A2, Inc., et al. v. Town of Colchester, et al., No. S0813-04 Cncv (Katz, J., Nov. 26, 2007)

STATE OF VERMONT SUPERIOR COURT
Chittenden County, ss.: Docket No. S0813-04 CnC

A2, Inc., et al.

v.

TOWN OF COLCHESTER, et al.

ENTRY

Motions for Summary ,Judgment

The developers of the Water Tower Hill commercial park in Colchester, predecessors in interest to Defendant Chittenden Trust Company (collectively, "the Bank"), reserved a large block of sewerage capacity with the Town at considerable expense. Plaintiffs A2, Inc., et al., bought three adjacent lots in the development; A-1.1, A-14, and A-2. Despite Plaintiffs' intentions to hold the plots as an investment before selling or developing them (Carroll Aff. ¶ 5), Plaintiffs agreed to assume some sewerage capacity for the first two plots from the Bank's reserved block, along with the associated fees. (Id.) Plaintiffs assert that they also

paid for sewerage allocation for plot A-2 (Russell Aff. ¶ 6), which the Bank disputes. After selling off its last lot, the Bank returned its remaining allocation back to the Town. Plaintiffs now claim not to have enough sewerage for their desired land use. They claim they did not receive their rightful allocation for plot A-2 and that the Bank breached its duties to them by returning the excess to the Town. Instead, the Bank should have retained the excess, transferred it to the development's Landowner's Association, or at least offered it to plot owners first. The Bank asserts that it had no such duties. It asserts that Plaintiffs purchased as little allocation as they could and now find themselves in a jam because the Town has none left to sell. Both sides move for summary judgment.

Plaintiffs call the Bank's sewerage allocation "a vital common element" of the development. A common element is a shared area of real estate that benefits an entire community, such as a road or a park. See, e.g., 27A V.S.A. § 1-103(4) (defining common elements as any real estate owned by the association); Clearwater Realty Co. v. Bouchard, 146 Vt. 359, 363 (1985). Plaintiffs also assert that, just as a developer's representation of a common element on a subdivision plat implies a promise that it will be built, the Bank's reservation of sewerage implies that the allocation will always be available. It cites no cases in which courts have followed this rationale.

The comparison of a common element shown on a subdivision plat to reserved sewerage is inapposite. First, and fundamentally, sewerage allocation is not real estate which is shared by an entire community. It is a right to use a utility and it benefits only those to whom it is assigned, not the community at large. The sewerage here was granted to the developers, not to future owners of the lots, and remained theirs until they assigned it to someone else. (D.'s Ex. A, ¶ 1.5.)

Second, the analogy is inapposite because nothing about the reservation of sewerage implies that it will be available forever. A subdivision, by definition, represents an end result, on which buyers rely, so it is reasonable to enforce that representation. See Noble v. Kalanges, 2005 VT 101, ¶ 18. In contrast, a developer's sewerage allocation is, by definition, the availability of a finite resource that may be dispensed to individual buyers, but not by any predetermined calculus. Allocation is a zero sum game and the onus is clearly on each buyer to secure sewerage rights before they are monopolized by someone else. Buyers who chose not to secure future sewerage allocation and not ante up the front-end or outgoing cost, while they watched the park develop around them, placed a bet on future availability. They alone should pay for that gamble.

The Act 250 permit does not give buyers any rights in the unassigned allocation. It contains no requirement that the Bank hold sewerage on buyers' behalf, let alone foretell future development needs which they themselves have not determined. (D.'s Ex. C.) The D.E.C. granted the permit in part because the Bank held the allocation (D.'s Ex. B at 4-5), but the two are distinct, and the benefit of the allocation does not pass until it is assigned. (D.'s Ex. A, ¶ 1.5.) The duties imposed by the permit run with the land, which means that when Plaintiffs walked away from the Bank's supply of sewerage, they alone bore the duty to find more if the need arose.

Plaintiff's attempts to find a duty for the Bank to provide sewerage under other legal and equitable theories are also unpersuasive. The Bank has not violated the permit and thus has not created a cloud on Plaintiffs' title. Whether or not the permit gives the impression that the Bank still holds sewerage allocation is irrelevant, as it is not the function of the permit to track sewerage allocation. Plaintiffs can likewise show no fraudulent inducement because any representation of allocation holdings is subject to

other plots' needs. Finally, Plaintiffs cannot show that the Bank breached a duty to do nothing to hinder Plaintiffs ability to pay their mortgage because they have not shown that the Bank in any way intruded on their rights.

Plaintiffs fail to raise a genuine issue of material fact as to the Bank's denial that Plaintiffs are owed sewerage allocation for plot A-2. The statute of frauds requires that contracts for the sale of land, and any amendments to such a contract, be in writing, signed by the party to be charged. 12 V.S.A. § 181; Weale v. Lund, 162 Vt. 622, 624 (1994). The Purchase and Sale agreement also contains a merger clause providing that it is the complete agreement between the parties and may only be modified in writing. (D.'s Ex. M, ¶ 16.) Despite Mr. Russell's assertion that the agreement was part of the sale, the contract contains no term for sewerage transfer, and no subsequent written amendment is offered. The court cannot make a contract when none is shown to have been made by the parties. Bemis v. Lamb, 135 Vt. 618, 620 (1978). The only documentary evidence produced by Plaintiffs relating to this putative transfer is a summary of fees due to the bank, including one relating to 1,875 gallons of sewer use around the time of closing. (P.'s Ex. 218.) This document is inconclusive as to any agreement, is signed by no one, and was apparently prepared for the Bank's representative Bruce Bernier, not by it. (Id.)

Because Plaintiffs raise no genuine issue of material fact, Defendant's motion for summary judgment is GRANTED. See V.R.C.P. 56(c). Accordingly, Plaintiffs' motion is DENIED.

Done at Burlington, Vermont, _____, 20___.

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M. I. Katz, Judge