctrine does not bar specific performance here.

The court holds that the Fox-Morgan contract is specifically enforceable. It now asks the parties to submit proposals for shaping equitable relief within ten days of the date of this opinion.

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United States District Judge

Date: ________________________

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MEMORANDUM OPINION

On October 28, 1981, the court ordered the parties to this action to set a settlement date for specifically performing the Fox-Morgan contract. The settlement date was to have been within thirty days of the date of the order. In addition, the court ordered the parties to submit within ten days of settlement a list of all claims against the funds held in the registry of the court.

On November 30, 1981, the plaintiffs, Maurice P. and Virginia J. Fox, paid $165,000 into the registry of the court. This amount represented the remainder of the purchase price due on the Fox-Morgan contract. On December 7, 1981, the Foxes and defendants Raymond Lassen and Jerome Golub filed claims against the funds in the registry. Because of various difficulties, however, the parties were not able to complete settlement on the contract until January 22, 1982. On this date, the Foxes finally recorded a deed conveying the land in question from Lassen and Golub to defendant Russell S. Morgan and a second deed conveying the land from Morgan to the Foxes. In addition, Morgan cancelled and returned the note and deed of trust given to him by Lassen and Golub. On February 5, 1982, the court ordered the parties to update their claims against the funds in the registry of the court. They have now done so.

The court will divide the registry funds in two stages. First, the court will determine what portion of the funds belonged to each of the parties at the time of settlement.

Second, the court will allocate to each party a prorata share of the interest accruing after settlement based on that party's proportionate interest in the registry funds on the settlement date.

The court will begin by ruling on the Foxes' claims against the registry funds. First, the Foxes should receive interest from the contract settlement date to the actual settlement date on the $10,000 that they deposited with Morgan. The statutory interest rate in Virginia went up from 8% to 10% on July 1, 1981. See Va. Code § 6.1-330.10 (1979 & Supp. 1981). The Foxes, therefore, are entitled to simple interest of 8% on their deposit from February 2, 1979, through June 30, 1981, and to simple interest of 10% from July 1, 1981, through January 21, 1982. The court computes this amount to be $2,500.

Second, the Foxes should receive all interest accruing on the registry funds before settlement. They beneficially owned the funds until the parties completed the transfer of the land. The funds accumulated $1,559.70 in interest from November 30, 1981, through December 29, 1981. In addition, $1,677.80 in interest accrued from December 30, 1981, through January 28, 1982. The court calculates that $1,286.87 of this latter amount accumulated before January 22nd. Thus, the Foxes are due $2,846.57 in interest on their payment into the registry.

Third, the court will award the Foxes $5,000 as the cost of curing the encroachment on the small parcel originally owned by Dr. Stuart. The Foxes have claimed $17,650 as the cost of physically removing the encroachment. They, however, had an opportunity to purchase the Stuart parcel from Lassen and Golub for $5,000. The defendants made this offer on December 9, 1981, and held it open until December 15, 1981. This offer came after the court had ordered the transfer of the Morgan property to the Foxes. The Foxes, therefore, had a duty to mitigate their damages by purchasing the Stuart parcel. As a consequence, the Foxes will only receive $5,000 in compensation for the encroachment. The court will not order the transfer of the Stuart parcel to the Foxes for the reasons stated in the court's order

of October 28, 1981. The Foxes must strike their own bargain with Lassen and Golub.

Fourth, the Foxes should receive reimbursement for any real estate tax payments covering the period before settlement. At the time of settlement, the real estate tax for the second half of 1981 was still outstanding. The principal amount of this tax bill was $1,298.90. In addition, the bill had accumulated a penalty of $129.89 and interest of $11.20. Thus, the total tax liability for the second half of 1981 was $1,439.99. The Foxes also should receive compensation for a portion of the 1982 real estate taxes, because the original contract provided that such taxes would be prorated as of the settlement date. The court will assume that the 1982 tax will be the same as that for 1981. Under this assumption, the portion of the tax accruing before January 22nd is $149.37. Thus, the court will allow the Foxes a total real estate tax claim of $1,589.36.

Fifth, the court will permit the Foxes to recover the following costs incurred in compelling specific performance of the Fox-Morgan contract: (1) the $175 grantor tax on the transfer of the property from Morgan to Fox; (2) the $361 cost of recording the deed from Lassen and Golub to Morgan; and (3) court costs of $141.60. The court, however, denies the Foxes' claims for attorney's fees and for the cost of releasing the lis pendens. The court can find no legal basis for recovery of these latter amounts. Thus, on the settlement date, the Foxes owned $12,613.53 of the $167,846.57 in the registry.

The court next will dispose of the claims made by Lassen and Golub against the registry funds. First, Lassen and Golub may recover the $353 premium for property and liability insurance that they paid on December 29, 1980. The payment of this premium was necessary to maintain the property. Lassen and Golub also are due interest on this amount through January 21, 1982. The court calculates the total amount of reimbursement for the premium to be $386.96.

Second, the court will award Lassen and Golub the net payment of $36,779.34 that they made to Morgan on December 10, 1980.

In addition, they should receive interest on this sum through January 21, 1982. The court computes the total amount due to Lassen and Golub on this claim as $40,473.46.

Third, Lassen and Golub may recover the two $2,000 mortgage payments that they made. The court also will allow interest on these payments through January 21, 1982. The total amount due on this claim is $4,365.92.

Fourth, Lassen and Golub should receive reimbursement for paying the real estate tax liability for the first half of 1981. They made this payment of $1,298.90 on May 5, 1981. They may recover interest on this amount through January 21, 1982. The court, therefore, will allow Lassen and Golub a total real estate tax claim of $1,388.14.

Fifth, the court will permit Lassen and Golub to recover the cost of defending the Janovetz suit. This expense was necessary to maintain the property. On December 11, 1980, Lassen and Golub paid legal fees of $1,250 in connection with this suit. They may recover interest on this sum through January 21, 1982. The court computes the total amount of this claim to be $1,375.37.

The court denies the claim for architectural and engineering expenses made by Lassen and Golub. These two defendants had actual notice of the Fox-Morgan contract at the time that they incurred these costs. The court holds, therefore, that any expenditures for improvements were at the risk of Lassen and Golub. This conclusion holds especially true when the expenditures did not add to the value of the property. For the same reason, the court also denies the defendants' claims for the cost of advertising for a lessee, for the outstanding electric bill, and for the locksmith fee.

The court also denies the claim made by Lassen and Golub for the cost of acquiring the Stuart parcel. The two defendants still own this land. They, therefore, are not entitled to recover this cost from the registry. Their remedy is to negotiate a sale of the land to the Foxes. Finally, the court

refuses to allow recovery of any attorney's fees by Lassen and Golub other than those incurred in defense of the Janovetz suit. The court can find no legal basis for recovery of these fees. Thus, on the settlement date, Lassen and Golub owned $47,989.85 of the $167,846.57 in the registry.

The court will now allocate the interest that has accumulated in the registry since January 22, 1982. At the time of settlement, the Foxes owned 7.5% of the registry funds and Lassen and Golub owned 28.6%. The remaining 63.9% of the funds belonged to Morgan. The court orders that the parties share post-settlement interest in proportion to their interest in the registry funds on the settlement date.

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UNITED STATES DISTRICT JUDGE

Date: ____________________