IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

Slomin's, Inc.,	:	
	:	C.A. No. 07-07-0217
Plaintiff,	:	
	:	
v.	:	
	:	
Donald Wilson,	:	
	:	
Defendants.	:	

Decision after Trial

Date of Trial: February 11, 2009

Date of Decision: March 11, 2009

Judgment for the Defendant, Donald Wilson and against Plaintiff, Slomin's, Inc.

Charles S. Knothe, Esquire, 3516-14 Silverside Road, Wilmington, Delaware 19810, Attorney for Plantiff.

Donald Wilson, Post Office Box 83, McVeytown, PA 17051, *Pro se* Defendant.

Trader, J.

In this civil action for the balance due on a contract for the installation of a security device in the defendant's home, I hold that the contract may be rescinded at law based on a mutual mistake of fact. I further hold that the contract is a contract of adhesion and parol evidence may be introduced to show the real intentions of the parties.

RELEVANT FACTS

In this civil case, the defendant, Donald Wilson (Wilson) entered into a written contract to purchase a home alarm system service from the plaintiff, Slomin's, Inc. (Slomin's). The defendant testified that before he entered into the contract with Slomin's, he informed the sales representative that he was selling his house and inquired whether the system would be available where he was moving in Pennsylvania. The defendant did not know the exact street address of where he would be moving, but he gave the location within a 20 mile radius of where he would live. The exact location did not matter because the sales representative told Wilson that Slomin's covered all of Pennsylvania. After being assured by two different sales representatives from Slomin's that Pennsylvania was a covered service area, the defendant entered the contract. The buyer of the defendant's house chose not to continue the alarm service and the defendant scheduled installation of the service at his new home in Pennsylvania. The day before the installation the company called to say they did not offer service to his new home.

The plaintiff brings this civil action against the defendant for $1563.46 plus interest at the rate of 18% on the balance due since November 25, 2006. The balance due represents 60% of the cost of equipment in the amount of $683.00 plus 60% of the remaining monitoring fees due over the 5 years in the amount of $825.00, plus interest at the rate of 1 ½ per cent per month.. The sales representative that dealt with the

defendant no longer works for the plaintiff. A sales representative from Slomin's testified at trial that now and at the time the defendant entered the contract the entire state of Pennsylvania was not under its service. The only payment made by the defendant was a down payment of $79.35 which was due at the time of signing and represented 3 months of service at $26.45 per month.

The contract between Slomin's and Wilson was admitted into evidence by the plaintiff at trial and it was attached to the defendant's answer. The sales representative that testified at trial stated that he has no authority to change any of the terms of the contract. The contract is a standard form contract in very small print. The plaintiff pointed out that paragraph 20 states that the contract is the full agreement between the parties and any changes would have to be in writing signed by both parties.

CONTRACT OF ADHESION

Although both parties provided copies of the contract, neither copy is entirely legible. The print is abnormally small and the provisions cumbersome and difficult to interpret. It is a classic adhesion contract. An adhesion contract is a standardized contract written entirely by a party with superior bargaining power, leaving the weaker party, usually a consumer, in a position with little choice about the terms. *Middlesex Mutual Assurance Co. v. Delaware Electric Signal Co.,* 2008 WL 4216145, at *4 (Del. Super. Ct.). The fact that the contract is an adhesion contract in itself doesn't render the contract unenforceable or unconscionable. *Id.* But, the fact that the contract was a standard adhesion contract and that the sales representative testified he has no authority to change a contract, supports to the argument that oral representations would not be reflected in the actual signed contract.

PAROL EVIDENCE RULE

"[T]he parol rule of evidence bars the introduction of evidence of prior or contemporaneous oral understandings that vary the written terms of the agreement." *Carrow v. Arnold,* 2006 WL 3289582, at * 4 (Del. Ch.). In this case, the defendant seeks to introduce oral statements by the sales representatives of Slomin's stating that the area to which he was moving in Pennsylvania would have service. The parol evidence rule is a principal of substantive law that prevents use of extrinsic evidence that would contradict the terms of a writing where the written agreement is meant to be a final and totally integrated representation of the agreement between the parties. *Id.*

In order to admit the oral representations there must be an exception to the parol evidence rule. Parol evidence is allowed when used to show "that the agreement entered into is invalid, void, or voidable by causes such as fraud, illegality, duress, mutual mistake, lack or failure of consideration and incapacity." *Rodgers v. Erickson Air-Crane Co., LLC,* 2000 WL 1211157, at *4 (Del. Super. Ct.).

"When determining whether a written contract is the final expression of the parties' agreement, a court should consider the facts and circumstances surrounding the instrument." *Carrow,* 2006 WL 3289582, at * 4. Factors that the court should consider in it's analysis are: "the intent of the parties, where such intent is discernable; 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." *Id.* Although paragraph 20 of the contract is an integration clause stating that the

agreement is the full understanding of the parties because of the nature of the standardized contract and the oral statements of the sales representative, it is unlikely that this contract represents the real intentions of the parties. Additionlly, the sales representative at trial testified to the procedures if a person moves, there is not any contractual clause that addresses this specific situation.

The defendant moved very soon after signing the contract and he only paid the down payment under the contract. There has been no evidence presented by the plaintiff to contradict the fact that the defendant intended when entering this contract to sell his house and move to Pennsylvania. There has been no evidence presented by the plaintiff to show that the defendant never intended to resume service with Slomin's at his new residence. In fact, the sales representative testified that Slomin's does not service all of Pennsylvania. The parol is admitted into evidence to show the intentions of the parties concerning the subject matter of the contract.

MUTUAL MISTAKE OF FACT

The most obvious reason to allow parol evidence to avoid the contract is due to mutual mistake of fact as to the existence of service in Pennsylvania. "Mutual mistake as to the existence of the subject matter is always a grounds for avoidance of a contract." Laurence B. Simpson, Contracts § 42 at 66 (2d ed. 1965). To avoid a contract based on mutual mistake regarding a basic assumption of the contract, the adversely affected party must show: 1) both parties were mistaken as to a basic assumption; 2) the mistake has a material effect on performance; and 3) the adversely affected party does not assume the risk of mistake. *Williams v. White Oak Builders,* 2006 WL 1668348, at * 8 (Del. Ch.). "The mistake must be as to a fact which enters into, and forms the very basis of, the

contract; it must be the essence of the agreement, the *sine qua non* or, as it is sometimes expressed, the efficient cause of the agreement." *Id.* [citations omitted]. The affected party must prove the elements by clear and convincing evidence. *Id.*

In this case, the sales representative that worked with Wilson no longer works for Slomin's, but from the defendant's non-contradicted testimony, it is clear that the sales representative believed that service was available in Pennsylvania. Wilson knew when he spoke with the sales representative that he was moving to Pennsylvania and therefore he was not going to enter into a five year agreement if his new residence could not be serviced. The Slomin's sales representative assured Wilson that Slomin's covered all of Pennsylvania, including the area where Wilson intended to move. The fact that Slomin's does not service this area means that there is no possibility of service for Wilson to purchase and use. Wilson also placed phone calls to Slomin's to verify that all of Pennsylvania was covered and based on a discussion with a representative from Slomin's, there was a mutual belief that service existed at his new home. The mistake of fact as to the existence of services in Pennsylvania was proven at trial by clear and convincing evidence. Thus, parol evidence should be admitted to establish mutual mistake as to the existence of the subject matter of the written agreement.

RESCISSION AT LAW

The remedy the court should impose to avoid the contract based upon mutual mistake as to the subject matter of the written agreement is a rescission of the contract at law. Rescission is the unmaking of an agreement that returns the parties to the status quo. *Norton v. Poplos,* 443 A.2d 1, 4 (Del. 1982). Rescission can be in equity and at law. "Equitable rescission is appropriate where a declaration that a contract is invalid, coupled

with an award of damages, would not be adequate to restore a plaintiff to his original position." *Russell v. Universal Homes,* 1991 WL 94357, at *2 (Del. Ch. 1991). In a case involving rescission at law, the court has authority to enter an order restoring the defendant in this case, to his original position by awarding monetary damages or return of property of which he has been deprived. *Id.* In this case, there is no evidence to show that the defendant received any benefit of services from Slomin's beyond the three months of services that were paid for. No testimony was presented indicating whether any equipment was left in Wilson's previous residence. Therefore, although damages should not be awarded, the contract should be rescinded at law based on a mutual mistake of fact.

Common grounds for rescission are fraud, misrepresentation and mutual mistake of fact. *Id.* at 4. As discussed earlier, the sales representative's material misrepresentations or the mutual mistake of fact of the parties as to the service area of Slomin's. Judge Carey in *Beard v. West Manor Apartments, Inc.,* 130 A.2d 556, 557 (Del. Super. Ct. 1957), stated that as "[n]o reported Delaware case seems to touch directly upon this point, at least where the ground for rescission [at law] is mistake…there is no reason to draw a distinction between rescission based upon mistake and one based upon fraud." Therefore, the contract should be rescinded based on mutual mistake of fact which causes the impossibility of performance of the contract.

In conclusion, parol evidence should be admitted because of a mutual mistake as to the subject matter of the contract. The contract should be rescinded at law based on this mutual mistake because the mistake goes to the basis of the bargain and without service to the defendant the contract cannot be performed. This rescission of the contract

should put the parties back into their original positions as there was no benefit of the bargain for the defendant.

Accordingly, judgment is entered in behalf of the defendant, Donald Wilson, and against Slomin's, Inc. for the costs of these proceedings.

IT IS SO ORDERED.

_____

Merrill C. Trader
Judge