IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

HARVEY CARROW,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 182-K
	)	
LLOYD F. ARNOLD,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

Submitted: June 5, 2006
Decided: October 31, 2006

Daniel F. Wolcott, Jr., Esquire, Suzanne M. Hill, Esquire, POTTER ANDERSON & CORROON LLP, Wilmington, Delaware, *Attorneys for Plaintiff*

Steven Schwartz, Esquire, SCHWARTZ & SCHWARTZ, Dover, Delaware, *Attorney for Defendant*

PARSONS, Vice Chancellor.

This is an action brought by Harvey Carrow ("Carrow") against Lloyd F. Arnold ("Arnold") to rescind a set of real estate contracts entered into on April 28, 2003 and May 6, 2003. The April 28 contract (the "Agreement of Sale" or "Agreement"), which underlies the present dispute, is for the sale of Carrow's farm, which he bought from his brother in 1961. Carrow, who was 73 years old when the Agreement was executed, alleges that Arnold used fraudulent and misleading statements to induce him to enter the contract and now seeks its rescission.

Arnold denies making any statements that were fraudulent or misleading. He maintains that the contract is fair and equitable and has counterclaimed for specific performance, declaratory relief and an award of attorneys' fees.

The Court held trial on the parties' claims on March 6-7, 2006. Based on the evidence produced at trial and the parties' post-trial submissions and arguments, the Court holds that Carrow failed to establish any basis to rescind the contract and concludes that Arnold is entitled to have the Agreement specifically enforced.

I. BACKGROUND

A. The First Meeting

In mid-April, 2003, Arnold, Rodney Mitchell ("Mitchell"), and an intermediary, Al Moor ("Moor"), met with Carrow at his farm in Kent County. Moor, a long-time acquaintance of Carrow, had heard a rumor that Carrow was interested in selling his farm, which consists of approximately 223 acres and is located on Whitehall Neck Road near the towns of Leipsic and Smyrna.

Arnold and Mitchell are partners in a real estate partnership. Pursuant to the terms of their partnership agreement, they share, 50/50, all profits and losses from their real estate investments. Their partnership agreement also requires them to sell any new parcel within three years of its purchase, unless both parties agree to retain it for a longer period.[1] Moor knew that Arnold and Mitchell were looking to buy real estate in the area, so he introduced them to Carrow. At their first meeting, Carrow gave Arnold and the other gentlemen a tour of his farm but expressed reservations about selling it. Indeed, Arnold offered Carrow $1.2 million for the farm, but Carrow declined.[2] During the meeting, Carrow showed Arnold a letter from the New Jersey Nature Conservancy offering to buy his farm for $1.5 million. During their discussions, Arnold told Carrow that if Carrow sold him the farm, he could continue to live on the farm and to till the land as long as Arnold owned it.[3] At the end of the meeting, Arnold asked Carrow to consider selling the farm and told him that he would come back to talk to him in approximately one week.

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1 Pl.'s Ex. 17.

2 Trial Transcript ("Tr.") at 30 (Carrow).

3 Tr. at 397 (Moor). Carrow appears to dispute whether Arnold limited his statement to as long as he owned the property. Moor had a different recollection. Having observed Moor's demeanor and heard his testimony in the context of all of the evidence, however, I credit Moor's recollection. In this regard, I note that Moor ultimately received a finder's fee of $10,000 from Arnold. Nevertheless, I do not believe that payment undermined Moor's credibility.

B. The Second Meeting

Approximately a week later, Arnold and Mitchell returned to the farm and negotiated with Carrow over the terms and conditions of a sale. During these negotiations, Carrow again expressed reservations about selling the farm because he did not want to leave it. Carrow alleges that certain representations made by Arnold eventually induced him to sell the farm. For example, Carrow testified that Arnold assured him that "Nothing would ever change for you, nothing …" and that Carrow could "go right on farming this farm the rest of your life …."[4] Carrow avers that Arnold assured him that he wanted to buy the land to use strictly as a hunting farm, and he understood this to mean that Arnold did not intend to develop the property or to transfer it any time in the near future.[5] Carrow further testified that he would not have sold the farm without these representations.[6]

Arnold admits that during various stages of the negotiations he assured Carrow that Carrow could continue to live on and farm the land and that Arnold would never develop it.[7] He also agrees that he told Carrow that he wanted the land for hunting purposes.[8] According to Arnold, however, he did not make the statement "nothing will

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4 Tr. at 31.

5 Tr. at 43.

6 Tr. at 59-60.

7 Tr. at 154, 158, 221-23.

8 Tr. at 151.

ever change for you," until a week or so after the parties signed the Agreement,[9] and in making this and other assurances to Carrow, he always included the qualifier "as long as I own it."[10] After some back and forth bargaining, mostly over the price, Carrow agreed to sell the farm to Arnold for $1.4 million, not including the farm equipment.

Within a few days of their second meeting, Arnold returned to the farm and left a draft of a written contract with Carrow. The parties dispute whether Arnold advised Carrow to seek the assistance of an attorney, but the record is clear that Arnold did not discourage Carrow from seeking an attorney's advice.[11] Carrow put the contract on a shelf and did not discuss it with anyone for approximately one week. Carrow testified that although he saw provisions in the draft agreement that he did not like, he did not pay too much attention to it and did not "look at [the agreement] like I should have."[12] Carrow did not seek the advice of an attorney, nor did he tell his adult children that he was selling the farm. He instead sought the assistance of his accountant, Ray Book ("Book").

C. The Execution of the Agreement of Sale

On April 28, 2003, Book, Carrow and Arnold met in Book's office to discuss the proposed contract. Before Arnold joined them, Carrow met with Book for about 20 or 30 minutes. Carrow expressed reservations about certain provisions in the contract, and the

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9 Tr. at 218-20.

10 Tr. at 155-56, 220.

11 Tr. at 73-74 (Carrow).

12 Tr. at 35 (Carrow).

parties changed those provisions in response to Carrow's concerns. One notable change was to Section 14, which gives Carrow a right of first refusal if Arnold seeks to lease a tillable portion of the land.[13] This section further states that Carrow's right of first refusal is non-assignable and non-transferable and "will terminate (without liability to Seller [Carrow] on the part of Purchaser [Arnold]) with regard to any part of the property when Purchaser no longer has title to it …." Carrow apparently was concerned about the *price* at which the land might be rented to him and bargained for a specific price. Thus, at the end of Section 14, the parties added and initialed the following handwritten sentence: "[t]he price of rental shall be $75/Ac[re] for the duration of Seller's desire to till land (Lease) unless Purchaser decides not to rent." Carrow bargained for this provision to lock in the $75/Acre rate.[14] The contract contains other handwritten modifications, which also are initialed by the parties, including the entirety of Section 21.

During the meeting at Book's office, Arnold assured Carrow that Carrow would be allowed to remain on the land and could continue to farm it.[15] On this point, Book testified as follows:

> Q. Now, when you were there with Mr. Arnold and Mr. Carrow, was there any discussion between the three of you about Mr. Carrow's right to farm?
>
> A. Yes.

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13 Pl.'s Ex. 3; Def.'s Ex. 3 (cited herein as "Agreement").

14 *See* Tr. at 395-97 (Moor). Moor, who owns and leases numerous farms in the area, testified that $75/Acre is a "very, very reasonable rate." Tr. at 397.

15 Tr. at 235 (Arnold).

> Q. What was the discussion?
>
> A. Well, the first part of the discussion was regarding the rent, and then at the end, Mr. Carrow said that he noticed a provision in the agreement that if it was sold, and Mr. Arnold said, "Harvey, you can farm that as long as you want to."[16]

Although Book inferred from Arnold's statement "that he was going to hang on to [the property]"[17] there is no convincing evidence that Arnold said or represented that he was not going to sell the farm.[18]

Section 4 of the Agreement grants Carrow a life estate in the farmhouse and in the (approximately) two acres surrounding it. This provision further states that Carrow may, at his option, exchange his life estate for a fee simple interest in any one acre of Carrow's choosing.[19] At least two provisions in the Agreement are qualified by the statement "for as long as Purchaser shall own" the property or a similar locution.[20] Section 5 of the

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16 Tr. at 172.

17 *See* Tr. at 172.

18 Carrow testified that Arnold told him that he would be dealing with Arnold the rest of his life, implying that he would not be selling the farm. Tr. at 43. Arnold, however, denies making that statement. Tr. at 220-21. Furthermore, several provisions of the Agreement are inconsistent with Arnold's having made such a representation. Based on observing the witnesses and considering the evidence, I find that Arnold's recollection on this issue is more reliable.

19 In a second agreement dated May 6, 2003, Carrow exercised his option under Section 4 of the Agreement of Sale and elected to trade his two-acre life estate for the one-acre fee simple. Carrow is also seeking rescission of the May 6 agreement. Because the validity of this second contract is directly linked to the validity of the Agreement of Sale, I will not separately analyze the May 6 contract.

20 *See* Agreement ¶¶ 6, 14.

Agreement states that Arnold may apply to Kent County for subdivision approval prior to final settlement, and reflects Carrow's agreement to sign such application forms as the County reasonably requires. At the conclusion of the meeting, the parties signed the Agreement and Arnold gave Carrow a $200,000 deposit.

Within days of executing the Agreement, Arnold and Mitchell began to have the land surveyed for subdivision.[21] On May 16, Mitchell submitted plans to the Kent County Department of Planning Services to have the land approved for residential development.[22] Arnold and Mitchell testified that they never had any intention to actually develop the land, but submitted the plans to the County because the land would be more valuable if approved for residential development.[23] Consistent with this testimony, Arnold and Mitchell tried to enter into a transaction whereby they would sell the land for less than its appraised value to the Delaware Chapter of The Nature Conservancy (the "Conservancy"), a nonprofit organization dedicated to preserving undeveloped land. Since part of the transaction would be considered a charitable contribution, the higher the appraised value of the land, the higher the tax deduction Arnold and Mitchell would receive.

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21 Pl.'s Ex. 7 is a set of engineering overlays done for Arnold and Mitchell dated May 2, 2003, only four days after the parties signed the Agreement.

22 Pl.'s Ex. 6; Def.'s Ex. 19.

23 Tr. at 242 (Arnold); Tr. at 324 (Mitchell).

After learning that the Carrow farm was under a contract to be sold, the Conservancy had contacted Mitchell to see if it could purchase the farm.[24] During the negotiations with the Conservancy, Arnold bargained for contractual provisions that would allow Carrow to remain on the farm and continue to till it for as long as he wanted.[25] Eventually, the proposed transaction with the Conservancy fell apart, mostly because of tax difficulties.

By early May, Carrow was having reservations about selling his farm, so he called Arnold and told him that he wanted to return the deposit.[26] Arnold replied that Carrow could not back out of the deal. Carrow says that he began to reconsider the Agreement after he saw surveyors on various parts of the property. He asserts that he did not know that Arnold and Mitchell were professional real estate developers, and he thinks he sold the farm for substantially less than its true value. Arnold, on the other hand, argues that Carrow simply has seller's remorse and wants more money. On January 23, 2004, Carrow filed this suit to have the Agreement rescinded, and Arnold later counterclaimed for specific performance.

D. The Parties' Contentions

Carrow alleges that the Agreement was procured through fraud and misrepresentation. His allegation of fraud, however, consists entirely of the claim that

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[24] Tr. at 194-96.

[25] Tr. at 197-98, 203 (Arnold); Def.'s Exs. 6, 7.

[26] Tr. at 53.

Arnold made oral representations and promises before the execution of the written agreement and that such representations and promises have not been honored. Arnold denies Carrow's accusations of fraud and misrepresentation. In addition, Arnold contends that the Agreement of Sale is an integrated agreement and the parol evidence rule bars consideration of earlier representations or promises that he allegedly made.

These competing contentions raise several legal and factual issues. The first issue that must be resolved, however, is whether the Court is precluded from considering Arnold's oral representations because their consideration is barred by the parol evidence rule. I find that the parol evidence rule generally would bar admission of the oral representations, but the analysis cannot stop there. Carrow argues that parol evidence is admissible under one or both of two exceptions to the rule: (1) for instances where the contract language is ambiguous; and (2) when the contract is the product of fraud or misrepresentation. Having carefully considered the Agreement and all of the competing evidence of alleged fraud or misrepresentation, I have determined that neither exception applies in the circumstances of this case. Therefore, I deny Carrow's claim for rescission and grant Arnold's claim for specific enforcement.

II. ANALYSIS

A. The Parol Evidence Rule

When a written contract is intended to be the final expression of the parties' agreement, the parol evidence rule bars the introduction of evidence of prior or

contemporaneous oral understandings that vary the written terms of the agreement.[27] As (then) Vice Chancellor (now) Justice Jacobs explained in *Taylor v. Jones*,

> The parol evidence rule is a principle of substantive law that prevents the use of extrinsic evidence of an oral agreement to vary a fully integrated agreement that the parties have reduced to writing. Where a written agreement is meant to be final and complete, it is a totally integrated contract. If a written agreement is final and incomplete, it is a partially integrated contract. … The parol evidence rule prevents the consideration of oral evidence that would *contradict* either total or partial [sic] integrated agreements.[28]

Thus, to apply the parol evidence rule, the Court first must decide whether the parties written contract was intended to be the final expression of their agreement, and second whether the alleged oral representations would contradict the written terms of the agreement.[29]

1. Integration

When determining whether a written contract is the final expression of the parties' agreement, a court should consider the facts and circumstances surrounding the execution of the instrument.[30] Some of the factors a court should consider are: the intent of the

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27 *Taylor v. Jones*, 2002 Del. Ch. LEXIS 152, at *10-11 (Dec. 17, 2002).

28 *Id*. at *3 (emphasis in original, internal quotations and citations omitted).

29 *Taylor*, 2002 Del. Ch. LEXIS 152, at *10-11; Restatement (Second) of Contracts ("Restatement (Second)") §§ 209, 210 (1979).

30 Restatement (Second) §210 cmt. b ("a writing cannot of itself prove its own completeness, and wide latitude must be allowed for inquiry into circumstances bearing on the intention of the parties"); *see Johnson v. Reno*, 1996 U.S. Dist. LEXIS 5347, at *21-22 (D.D.C. Apr. 17, 1996) (in assessing the intent of the parties, the Court will consider the conduct and language of the parties and the surrounding circumstances); *Nysingh v. Warren*, 488 P.2d 355, 385 (Idaho 1971)

parties, where such intent is discernible; the language of the contract itself and whether it contains an integration clause; whether the instrument was carefully and formally drafted; the amount of time the parties had to consider the terms of the contract; whether the parties bargained over specific terms; and whether the contract addresses questions that naturally arise out of the subject matter.[31]

The Agreement of Sale is a final, integrated contract. The written contract does not contain an integration clause stating that it is intended to be the parties' final agreement. Such a clause would create a presumption of integration.[32] The absence of an integration clause, however, does not necessarily mean that the parties did not intend the contract to be the final and complete expression of their agreement. Although lacking an integration clause, the Agreement of Sale is a formally drafted instrument. It is type-written, and Carrow and Arnold had their signatures witnessed by a notary. Having the contract witnessed reflects a certain solemnity which shows that the parties acted deliberately and intended to be legally bound to the contract *as written*.[33]

("Whether a particular subject of negotiation is embodied in the writing depends on the intent of the parties, revealed by their conduct and language, and by the surrounding circumstances. Mere existence of a document does not establish integration.").

31 *See Taylor*, 2002 Del. Ch. LEXIS 152, at *12-13 (discussing several of the factors used to determine whether a contract is totally integrated).

32 *Johnson*, 1996 U.S. Dist. LEXIS 5347, at *22; *See Telecom Int'l Am., Ltd. v. AT&T Corp.*, 280 F.3d 175 (2d Cir. 2001) (applying New Jersey law).

33 *Cf. Homer Nat'l Bank v. Springlake Farms, Inc.*, 616 So.2d 255, 257 (La. Ct. App. 1993) ("the very purpose of the parol evidence rule would be defeated if a signatory to an unambiguous, notarized writing could be permitted to contradict

Furthermore, Carrow had approximately a week to study the proposed contract. Nothing prevented Carrow from reviewing the draft agreement with an attorney or discussing the sale with his family. Instead, Carrow chose to consult only his accountant about the agreement. At the meeting with Arnold in Book's office, Carrow and his accountant bargained over, and achieved concessions on, several specific terms in the final Agreement. If, as Carrow contends, the written contract was inconsistent with oral promises and representations Arnold had made earlier, Carrow had ample opportunity and motive to raise these issues with Arnold before signing the Agreement. He did not.

In addition, the written Agreement addresses issues that normally arise in connection with the sale of land. For example, Carrow bargained for a clause requiring Arnold to carry insurance on the farmhouse after settlement, presumably for the duration of Carrow's life estate, and a provision clarifying that Arnold would pay the settlement costs.[34] The Agreement also contains terms addressing zoning, risk of loss, marketability of title and liability for environmental contamination.[35]

Based on these facts, and because Carrow presented no evidence tending to show that the contract he signed was not intended to be the final and complete agreement of the parties, I find that the Agreement of Sale is a final, integrated contract. Because it is a

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the terms of the agreement by parol evidence of his subjective intent, especially where the alleged misrepresentation could have been resolved by a simple reading of the document.").

[34] Agreement ¶ 4.

[35] Agreement ¶¶ 7, 9, 11 and 18.

final, integrated contract, the parol evidence rule bars the admission of oral promises and representations that are inconsistent with its written terms, unless an exception to the rule applies in this case.

2. Consistency

As Carrow seeks to construe them in this litigation, Arnold's prior oral representations are inconsistent with the written terms of the Agreement. Carrow alleges that, during their negotiations, Arnold told him that "nothing would ever change for him." It is unclear how this statement should be interpreted since certain changes inevitably will occur when a person sells a 223 acre farm and receives $1.4 million in return. The parties agree that Arnold promised to grant Carrow a life estate in the *farmhouse* and its immediately surrounding acreage, and the Agreement provides for this life estate in Section 4.

Similarly, if the statement that "nothing would ever change" was intended by the parties to include a life estate or some other interest in the *tillable* portion of the farm, the parties could and should have so provided in their contract. Reading such an interest into the Agreement, however, would be inconsistent with Section 14, which provides Carrow with a right of first refusal *if Arnold decides to rent* the premises for farming purposes. Indeed, the handwritten modification to Section 14, for which Carrow bargained, ends with the phrase "unless Purchaser decides not to rent." Arnold's reservation of the right not to rent the land for farming purposes in the formal Agreement overrides any alleged representation by Arnold giving Carrow an inconsistent, unqualified right to continue

farming the land.[36] Carrow's claim of such a right also conflicts with other language in Section 14. For example, with regard to the tillable portion of the land, Section 14 says "*if Purchaser shall decide to lease the premises* or any portion thereof for farming purposes (and not solely for hunting uses), Purchaser shall give Seller written notice of any such lease proposal …."[37] Carrow admitted seeing this language in Section 14.[38] He and Arnold explicitly negotiated over the Section, but did not change it to reflect Carrow's purported understanding. The Court will not now do what the parties could have, but did not, do.

Carrow also complains of engineers surveying the farm for development within days after he signed the Agreement. He argues that Arnold told him that the land would never be developed and that Arnold was buying the land for hunting purposes. Section 5 of the Agreement, however, gives Arnold the right to apply for subdivision approval even before final settlement under the Agreement of Sale. In Section 5, Carrow agrees to sign any subdivision application forms or other instruments as required for the application. The admission of an alleged oral promise never to subdivide the land for development purposes obviously would be inconsistent with this provision.

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[36] Indeed, Carrow's accountant, Book, told Carrow that under Section 14 Carrow's right of first refusal would terminate when Arnold sold the property. Tr. at 176 (Book).

[37] Emphasis added.

[38] Tr. at 50.

To summarize, the Court finds that the Agreement of Sale is a final, integrated contract and was intended by the parties to be the final and complete expression of their agreement. The Court further finds that the alleged oral representations Arnold made to Carrow during their negotiations, if admitted for purposes of construing their contract, would be inconsistent with the written terms of their final Agreement. Thus, in the absence of an exception such as ambiguity or fraud, the parol evidence rule precludes the admission of Carrow's evidence of alleged oral modifications.

3. Ambiguity

Carrow argues that the Agreement is ambiguous and that extrinsic evidence should be admitted to clarify the alleged ambiguity. This argument is unconvincing because I find the Agreement to be unambiguous in all relevant aspects. Delaware courts give clear and unambiguous contract language its ordinary and usual meaning.[39] "A contract is not rendered ambiguous simply because the parties do not agree upon its proper construction."[40] To avoid repeating points made elsewhere in this opinion, I will not discuss each argument for ambiguity advanced by Carrow. The following is fairly representative.

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[39] *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 739 (Del. 2006) (internal citations and quotations omitted).

[40] *Id*.

Carrow argues that the phrase "as long as Purchaser shall own it" is ambiguous as to the length of time that it represents.[41] Carrow claims to have understood this phrase as implying that his rights to remain on the farm would last into the foreseeable future.[42] Otherwise, Carrow argues, rights such as those granted in Section 6 of the Agreement would be rendered useless. Section 6 states:

> There is currently on the property a fenced-in horse pasture, approximately one acre in size, with access from a lot belonging to one of Seller's children. For so long as Purchaser shall own any part of that horse pasture, it is agreed that Seller will have the exclusive use and enjoyment during his lifetime of that part of the fenced in horse pasture provided that he can secure access to and from it through his child's lot which [sic] to which it is adjacent. Seller's rights will terminate (without liability to Seller on the part of Purchaser) with regard to any part of the horse pasture when Purchaser no longer has title to that part of it ….

Without endorsing Section 6 as a model of drafting clarity, I find the challenged language unambiguous. A contract is only ambiguous if its language is susceptible to two competing reasonable interpretations.[43] Further, determining whether a contract is ambiguous involves a question for the court to determine as a matter of law.[44] I consider Carrow's interpretation unreasonable. Reasonably interpreted, Section 6 means that for as long as Arnold owns part of the horse pasture, Carrow has a right to use that part

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41 Letter from Daniel J. Wolcott, Jr., on behalf of Harvey Carrow, to the Court (May 10, 2006).

42 Pl.'s Post-Trial Reply Br. at 5.

43 *Lorillard Tobacco*, 903 A.2d at 739 (internal citations and quotations omitted).

44 *Cantera v. Marriott Senior Living Servs., Inc.*, 1999 Del. Ch. LEXIS 26, at *8 (Feb. 18, 1999).

(providing he has ingress and egress through the adjacent lot). It contains no guarantee as to how long Arnold will own the farm and expressly states that Carrow's rights terminate (without liability) when Arnold transfers his interest. Section 6 is not rendered ambiguous by the fact that Carrow regrets not having bargained for a guarantee that Arnold would not transfer the property for some period of time. Merely disliking the implications of a contractual provision does not render it ambiguous.

In a similar vein, Carrow argues that if the phrase "as long as Purchaser shall own it" means that Arnold could immediately sell the lot, this would conflict with the following statement of intent in Section 7:

> Purchaser intends to occupy the premises for agricultural uses, and any zoning ordinance or other restriction that will prevent such use of the property shall be deemed a defect in title.

Section 7, Carrow contends, contemplates at least one growing season, and therefore supports a second reasonable interpretation of "as long as Purchaser shall own it" to mean that Arnold would not sell the farm in the foreseeable future. Again, I do not think Carrow's interpretation of the phrase in question is reasonable. A stated intention to use a farm for agricultural purposes in the context of securing an assurance that such use would not conflict with any zoning ordinance or other restrictions is entirely consistent with the Purchaser's preservation of the right to sell the property at any time. Because I find the disputed language unambiguous, it must be given its ordinary meaning.[45] The

[45] *Lorillard Tobacco*, 903 A.2d at 739.

ordinary meaning of the phrase "as long as Purchaser shall own it" places no restriction on the length of time that ultimately may turn out to be.

4. The fraud exception to the parol evidence rule

Carrow argues that parol evidence should be admitted because Arnold fraudulently induced Carrow to enter the Agreement. Courts have long recognized that "where fraud or misrepresentation is alleged, evidence of oral promises or representations which are made prior to the written agreement will be admitted."[46] To successfully allege fraudulent misrepresentation, a plaintiff must show that: (1) the defendant made a false representation, usually one of fact; (2) the defendant knew or believed that the representation was false, or made it with reckless indifference to the truth; (3) the defendant's false representation was intended to induce the plaintiff to act or refrain from acting; (4) the plaintiff's action or inaction was taken in justifiable reliance upon the representation; and (5) the plaintiff was damaged by such reliance.[47]

Carrow alleges that Arnold committed fraud by making the following promises and representations: (1) that Carrow could remain on the land and continue to farm it; (2) that if Carrow sold his farm to Arnold, nothing would change for him; (3) that Arnold intended to use the farm for agricultural and hunting purposes, which Carrow understood to mean that he did not intend to transfer the property for a long time; and (4) that Arnold would not develop or build on the land. Even assuming that Arnold promised each of

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[46] *Anglin v. Bergold*, 565 A.2d 279 (table), 1989 Del. LEXIS 236, at *5-6 (Del. June 26, 1989).

[47] *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1074 (Del. 1983).

these things, Carrow's arguments suffer from two serious flaws. First, these promises preceded the execution of the written contract and are not false statements of fact. Second, Carrow knew that there were provisions in the proposed Agreement that he did not like because they seemed inconsistent with the alleged oral promises. He had the opportunity to, and actually did, bargain for specific terms ameliorating some of those concerns, but not others. Thus, any reliance Carrow placed on the prior oral representations was unjustified.

Prior oral promises usually do not constitute "false representation[s] of fact" that would satisfy the first element of fraudulent misrepresentation. "[A] viable claim of fraud concerning a contract must allege misrepresentations of present facts (rather than merely of future intent) that were collateral to the contract and which induced the allegedly defrauded party to enter into the contract."[48] All of the four statements Carrow characterizes as fraudulent are either promises or statements of future intent. The problem with allowing a party to use promises and statements of intention to invoke the fraud exception to the parol evidence rule is that the very point of the rule is to *exclude* such things. Parties exchange various representations and supposed offers during negotiations, and reasonable misunderstandings can, and do, occur. By putting their understandings into a written contract, the parties highlight the points on which they have reached agreement and in some cases, the points on which they still diverge. The presumption embodied in the parol evidence rule is that the final written contract reflects

[48] *Orix Credit Alliance, Inc. v. R.E. Hable Co.*, 256 A.2d 114, 115 (N.Y. App. Div. 1998).

the positions and compromises upon which the parties finally reached agreement. If the only showing required to invoke the fraud exception to the parol evidence rule were inconsistent prior oral statements, such oral statements would often (usually) be admitted, and the exception would swallow the rule.[49]

I say that prior oral promises "usually" will not suffice to invoke the fraud exception to the parol evidence rule because one can imagine cases where such promises could amount to fraud. For example, a promisor could make an oral promise knowing that, either because of exigencies of time or circumstance, the promisee will not notice or understand if the promise is omitted or changed in the final written agreement, or perhaps that other terms that should have been excluded were, nonetheless, included. The present case, however, does not involve that type of sharp practice. Arnold and Carrow negotiated for various terms, such as Carrow retaining a life estate in the farmhouse and its surrounding acreage, and the final Agreement includes this term and others for which Carrow bargained. Carrow had sufficient time to inspect the written instrument and seek the advice of professionals. In fact, the parties sat down together, with Carrow's accountant, discussed various provisions in the Agreement, made changes to some of them and left others as originally written. Carrow had ample opportunity and motive to call attention to any fraudulent inclusion or exclusion of terms, but failed to do so.

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[49] *See Hercules & Co. v. Shama Rest. Corp.*, 613 A.2d 916, 929-33 (D.C. 1992) (discussing how courts should approach with care the fraud exception to the parol evidence rule).

An oral promise also may amount to fraud when the promisor makes a promise with no intention of keeping it. "It is ordinarily reasonable for the promisee to infer from the making of a promise that the promisor intends to perform it. If, therefore, the promise is made with the intention of not performing it, this implied assertion is false and is a misrepresentation."[50] In this case, Carrow has not shown that Arnold made any of the alleged promises or representations knowing they were false or with an intention to deceive Carrow. For example, I find from the evidence that Arnold meant what he said when he told Carrow that "nothing will ever change for you." That is, around the time of the sale, Arnold believed that he, as the new owner or through agreement with any subsequent owner, could ensure that Carrow would be able to continue living on the property and probably farming it, as well. This inference is corroborated by the fact that, after the Conservancy approached Arnold about acquiring the property, Arnold bargained with them for a provision that would allow Carrow to remain on the property and continue to farm the land. Thus, I find that Arnold did not misrepresent his intentions when he assured Carrow that nothing would change for him.

I also find that Arnold did not misrepresent his intentions when he promised not to develop the property. Section 5 of the Agreement of Sale specifically allows Arnold to apply to the County for subdivision approval, and Carrow agreed to sign any paperwork

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[50] Restatement (Second) §171 cmt. b. *See also Sabo v. Delman*, 143 N.E.2d 906, 908 (N.Y. 1957) ("While mere promissory statements as to what will be done in the future are not actionable … if a promise was actually made with a preconceived and undisclosed intention of not performing it, it constitutes a misrepresentation of a material existing fact upon which an action for rescission may be predicated.").

the County reasonably requires. Other than filing the preliminary plans, Arnold made no attempt to develop the property. Indeed, Carrow's own expert testified that the property was outside Kent County's so-called "Growth Zone," which consists of areas that have access to County sewer services or will have such access in the future.[51] Carrow's accountant testified that, from what Carrow had told him over the years, he understood that the land was not suitable for development because of its proximity to the marsh and its infestation with flies and bugs.[52] Carrow has made no showing that Arnold thought otherwise.

Carrow's reliance on cases such as *Anglin v. Bergold*[53] does not support a conclusion that this case falls within the fraud exception to the parol evidence rule. In *Anglin*, the plaintiff (Bergold) sued Anglin over a contract for the sale of an airplane. The two men had been part of a small company that owned and operated a twin-engine aircraft, and Anglin maintained the airplane. When the company began to fail, Bergold bought out the other stockholders and acquired the aircraft. All of the stockholders signed a release of all claims relating to the aircraft. Anglin supplied Bergold with aircraft maintenance logs that materially misrepresented the maintenance that had been done on the aircraft and its condition. In fact, the airplane was not airworthy. Anglin appealed the trial court's judgment against him arguing, among other things, that the

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51 Tr. at 281.

52 Tr. at 171 (Book).

53 1989 Del. LEXIS 236 (Del. June 26, 1989).

court erred in admitting evidence that the inspection manual was fraudulent because an "absence of warranties" clause in the release and the parol evidence rule precluded consideration of such evidence. The Delaware Supreme Court affirmed, holding that the material was admissible because of the "well recognized" exception to the parol evidence rule for fraud or misrepresentations made before the written agreement.[54]

Anglin is distinguishable from this case because the misrepresentations at issue in *Anglin* were of *fact*. In contrast, Arnold's representations were either (at best) promises, *e.g.*, that Carrow could remain on the land and continue to farm it, or statements of intention, *e.g.*, that Arnold intended to use the farm for agricultural and hunting purposes. Determining whether such statements were fraudulent or actionable misrepresentations requires a subjective examination of the speaker's intent and state of mind. For the reasons previously stated, I have found that Arnold did not misrepresent his intentions to Carrow.

Carrow also argues that the discrepancy between the purchase price specified in the Agreement of Sale for his farm, and its value, is an indicia of fraud. Both parties presented experts who opined on the farm's value. Carrow's expert, George M. Records, Jr., valued the farm at about $2.5 million. Arnold's expert, Philip J. McGinnis, valued it at about $1.36 million. I find that Records' methodology, and in particular his use of comparable sales of properties that had been approved for subdivision or development, renders his opinion less reliable than McGinnis's. Much of the discrepancy in appraised

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[54] Id. at *5-6.

value appears to derive from Records' implicit assumption that the property is suitable for development. As discussed above, that assumption is speculative at best. Thus, it is not clear from the evidence presented that at the time the parties entered into the Agreement of Sale there was a material difference between the purchase price and the value of the property. I therefore find unpersuasive Carrow's argument that the $1.4 million price evidences "inequitable or oppressive conduct such as fraud or duress that would support rescission."[55]

I also question Carrow's reliance on Arnold's alleged misrepresentations. It is unreasonable to rely on oral representations when they are expressly contradicted by the parties' written agreement. "Fraudulent inducement is not available as a defense when one had the opportunity to read the contract and by doing so could have discovered the misrepresentation."[56] Because Carrow had such an opportunity, any reliance he placed on prior, inconsistent, oral promises or representations was unreasonable.

B. Specific Performance

Arnold has counterclaimed seeking an order of specific performance of the Agreement of Sale. Barring an applicable defense, a purchaser of land is entitled to have an enforceable contract for the sale of land specifically enforced.[57] Apart from the unsuccessful arguments discussed above, Carrow has not presented any persuasive

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55 Pl.'s Post-Trial Reply Br. at 7-8.

56 17A Am. Jur. 2d Contracts §214 (2006).

57 *Smith v. Dixon*, 1988 Del. Ch. LEXIS 137, at *3 (Del. Ch. 1988).

defense to Arnold's counterclaim for specific performance. Therefore, the Court grants Arnold's request for specific performance of the Agreement.

C. Attorneys' Fees

Arnold has petitioned the Court for attorneys' fees. Under the American Rule, parties bear their own attorneys' fees except where it appears that a party, or its counsel, has proceeded in bad faith, acted vexatiously, or relied on misrepresentations of fact or law in connection with advancing a claim in litigation.[58] Based on my review of the evidence and arguments in this case, I do not believe that Carrow has proceeded vexatiously or in bad faith. Furthermore, I find that Arnold's failure to communicate his position as carefully and precisely as he could have during the negotiations that preceded the Agreement contributed to the misunderstandings that gave rise to this litigation. Therefore, Arnold's petition for an award of attorneys' fees is denied.

III. CONCLUSION

The parties have entered a binding contract, represented by a written instrument, for the sale of Carrow's farm to Arnold. The parol evidence rule bars the admission of the oral statements and representations Carrow alleges Arnold made during the course of negotiations because those alleged representations are inconsistent with the express written terms of the Agreement. Carrow has not shown that the contract is ambiguous, nor has he proved that the fraud exception to the parol evidence rule applies in this case.

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[58] *Norman v. US MobilComm, Inc.*, 2006 Del. Ch. LEXIS 81, at *6 (Apr. 28, 2006); *McNeil v. McNeil*, 798 A.2d 503, 514 (Del. 2002); *Rice v. Herrigan-Ferro*, 2004 WL 1587563, at *1 (Del. Ch. July 12, 2004).

For these reasons, I deny Carrow's claim for rescission of the Agreement of Sale. Further, because the real estate in dispute is unique and Carrow has thus far refused to perform his obligations under the Agreement, I conclude that Arnold is entitled to have the Agreement specifically enforced.

Arnold's counsel shall prepare and file promptly, after notice to Carrow, a proposed form of final judgment implementing this opinion.