June 4, 2001

VIA FACSIMILE AND U.S. MAIL

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RE: Massey's Used Cars, Inc. v. Richard T. Jones
C.A. No. 99C-09-020

Date Submitted: March 2, 2001
Date of Decision: June 4, 2001

Dear Counsel:

This is a Motion for Summary Judgment made by Plaintiff, Massey's Used Cars ("Plaintiff" or "Massey's"), to find there was a breach of a covenant of special warranty and to set the appropriate damages. The Defendant concedes that there was a breach of warranty but disputes the proper measure of damages. Plaintiff contends that damages must be based on the value of the land at the time of trial, while Defendant argues that the value of the land at the time of transfer is the basis for establishing damages. Plaintiff's Motion for Summary Judgment is denied in part and granted in part for the following reasons.

Facts of the Case

On May 9, 1991, Defendant, Richard Jones ("Defendant" or "Jones") conveyed by special warranty deed a 48,365 square foot parcel of property to Plaintiff.[1] Although the property was surveyed, the Delaware Department of Transportation ("DelDot") had previously acquired 8,579 square feet of the property for right of way purposes. Thus, Plaintiff received only 39,786 square feet. Ten years later, after Plaintiff had been using the property for a used car business and had made several improvements on it, DelDot's interest was discovered. Plaintiff does not allege any misconduct on the part of the Defendant, and it is unclear how DelDot's ownership interest was overlooked.

Discussion

In paragraph 7 of the Answer, Defendant admits that the special warranty in the deed was breached. Cf. Indian Harbor v. Sea and Pines, Del. Super., C.A. No 86C-NO-23, Chandler, J. (June 10, 1987) (where the Defendant contested whether or not there was a breach of a special warranty and the Court concluded that there was not). Accordingly, the parties in the pre-trial stipulation agree that Defendant is liable for the breach, and they

[1]Special warranty deeds are controlled by 25 *Del. C.* § 121. Subsection (a) gives an example of a sample deed, and subsection (b) describes the effect of that deed:

> A deed in the form prescribed in subsection (a) of this section, duly executed and acknowledged, unless otherwise restricted or limited, or unless contrary intention appears therein, shall be construed to pass and convey to the grantee therein and to his heirs and assigns the fee simple title or other whole estate or interest which the grantor could lawfully convey in and to the property therein described together with the tenements, hereditaments, franchises and appurtenances thereunto belonging, and the reversions and remainders, rents, issues and profits thereof. The words "grant and convey" in any deed shall, unless specifically restricted or limited operate as a special warranty against the grantor and his heirs and all persons claiming under him or them. Nothing contained in this section shall invalidate a deed not made in the form prescribed in subsection (a) of this section, but a deed made in the form heretofore in common use within this State shall be valid and effectual.

further agree that the only question left to address is that of damages. Plaintiff asserts that the Defendant's breach of the warranty in the deed entitles him to damages equal to the reduction in the value of the property, the payment of principal and interest for the portion of the land not conveyed, and the loss of the economic value of the land; he asserts that the loss in the value of the land must be based on the fair market value calculations at time of trial. Defendant, on the other hand, argues that fair market value of DelDot's portion of the property at time of the conveyance determines the proper level of damages.

The damages to be recovered here are for the breach of the covenant of special warranty contained in the deed. Warranties of this nature are "future covenants" since they offer to protect the grantee from claims that arise over the time of the grantee's possession of the property. 9 *Thompson on Real Property Second Thomas Edition,* § 82.10(c) (David A. Thomas ed., 1999). Although breach usually comes with the assertion of a rival claim after conveyance, most courts "will award no more than the consideration paid to the covenator plus interest, or a proportionate share of that consideration if the loss of the title is partial." Powell on Real Property § 81A.06[4] [b] (Michael Allen Wolf ed., Matthew Bender, 2000). These authorities recognize that land values generally escalate over time but the courts have not usually awarded damages on a loss of bargain basis. Perhaps this reflects a judicial recognition that awards in times of appreciation could exceed purchase prices and would not be economical or fair. In the present case, the breach would have occurred at the time the claim of paramount title was asserted, and the Plaintiff is then entitled to damages.[2]

In this regard, "where the paramount outstanding title is in the government, this fact of itself constitutes such a constructive eviction as amounts to a breach of the covenant of warranty; that is, if the title to land attempted to be conveyed is in the public, there exists

[2]It is not clear to the Court when Plaintiff first received notice that part of his property was actually owned by the State.

such a hostile possession as amounts to a constructive eviction, the instant the deed is made." 20 Am. Jur., *Covenants* § 61. Here, there was a constructive eviction of Plaintiff from the moment the deed was conveyed; thus the breach occurred on that date, not at the time Plaintiff received notice of paramount title or at the time of judicial determination of the breach. Therefore, damages are to be determined on May 9, 1991.

Consistent with the previously cited authorities, the damages are the fair market value of the land lost as a result of the breach at that time:

> As a general rule, where the title is invalid as to a part of the land conveyed, resulting in a loss of this portion of the land, the damages recoverable for the breach of a covenant of title contained in the conveyance are to be measured by the loss actually sustained by the eviction of the grantee from that part of the land as to which the title is invalid. The usual means resorted to in ascertaining the amount of damages is to award such proportion of the whole consideration as the value of that part of the land as to which the title failed bore to the value of the whole tract at the time the transaction was consummated. Thus, in the case of a partial breach of a covenant of warranty by reason of a failure of title to a portion of the estate conveyed resulting in eviction from that portion of the premises, the measure of damages is the relative value which the part as to which the title failed bears to the purchase price or consideration of the whole estate.

20 Am. Jur. 2d *Covenants* § 132. This rule of computing damages is followed in Delaware. See State v. Regency Group, Inc., Del. Super., 598 A.2d 1123 (1991). In Regency Group, the Court's damage award was the value of lost acreage when the land was conveyed. Where an undiscovered restrictive covenant encumbered property, the Court of Chancery ruled: "The measure of damages is the difference between what the Naegles bargained for, the lot without a restrictive covenant prohibiting trailers, and what they actually received, the lot with a restrictive covenant prohibiting trailers and with a certain liability, namely, the cost of removing the trailer. . ." Keen v. Naegle, Del. Ch., C.A. No. 1266, Chandler, V.C. (Nov. 30, 1989). In the Keen case, the Court's focus on the basic measure of damages was set at the time of the restricted conveyance although the cost to remove the trailer was obviously

calculated at the time of judgment.[3] Furthermore, the Court found that the depreciated trailer was not compensable, and as found in Powell, "the courts are in general agreement that the value of improvements on the property is not properly a part of the computation of damages for the breach of a covenant." *Powell on Real Property* § 81A.06[4][c] (Michael Allen Wolf ed., Matthew Bender, 2000). In both decisions, eviction was implicitly found to exist when the deeds were delivered to the aggrieved parties.

Conclusion

Because Defendant concedes breach of the special warranty, summary judgment is granted for Plaintiff with respect to that issue. Delaware Courts have discretion to employ a flexible approach to damages in order to achieve a just and reasonable result. Council of Unit Owners v. Freeman Assoc., Del. Super., 564 A.2d 357, 363 (1989). This case does not present special circumstances to justify a departure from the traditional damage rules. Plaintiff's appraiser found damages of $88,000, a figure derived in part from the loss of display space for used cars (loss of 14 of 50 spaces). This exceeds the $85,000 price paid and is not an appropriate measure of damages. In any event, the parties agree the only issue is a legal question about the time from which damages are measured. With this in mind, the damages are to be the difference in the value of the land as described in the deed and the land actually conveyed on May 9, 1991, plus interest.

The Court understood from the pre-trial conference that settlement would likely occur once this motion was decided. Should this not happen, please advise me. The June 6th trial must be rescheduled given the Bench and Bar Conference, and another date will be assigned, if necessary.

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[3]Plaintiff cites a one page unreported letter decision in Reed v. Hassel, Del. Super., 340 A.2d 157 (1975), dated September 22, 1975, to measure damages as of date of trial. (Exhibit D to appendix.) I do not agree because the defendant failed to contest this point. A default judgment is not a substitute for a fully developed and considered argument.

IT IS SO ORDERED.

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Richard F. Stokes, Judge

cc: Prothonotary