

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

DOROTHY E. CLARKSON and)
ELIZABETH F. DINSMORE,)

Plaintiffs,)

v.)

C.A. No. 04C-03-109 MMJ

SELMA GOLDSTEIN in her individual)
capacity, and ON BEHALF OF THE)
ESTATE OF LOUIS GOLDSTEIN,)

Defendants.)

SELMA GOLDSTEIN,)

Counterclaim Plaintiff,)

v.)

DOROTHY E. CLARKSON and)
ELIZABETH F. DINSMORE,)

Counterclaim Defendants.)

SELMA GOLDSTEIN,)

Third-Party Plaintiff,)

v.)

ERISMAN & VAN OGTROP,)

Third-Party Defendant.)

Submitted: February 22, 2005

Decided: May 31, 2005

MEMORANDUM OPINION

Deborah I. Gottschalk, Esquire, Elizabeth Hirst, Esquire, Community Legal Aid Society, Wilmington, Delaware, *Attorney for Plaintiffs.*

Richard H. Cross, Jr., Esquire, Mark D. Olivero, Esquire, Wilmington, Delaware, *Attorney for Defendants.*

JOHNSTON, Judge

This is an action brought by Plaintiffs Elizabeth F. Dinsmore and Dorothy E. Clarkson alleging claims of fraud, conversion, and violation of the Delaware Prohibited Trade Practices Act (“DPTPA”).¹ Plaintiffs seek return of all money paid to Defendants Selma Goldstein and the Estate of Louis Goldstein in excess of the amount Defendants paid, if any, toward the existing mortgage on property located at 1200 West 3rd Street, Wilmington, Delaware (“Property”). Plaintiffs also seek enhanced civil penalties under the DPTPA² in connection with the sale of the Property. Plaintiffs have moved for summary judgment.

There are three primary issues raised by Plaintiffs’ motion: (1) whether Defendants committed fraud in connection with the alleged sale of the Property to Plaintiffs; (2) whether Defendants committed fraud in connection with the mortgage secured by the Property and listing Selma Goldstein as mortgagee; and (3) whether Plaintiffs are entitled to recover damages for Defendants’ alleged violation of the DPTPA. Because there are issues in this case not specifically addressed in Plaintiffs’ motion and Defendants’ opposition, the Court has determined to treat Plaintiffs’ request for relief as a Motion for Partial Summary Judgment.

¹6 *Del. C.* §§ 2511 *et seq.*

²6 *Del. C.* §§ 2580(a), 2581(a).

Defendants claim that summary judgment is inappropriate in this case because there are factual issues in dispute. Defendants have counterclaimed against Plaintiffs for waste and breach of contract for failure to insure the Property pursuant to the terms of the mortgage, and for failure to make mortgage payments pursuant to the terms of the mortgage. Defendants also have filed third-party claims against the law firm of Erisman and Van Ogtrop.

FACTS AND PROCEDURAL CONTEXT

Mrs. Dinsmore is a 77 year old widow who lives primarily in the downstairs of the Property. Ms. Clarkson is 79 years old and lives primarily in the upstairs of the Property.

In 1983, Mrs. Dinsmore and Ms. Clarkson began renting the Property from Louis and Selma Goldstein. Mr. Goldstein was an attorney who practiced in Wilmington, Delaware. Mr. Goldstein died on March 31, 2004. Mrs. Goldstein is handling the administration of Mr. Goldstein's estate.

The Property was condemned by the City of Wilmington, Department of Licenses and Inspections, in 1990. The "Unfit for Human Habitation Notice," dated October 29, 1990, lists Louis Goldstein as "Agent" for William and Blanche Raisin.

In 1990, Mr. Goldstein approached Plaintiffs about buying the Property. Plaintiffs agreed to buy the Property. The closing was held at the offices of Robert E.

Daley, Esquire,³ on December 27, 1990. The only people present at the closing were Mrs. Dinsmore, Ms. Clarkson, Mr. Goldstein, and Mr. Daley. Mrs. Dinsmore and Ms. Clarkson entered into a mortgage with Mrs. Goldstein, dated December 31, 1990, for \$37,500.00 with interest at the rate of 10.75% per year (“Goldstein Mortgage”). The Goldstein Mortgage was secured by the Property.

At closing, it was revealed that there was an existing mortgage in favor of Bank One Columbus, N.A. (“Bank One Mortgage”)⁴ encumbering the Property. According to Plaintiffs, when Mr. Daley asked Mr. Goldstein about the mortgage, Mr. Goldstein stated that the pre-existing mortgage had nothing to do with the closing.

The deed was not recorded until January 22, 1991. The deed conveying the Property to Mrs. Dinsmore and Ms. Clarkson was signed by William L. and Blanche L. Raisin, as sellers, on July 30, 1981, nine and a half years before closing. Mr. and Mrs. Goldstein’s names are not listed anywhere on the deed. The Affidavit of Residence signed by Mr. and Mrs. Raisin on July 31, 1981 as sellers does not list Mr. and Mrs. Goldstein as purchasers. The line titled “Name and Address of Purchaser” is blank.

³Mr. Daley is deceased. He practiced law with the firm formerly known as Erisman & Van Ogtrop.

⁴The mortgage originally was held by Mercantile Mortgage Corporation, predecessor in interest to Bank One.

Plaintiffs made monthly mortgage payments to Selma Goldstein in amounts of \$375.00 or slightly more until 1997. Payments in amounts substantially lower or slightly higher than \$375.00 were received by Defendants in 1998, 1999 and 2000. Plaintiffs did not make several monthly mortgage payments between 1998 and 2000. Three payments of \$60.00 were received in 2001 and two payments of \$100.00 were received in 2002. Eventually, Plaintiffs failed to make a number of payments to Mrs. Goldstein. Mr. Goldstein sent Plaintiffs a delinquency notice dated April 11, 2001.

On or about June 27, 2003, Bank One filed a mortgage foreclosure action against William and Blanche Raisin, Mrs. Dinsmore and Ms. Clarkson (“Foreclosure Proceeding”).⁵ Plaintiffs served both a response to Bank One and a third-party complaint against Mrs. Goldstein. On March 8, 2004, Plaintiffs filed this separate action against Louis and Selma Goldstein. On March 25, 2004, Plaintiffs moved to stay the Foreclosure Proceeding pending the outcome of this action. The Foreclosure Proceeding was stayed.

At the pretrial conference in this action on September 27, 2004, the Court and counsel for both parties agreed that there were few, if any, material facts in dispute. Rather than go forward with trial scheduled for October 4, 2004, the Court directed

⁵C.A. No. 03L-06-090 MMJ.

Plaintiffs to prepare a Motion for Summary Judgment. A hearing was held on January 7, 2005.

PLAINTIFFS' CONTENTIONS

Plaintiffs argue that Summary Judgment is appropriate in this case because there are no genuine issues of material fact in dispute. Defendants did not have a valid mortgage with Plaintiffs. Defendants were never owners, nor did they have an equity interest in the Property. Additionally, Defendants' conduct violated Delaware's Prohibited Trade Practices Act.

Plaintiffs are seeking the following relief: (a) the difference between the amount that they paid Defendants, \$41,476.00, and the amount that Defendants paid toward the Bank One Mortgage. Defendants provided canceled checks totaling payments of \$10,251.16. Thus, Plaintiffs seek the difference of \$31,224.84. Plaintiffs argue that the Goldstein Mortgage should be declared void. Defendants never were entitled to any money. Any money that Plaintiffs paid, in excess of what was due to Bank One, was fraudulently induced and should be returned to Plaintiffs.

Plaintiffs request that the Court impose the maximum penalties allowed under Deceptive Trade Practices Act ("DTPA").⁶ Section 2533 provides for penalties of \$10,000 for each violation of the DTPA, thus a penalty of \$10,000 on behalf of each

⁶*Del. C. § 2533* (The Deceptive Trade Practices Act is a subchapter of the Prohibited Trade Practices Act).

Plaintiff against each Defendant for \$40,000. The Act allows for enhanced penalties where the victim is over 65 years old at the time of the fraud. Plaintiff is asking that an additional \$10,000 penalty be assessed against each Defendant because Ms. Clarkson was 66 years old in 1990.

Plaintiffs contend that in order to establish ownership, Defendants must produce a deed to the Property evidencing the conveyance from the Raisins to the Goldsteins, or must satisfy the Statute of Frauds.⁷ Such a deed does not exist. The Statute of Frauds can be satisfied through the part performance exception by clear and convincing evidence. Defendants would have to demonstrate two out of three criteria: (1) partial payment; (2) possession; or (3) substantial improvement.

Plaintiffs assert that Defendants cannot satisfy the Statute of Frauds because they cannot meet any of the three criteria. First, there was no consideration for the Goldsteins' purchase of the Property from the Raisins. Defendants did not make partial payments on the Property. They simply acted as the conduit for rental payments they received from Plaintiffs. Second, preparatory actions, such as making a lease, are not equal to possession. Possession must be actual and physical. Third, the only repair made by the Goldsteins was replacement of a heater after the Property

⁷6 *Del. C.* § 2714(a).

was condemned by the City of Wilmington in 1990. Routine maintenance and small improvements do not rise to the level of substantial improvements.

Plaintiffs contend that there is a presumption of fraud under Delaware law, where there are other ingredients in the case of a suspicious nature, such as gross inadequacy of price.⁸ In this case, Defendants claim that Plaintiffs took the Property subject to an existing mortgage. However, there was no reduction in the purchase price to reflect the existing lien.

Mr. Goldstein was engaged in over 200 real estate transactions from 1950 to 2000. Mrs. Goldstein has been involved in over 100 real estate transactions from the similar time period, in her name alone. These transactions include buying and selling property and granting, obtaining and assessing mortgages. In addition, Louis and Selma Goldstein formed several corporations that deal strictly with real estate. Therefore, they were acting in the course of their business or occupation when they conveyed the Property to Plaintiffs.

To prove fraud under the DTPA, Plaintiffs must show: (1) that the Goldsteins provided a fraudulent or negligent misrepresentation; (2) that the Goldsteins acted with reckless indifference to the truth; (3) reliance by Plaintiffs; and (4) actual damages.

⁸*Ryan v. Weiner*, 610 A.2d 1377, 1382 (1992).

Plaintiffs signed a deed for a property that listed Blanche and William Raisin as the sellers. The deed was signed as of 1981 but not recorded until 1990. Mr. Goldstein stated in a letter to Elizabeth Dinsmore dated June 20, 2000:

Mrs. Dinsmore --

You are confused about your mortgage! If you look at your original settlement papers you will notice that I already had a mortgage of my own on your property. You have nothing to do with that mortgage company. What you pay me helps me pay off my mortgage to that company. Your mortgage is paid to me – not any company. If you have any questions, call me. Louis Goldstein⁹

There are no documents proving ownership of the Property by Louis and Selma Goldstein. Notwithstanding Defendants' knowledge of the recording statute, there is no record of a conveyance from Mr. and Mrs. Raisin to Mr. and Mrs. Goldstein. There is no deed executed pursuant to 25 *Del. C.* § 101. The recorded deed is between the Raisins and Plaintiffs.

Plaintiffs relied on Mr. Goldstein's assurances that the Property belonged to the Goldsteins and that the mortgage existing on the Property was not Plaintiffs' responsibility. This reliance was reasonable because Plaintiffs had a special relationship with Louis Goldstein. Not only was Mr. Goldstein Plaintiffs' landlord, but Mr. Goldstein was a real estate attorney.

⁹During the January 7, 1005 hearing, Defendants' counsel stated that although the note is on stationery labeled "From the Desk of Louis Goldstein Attorney," and purportedly signed by Louis Goldstein, the handwriting is that of Selma Goldstein.

Plaintiffs have suffered actual damage. The Property is in foreclosure proceedings and Plaintiffs have paid \$40,000 to the Goldsteins who cannot prove ownership interest in the Property. Damages under the DTPA are the difference between what was paid and the actual value of the Property. In addition, Plaintiffs are seeking enhanced penalties under Section 2582 of the DTPA. An elderly person has the right to seek enhanced penalties if their vulnerability or special relationship caused them to enter into a fraudulent transaction. Ms. Clarkson was 66 at the time she entered into this fraudulent conveyance, had never owned a property before, and was reasonably impaired in her understanding of how the transaction would work. Ms. Clarkson had a trusting relationship with Mr. Goldstein, her landlord and a real estate attorney.

DEFENDANTS' CONTENTIONS

Defendants claim that there are issues of material fact in dispute and, therefore, summary judgment is not appropriate at this stage of the proceedings. The Goldsteins acquired the Property from the Raisins in 1981, subject to the mortgage that the Raisins had obtained from Bank One. Additional consideration for the Property was in the form of improvements, specifically installation of a new furnace in 1990. The new furnace was not routine maintenance and, therefore, constituted consideration.

After July 31, 1981, there is no indication that the Raisins believed they had an interest in the Property. From 1981 until approximately 2000, Defendants paid the Bank One Mortgage.

Defendants assert that they satisfy the Statute of Frauds because of the partial payment exception. Defendants made payment on the Bank One Mortgage for approximately 19 years. Defendants further contend that there is no rigid test for satisfying the Statute of Frauds. Part performance is sufficient as it shows that a contract was in fact made.

Defendants contend that at the time of the closing, Mr. Daley, the Plaintiffs' attorney, and Plaintiffs signed a document which specifically indicated that there was a first mortgage on the Property held by John Hancock Insurance Company.¹⁰ Therefore, Plaintiffs were fully aware that there was a first mortgage on the Property, even though John Hancock Insurance Company never held a mortgage on the Property.

Defendants argue that Plaintiffs cannot assert a Deceptive Trade Practices Act claim. The number of real estate transactions in the 1960's or 1970's does not mean that Defendants were in the business of selling real estate in the 1990's. The relevant period is the year before and year after December 31, 1990. The purchase of property

¹⁰It is unclear why John Hancock Insurance Co. was listed as the mortgagee.

does not constitute engagement in the business of selling property. The Goldsteins may have bought property as an investment, acquired property to hold it, or purchased property for transfer to a corporation.

STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate when the moving party has shown that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law.¹¹ In considering the motion, the Court must evaluate the facts in the light most favorable to the non-moving party.¹² Summary judgment will not be granted under circumstances where the record reasonably indicates that a material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances.¹³ When a motion for summary judgment is made and supported as provided in Superior Court Civil Rule 56, the opposing party may not rest on mere allegations or denials. The adverse party must set forth specific facts, by affidavit or otherwise, showing that there is a genuine issue for trial.¹⁴

¹¹*Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

¹² *Id.*

¹³ *Ebersole v. Lowengrub*, 180 A.2d 467, 468-69 (Del. 1962).

¹⁴Super. Ct. Civ. R. 56(e).

ANALYSIS

At the heart of Plaintiffs' Motion for Partial Summary Judgment is the issue of whether Defendants have acted fraudulently and thereby violated Delaware's Prohibited Trade Practices Act ("PTPA").¹⁵ Section 2513(a) of the PTPA provides in pertinent part:

The act, use of employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, or the concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale, lease or advertisement of any merchandise, whether or not any person has in fact been misled, deceived or damaged thereby, is an unlawful practice.

The term "merchandise" includes "real estate or services."¹⁶

At the time the Property was sold to Plaintiffs, Louis and Selma Goldstein clearly represented themselves to Mrs. Dinsmore and Ms. Clarkson as owners of the Property. If the Goldsteins were not in fact owners of the Property, their representation cannot be construed as anything other than "deception, fraud, false pretense, false promise, misrepresentation, or the concealment, suppression or omission of [a] material fact."

¹⁵6 *Del. C.* §§ 2501 *et seq.*

¹⁶6 *Del C.* § 2511(4).

It is equally clear that Plaintiffs relied on the Goldsteins' ownership of the Property in entering into the Goldstein Mortgage. It cannot be disputed that the Goldsteins intended for Plaintiffs to rely upon the Goldsteins' ownership of the Property as an inducement for Plaintiffs to purchase the Property and to make payments pursuant to the Goldstein Mortgage secured by the Property.

STATUTE OF FRAUDS

Delaware's Statute of Frauds provides that any sale of real property must be reduced to writing and signed to be enforceable.¹⁷ Defendants have failed to produce any written documentation, in any form, memorializing their alleged purchase of the Property from the Raisins. Instead, the evidence compels the conclusion that the Goldsteins intended to reap the benefits of ownership, without any concurring substantial legal obligations.¹⁸ No transfer tax was paid for any

¹⁷6 *Del C.* § 2714(a).

¹⁸Defendants' counsel's arguments presented during the January 7, 2005 hearing, support the Court's conclusion:

THE COURT: Well, now, Mr. Cross, if the Court were to find that, in fact, the Goldsteins were the property owners and then transferred them – transferred that property to the plaintiffs and I would lift the stay on the foreclosure action, shouldn't the proper party – shouldn't I then dismiss the Raisins from the foreclosure action and favorably consider any motion that Bank One would have to substitute Mrs. Goldstein for the Raisins in that foreclosure action?

MR. CROSS: No, Your Honor. An the reason is, it goes back to the fact that the property was taken by the Goldsteins subject to the mortgage. It wasn't – the Goldsteins didn't assume the mortgage. And there is a legal distinction between assuming a mortgage and taking a property subject to a mortgage.

(continued...)

¹⁸(...continued)

If the Goldsteins had assumed the mortgage, then they are taking personal responsibility for the mortgage, in addition to having the property act as a – just having a lien on the property. When you take a property subject to a mortgage, you don't take any personal liability for it.

THE COURT: Are you suggesting that the Raisins had any contemplation that they – that this could ever happen to them, that they would ever be subject to a foreclosure action after that transfer of property from the Raisins to the Goldsteins?

MR. CROSS: I don't – I suppose that is the potential consequence of this.

THE COURT: So it seems like your – your position is that although they owned the property, they were accepting payments for it, when push comes to shove, they can't have any liability on the mortgage, instead it's the people they bought the property from and the people they sold it to and they're completely out of the loop because they — because Mr. Goldstein failed to record the deed. Don't you think that has a not-so-savory smell to it?

MR. CROSS: Well, Your Honor, I don't think it's because a deed wasn't recorded that leads to that conclusion. A deed could easily be recorded and the property still could have been taken subject to the mortgage.

THE COURT: I agree with that, but, I mean, they would still be affected by the foreclosure. They would still have been listed as a defendant in a foreclosure action, would they not have? Because the only reason that – that the plaintiffs are listed in the foreclosure action is because they're on the deed to the property.

MR. CROSS: I disagree with that, Your Honor. The reasons the Raisins are listed on the foreclosure action is because they signed the mortgage and note taking not only personal responsibility but pledging the home as – for the mortgage– or the mortgage is intended to record the pledge, I guess, for the note. So –

THE COURT: Wouldn't – realistically, wouldn't the Goldsteins have been made defendants in the foreclosure action if their name were on the deed?

MR. CROSS: I think they would have been named because it would be – it would be proper to name anyone who has an interest in the property in the foreclosure action. But I don't think it would change the fact that the Goldsteins would not have had personal liability to the – for example, to the extent the property was lost in foreclosure, that the bank took the property back, it was sold in a foreclosure action and there was a deficiency balance owed–

THE COURT: The bank can only then go against the Raisins –

MR. CROSS: That's correct, that's –

THE COURT: – not against plaintiffs in this action.

MR. CROSS: I don't think they can go against plaintiffs in this action.

(continued...)

transaction between the Raisins and the Goldsteins. Louis Goldstein is listed as “Agent” for purposes of the City of Wilmington’s Licenses and Inspections evaluation of the Property that resulted in a finding that the Property was “Unfit for Human Habitation.” It is undisputed that the Bank One Mortgage was a Veteran’s Administration loan. Such loans require notification upon transfer of title. It is undisputed that no notice was ever provided to the mortgage holder that title was transferred from Mr. and Mrs. Raisin to Mr. and Mrs. Goldstein.

Louis Goldstein was a member of the Delaware Bar, practicing in the area of real property. There is no doubt that Mr. Goldstein was acutely aware of the

¹⁸(...continued)

THE COURT: They loose their –

MR. CROSS: They loose their home, but –

THE COURT: – home –

MR. CROSS: I don’t think they have a personal liability.

THE COURT: Correct. Okay. Now, is – for – to the best of your knowledge, were any transfer taxes or other transfer fees paid in the transaction between the Raisins and the Goldsteins? I think at a prior hearing you stated that to the best of your knowledge there were no transfer taxes or other fees paid.

MR. CROSS: To the best of my knowledge, that’s correct, there were no transfer taxes paid.

* * *

THE COURT: Couldn’t it be viewed that Mr. Goldstein and Mrs. Goldstein, as sophisticated persons with substantial experience in real estate transactions, arranged the transaction which may or may not be legal and appropriate in such a way that they obtained all the benefits of ownership of the property and none of the responsibilities?

MR. CROSS: Well, I don’t agree with that, Your Honor.

January 7, 2005 Transcript, pp. 53-58.

requirements concerning recording deeds.¹⁹ This is not a situation in which the Goldsteins were naive consumers, relying on the closing attorney to perform all of the necessary settlement functions. The only reasonable conclusion to be reached from review of the undisputed material facts is that the Goldsteins intended to convey the Property from the Raisins to Plaintiffs, without ever becoming record owners and in avoidance of payment of transfer taxes and other legal obligations.

It is obvious that Selma Goldstein was not a bystander to the transaction. She is the sole named mortgagee of record. She is the actual author of the letter to Mrs. Dinsmore admonishing Mrs Dinsmore: “You are confused about your mortgage! ... You have nothing to do with that [Bank One] mortgage company.”

It is noteworthy that the Goldsteins were careful to record the Goldstein Mortgage in a timely manner to ensure the enforceability of any debt owed to them. In contrast, they neglected to record any deed which would trigger their legal burdens of ownership. This dichotomy is demonstrated by a document signed by Mrs. Dinsmore and Ms. Clarkson dated December 31, 1991. The document is a form of acknowledgment that Plaintiffs were advised by Robert E. Daley, Esquire, the closing attorney, that the mortgage company was “not aware of the transfer of

¹⁹25 Del C. §§ 101, *et seq.*

the property” and that Plaintiffs were “relying solely upon Louis Goldstein, Esquire to make the monthly mortgage payment on the...mortgage.”

Defendants assert that the part performance exception to the Statute of Frauds is applicable here. “[P]art performance by a party is regarded as substantial evidence that a contract was in fact made, thereby rendering the policy underlying the Statute of Frauds inapplicable.”²⁰ The party claiming the exception must demonstrate part performance by two of three conditions: making payments; taking possession; and/or making substantial improvements.²¹ The burden is on Defendants to prove that the part performance exception excuses the requirement of written documentation.²²

There is some limited documentation that the Goldsteins made periodic payments on the Bank One Mortgage. However, such payments are consistent with the Goldsteins’ role as conduits or agents through which payments were made on the Bank One Mortgage, for which Mr. and Mrs. Raisin remained legally obligated. There is no evidence that the Goldsteins took actual possession of the Property. The only evidence of improvements is installation of a new furnace in 1990.

²⁰ *Taylor v. Jones*, 2002 WL 31926612, at *4 (Del. Ch).

²¹ *See Houston v. Townsend*, 1 Del. Ch. 416 (1833).

²² *See Shepherd v. Mazzetti*, 545 A.2d 621, 623 (Del. 1988); *Hamilton v. Traub*, 51 A.2d 581, 583 (Del. Ch. 1947).

Therefore, Defendants have failed to prove ownership by part performance in the absence of compliance with the Statute of Frauds.

DELAWARE'S DECEPTIVE TRADE PRACTICES ACT

A person engages in a deceptive trade practice when, in the course of a business, vocation, or occupation, that person engages in conduct that creates a likelihood of confusion or of misunderstanding, or makes deceptive or misleading representations.²³ Because of Defendants' failure to comply with the Statute of Frauds, Defendants did not own the Property they purported to sell to Plaintiffs. The Raisins were the legal owners of the Property. By approaching Mrs. Dinsmore and Ms. Clarkson with a proposal to sell the Property to them, the Goldsteins affirmatively misrepresented that they owned the Property. The Goldsteins further reinforced the confusion and misunderstanding about legal ownership by inducing Plaintiffs to encumber the Property with the Goldstein Mortgage.

The Deceptive Trade Practices Act is not applicable to the sale of real estate.²⁴ The transactions at issue, however, are not the sale of real estate. The Goldsteins implied that they owned the Property in connection with their functional role as the agent for management of the Property, and as the conduit through which

²³6 *Del. C.* § 2532.

²⁴*Stephenson v. Capano Development, Inc.*, 462 A.2d 1069, 1073 (Del. 1983).

payments were made to Bank One. As evidenced by the pending foreclosure proceedings, the Raisins remain legally obligated under the Bank One Mortgage. In short, there was no valid sale of real property in which the Goldsteins were the sellers. Therefore, Defendants should not be shielded from the consequences of their deceptive trade practices by hiding behind a transaction in which they acted not as parties, but as persons providing real estate agent services between the Raisins and Plaintiffs, and providing financing services through the Goldstein Mortgage. While the Deceptive Trade Practices Act does not apply to sales of real estate, the Act does apply to businesses related to real estate that involve the provision of goods and services.²⁵

As compensation for their services, Defendants caused Plaintiffs to enter into the Goldstein Mortgage, with monthly payments of \$375. This amount was calculated as principal of \$37,500 and 10.5% interest. The monthly payment amount exceeded the amount of Bank One Mortgage payments by \$239 per month.

In order for the Deceptive Trade Practices Act to apply, Defendants must have engaged in deceptive conduct while in the course of a business, vocation, or occupation. Louis Goldstein regularly engaged in real property sales, leases, and conveyances as a party – over 200 transactions from 1950 to 2000. Goldstein has

²⁵*State v. Wellington Homes, Inc.*, 2003 WL 22048231, at *3-4 (Del. Super.).

been prosecuted for numerous housing violations or negligence at multiple properties, although he often denied ownership of the properties despite proof of purchase at a sheriff sale and/or record ownership.²⁶ Louis Goldstein was publically disciplined by the Supreme Court for violation of the City of Wilmington Health and Sanitation Code in connection with real estate investments.²⁷ Further, the Supreme Court rebuked Louis Goldstein for discrepancies found in the purchase and sale of property for a secret profit while acting as an attorney for a client in 1951.²⁸ Mrs. Goldstein was personally involved in over 100 real estate transactions from 1950 to 2000, in her name alone. Defendants' assertions that they were not in the real estate business, vocation or occupation, are at best disingenuous. Based on Louis and Selma Goldstein's long history of investment in real estate transactions, Plaintiffs reasonably relied on their assurances and misrepresentations concerning ownership, a clear chain of title, and the validity of the mortgage.

²⁶See *Goldstein v. State of Delaware*, 655 A.2d 307 (Del. 1995); *State of Delaware v. Goldstein*, 1992 WL 19981 (Del. Super.); *Goldstein v. Municipal Court for the City of Wilmington*, 1991 WL 53832 (Del. Super.); *Goldstein v. Municipal Court for the City of Wilmington*, 1991 WL 53830 (Del. Super.); *Thomas v. Frank Morris*, 1990 WL 91114 (Del. Super.); *The South Corp. v. City of Wilmington*, 1989 WL 76291 (Del. Ch.); *Goldstein v. City of Wilmington*, 1986 WL 6586, at *1 (Del. Super.).

²⁷See *In the Matter of a Member of the Bar of the Supreme Court of the State of Delaware: Louis Goldstein*, 698 A.2d 409, 1997 WL 425507 (Del.).

²⁸See *In re Goldstein*, 85 A.2d 361, 362 (Del. Supr. 1951).

COMMON LAW FRAUD

In order to prove fraud, Plaintiffs must demonstrate: (1) that Defendants either intentionally or recklessly misrepresented a material fact, or concealed such a fact from Plaintiffs at a time when Defendants had a duty to disclose it; (2) that Plaintiffs justifiably relied on Defendants' representation or duty to disclose; and (3) actual damages.²⁹

Defendants failed to disclose that they never signed or recorded a deed reflecting their ownership in the Property. Defendants failed to disclose they had no documentation proving any interest in the Property. For the reasons discussed *inter alia*, Defendants did not have legal ownership of the Property. When persons attempt to sell real property, knowing that they have no title to it, the suppression of such a material fact clearly is fraud.³⁰

The Court cannot resolve at this juncture the issue of whether Plaintiffs are entitled to relief with regard to the Goldstein Mortgage on the basis of fraud. Because Plaintiffs benefitted from residing in the Property, there is insufficient evidence before the Court as to actual damages resulting from paying toward the Goldstein Mortgage. Although the Court finds that Defendants intentionally or

²⁹*Holley v. Jackson*, 158 A.2d 803, 806 (1959).

³⁰*Holley*, 158 A.2d at 807.

recklessly misrepresented or concealed material facts, and that Plaintiffs acted with justifiable reliance in executing the Goldstein Mortgage, genuine issues of material fact remain as to compensatory damages.

DAMAGES

Plaintiffs seek compensatory damages under the Deceptive Trade Practices Act.³¹ Plaintiffs claim treble damages pursuant to 6 *Del. C.* § 2533(c):

... If damages are awarded to the aggrieved party under the common law or other statutes of this state, such damages awarded shall be treble the amount of actual damages proved.

In this case, the amount of compensatory damages is the Bank One Mortgage payoff amount Plaintiffs' must pay to obtain dismissal of the foreclosure proceedings. Actual damages include attorneys' fees incurred as part of the foreclosure proceedings. Therefore, treble damages are measured as three times the amount of compensatory damages.

In addition, there is a specific statutory authorization for attorneys' fees.

Pursuant to 6 *Del. C.* § 2533(b):

The court in exceptional cases may award reasonable attorneys' fees to the prevailing party. Costs or attorneys' fees may be assessed against a defendant only if the court finds that defendant has willfully engaged in a deceptive trade practice.

³¹See *Roberts v. American Warranty Corp.*, 514 A.2d 1132, 1133 (Del. Super. 1986) (Members of the consuming public may seek damages for violation of the Act.).

Because the Court has determined that Defendants have willfully engaged in a deceptive trade practice, attorneys' fees and costs will be assessed.

Enhanced civil penalties apply in this case because Ms. Clarkson was 66 years old, an elder person,³² at the time the prohibited trade practice occurred.³³ Section 2582 lists the factors that the Court should consider in determining whether to impose an enhanced civil penalty. The factors include whether the prohibited conduct resulted in any loss of or encumbrance upon a primary residence of the elder person.³⁴ Having found that Defendants' actions resulted in foreclosure proceedings against Ms. Clarkson, with the potential result of loss of or encumbrance upon her primary residence, enhanced civil penalties are warranted. The amount is \$10,000 against each defendant.

CONCLUSION

Plaintiffs' Motion for Partial Summary Judgment is hereby **GRANTED**. The Court finds that Louis and Selma Goldstein perpetrated common law fraud against

³²6 *Del. C.* § 2580(a).

³³6 *Del. C.* § 2581(a) provides:

If any person is found to have violated any provision of this chapter, and said violation is committed against elder or disabled persons, in addition to any criminal or civil liability otherwise set forth or imposed, the court may impose an additional civil penalty not to exceed \$ 10,000 for each violation.

³⁴6 *Del. C.* §2582(4)(ii).

Mrs. Dinsmore and Ms. Clarkson, and that the fraudulent conduct was in violation of Delaware's Prohibited Trade Practices Act, and Delaware's Deceptive Trade Practices Act. Plaintiffs are entitled to: (1) compensatory damages in the amount of Plaintiffs' payoff liability in the Bank One Mortgage foreclosure proceedings, and attorneys' fees incurred as a part of the foreclosure proceedings; (2) enhanced civil penalties pursuant to 6 *Del. C.* § 2581(a) in the amount of \$20,000 (\$10,000 against each Defendant); (3) treble damages pursuant to 6 *Del. C.* § 2533(c) of three times compensatory damages; and (4) reasonable attorneys' fees pursuant to 6 *Del. C.* § 2533(b).

IT IS SO ORDERED.

The Honorable Mary M. Johnston

ORIGINAL: PROTHONOTARY'S OFFICE - CIVIL DIV.