IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

T&R BATTLE CREEK LIMITED PARTNERSHIP,

Plaintiff,

17cv0666
ELECTRONICALLY FILED

v.

UG BUTLER PA, LLC,

Defendant.

MEMORANDUM OPINION

Currently before the Court in this Declaratory Judgment/Breach of Contract action is a Motion to Dismiss and Brief in Support filed by Defendant pursuant Fed.R.Civ.P. 12(b)(6). ECF 14, 16. Plaintiff has filed a Brief in Opposition. ECF 22. The matter is ripe for disposition.

Jurisdiction in this matter is predicated upon 28 U.S.C. § 1332, given that Plaintiff is an Ohio Limited Partnership, Defendant is a Delaware limited liability company, and the amount in controversy exceeds $75,000.00. Because: (1) the contract at issue involved the sale of real estate in the Commonwealth of Pennsylvania; (2) the contract indicates that the governing law shall be construed in accordance with the laws of the Commonwealth of Pennsylvania; and (3) the Parties to this lawsuit agree, Pennsylvania law controls the substantive issues raised by Defendant herein.

I. FACTUAL BACKGROUND

The following facts, taken from the Complaint and the documents attached thereto, are accepted as true solely for the purpose of adjudicating Defendant's Motion to Dismiss.

On July 26, 2016, Plaintiff and Defendant entered into an agreement for the sale of real property located in Butler County, Pennsylvania, at 400 Greenwood Plaza ("Agreement"). ECF 1, ¶ 8. Defendant was the "Seller" of the real property, and Plaintiff was the "Buyer." ECF 1-2.

Section 4.5 of the Agreement reads as follows:

> 4.5 Closing Costs and Charges. Seller shall be responsible for the cost of all state, county and local transfer or documentary stamp taxes. Buyer shall be responsible for: (i) all escrow fees and recording fees; (ii) the cost of any survey obtained by Buyer; and (iii) such title insurance as Buyer shall desire to obtain. Each party shall bear its own legal, accounting, and other professional fees.

ECF 1-2.

The closing date was October 5, 2017, and the total realty transfer tax was $201,500.00. ECF 1, ¶ 17. Although the Agreement indicated that Defendant-Seller was to pay the realty transfer tax, Plaintiff paid one-half of the tax under protest at the closing. ECF 1, ¶ 36.

II. STANDARD OF REVIEW

In considering a Rule 12(b)(6) motion, Federal Courts require notice pleading, as opposed to the heightened standard of fact pleading. Fed. R. Civ. P. 8(a)(2) requires only "'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds on which it rests.'" *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

Building upon the landmark United States Supreme Court decisions in *Twombly* and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the United States Court of Appeals for the Third Circuit explained that a District Court must undertake the following three steps to determine the sufficiency of a complaint:

> First, the court must take note of the elements a plaintiff must plead to state a claim. Second, the court should identify allegations that, because they are no more than conclusions, are not entitled to the assumption of truth. Finally, where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief.

Connelly v. Steel Valley Sch. Dist., 706 F.3d 209, 212 (3d Cir. 2013) (citation omitted).

The third step requires this Court to consider the specific nature of the claims presented and to determine whether the facts pled to substantiate the claims are sufficient to show a "plausible claim for relief." *Covington v. Int'l Ass'n of Approved Basketball Officials*, 710 F.3d 114, 118 (3d Cir. 2013). "While legal conclusions can provide the framework of a Complaint, they must be supported by factual allegations." *Iqbal*, 556 U.S. at 664.

This Court may not dismiss a Complaint merely because it appears unlikely or improbable that Plaintiff can prove the facts alleged or will ultimately prevail on the merits. *Twombly*, 550 U.S. at 563 n.8. Instead, this Court must ask whether the facts alleged raise a reasonable expectation that discovery will reveal evidence of the necessary elements. *Id.* at 556. Generally speaking, a Complaint that provides adequate facts to establish "how, when, and where" will survive a Motion to Dismiss. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 212 (3d Cir. 2009).

In short, a Motion to Dismiss should not be granted if a party alleges facts, which could, if established at trial, entitle him/her to relief. *Twombly*, 550 U.S. at 563 n.8.

III. ANALYSIS

Defendant raised three arguments in support of its Motion to Dismiss: (1) Pennsylvania's doctrine of merger of title bars Plaintiff's claims; (2) Plaintiff's claims are time-barred; and (3) Plaintiff's claim is barred by the limit on contractual remedies set forth in Section 7.3 of the Agreement.

A. Doctrine of Merger of Title

The doctrine of merger of title provides that, as a general rule, an agreement of sale merges into the deed, and no recovery may be had based upon an earlier agreement. *Stoever v. Gowen*, 124 A. 684 (Pa. 1924); *Elderkin v. Gaster*, 447 Pa. 118, 288 A.2d 771 (Pa. 1972). The merger rule, however, does not apply where the expressed intention of the parties is to the contrary. *Carsek Corp. v. Stephen Schifter, Inc.*, 431 Pa. 550, 246 A.2d 365 (1968). An agreement is not merged as to that which is not to be consummated by the deed, and which is of an entirely different nature and collateral to it. *Rappaport v. Savitz*, 220 A.2d 401 (Pa. 1966). The doctrine of merger is normally applied to warranties of title. *Elderkin v. Gaster*, 288 A.2d 771, 775 (Pa. 1972).

In *Carsek Corp.*, the Supreme Court of Pennsylvania held:

> Merger is said to be the rule, except when the intention of the parties is otherwise, or where the stipulations in the contract sought to be enforced are collateral to the functions performed by the deed. Anno: Merger of Contract in Deed, 38 A.L.R.2d 1310, 1313 (1954). Actually, the latter exception is subsumed in the former, since the fact that the stipulations are collateral to the functions of the deed gives rise to the inference that the parties did not intend that the stipulations merge into the deed. . . .'A covenant has been said to be collateral, and therefore one which survives delivery of the deed, if it bears no relation to title, possession, quantity or emblements of the transferred property.' Friedman, Contracts and Conveyances of Real Property, 411-12 (1963). Clauses in the contract dealing with consideration fit within this category.

246 A.2d at 559.

Simply put, Pennsylvania recognizes two exceptions to the doctrine of merger of title: (1) where the expressed intention of the parties is contrary to the doctrine; and (2) where the contract provision sought to be enforced is collateral to the consummation of the deed.

Turning to the facts pled by Plaintiff in the instant matter, this Court finds that Plaintiff has adequately pled facts which, if proven, would support a finding that one or both of the

exceptions to the doctrine of merger apply. Plaintiff first presents facts contending that Defendant was required to pay all of the realty transfer tax, and presented a signed a written agreement to that effect. See ECF 1-2. Plaintiff next presents facts which indicate a dispute arose on or before the closing date, and on the closing date, Plaintiff executed a document indicating that it would pay half of the realty transfer tax, but was making such payment under protest.

These facts pled by Plaintiff, if proven, give rise to a viable claim for breach of contract, because said facts suggest that Plaintiff's claim for Defendant's alleged breach of Section 4.5 of the Agreement could support a finding that the Parties intended to resolve the realty transfer tax matter after consummating the deed, and/or Section 4.5 of the Agreement was collateral to the consummation of the deed.

B. Statute of Limitations

Defendant next argues that the Plaintiff is time-barred from bringing this lawsuit, because it was not filed within the six-month time frame outlined in Section 9.1 the Agreement.

The Court agrees with Defendant's basic premise that Parties to a contract can "make their own contract," including the modification of an applicable limitations period. Defendant contends that the Parties agreed to a six-month statute of limitations to bring a lawsuit with respect to the specific claims raised by Plaintiff in its Complaint.

The portion of the contract upon which Defendant relies for this argument reads as follows:

> 9.1 Survival; Termination. The representations, warranties and agreements of the parties contained or provided for in this Agreement shall survive the Closing and the recordation and delivery of the Deed conveying the Property to Buyer for a period of six (6) months.

ECF 1-2.

However, the facts as pled by Plaintiff suggest that the Parties did not intend to shorten the four-year statute of limitations for breach of contract. Plaintiff's Complaint indicates that Plaintiff complied with Section 9.1 by seeking reimbursement from Defendant of the realty tax Plaintiff paid at the closing well within the six-month time frame. The facts, as pled by Plaintiff, indicate that Plaintiff's claim for repayment of one-half of the realty transfer tax arose at the closing. On that same date, Plaintiff, in a writing, demanded that Defendant reimburse Plaintiff for the transfer tax it paid so as to comply with Section 4.5 of the Agreement.

The Court concludes that Section 9.1 did not alter the four-year statute of limitations to assert a breach of contract claim. Rather, Section 9.1 provided that the representations, warranties and agreements of the Parties which had been set forth in the Agreement would "survive" the closing and recordation of the deed for six months from the date the deed was recorded. Plaintiff's allegations concerning Section 9.1 suggest that Plaintiff timely notified Defendant (well within six months from the date the deed was recorded) of Defendant's alleged obligation to pay the entire transfer tax amount. Accordingly, Plaintiff's Complaint will not be dismissed as time-barred.

C. Exclusive Remedy

Defendant's third and final argument in support of dismissal is that Section 7.3 of the Agreement bars Plaintiff's claims. Plaintiff disagrees.

Section 7.3 reads as follows:

> 7.3 Failure of Condition; Default by Seller. Should the conditions· set forth in this Agreement not be satisfied on or prior to the Closing Date, or upon breach by Seller of any of its obligations hereunder, then Buyer shall be entitled, at its option, to (i) specific performance of this this Agreement and the consummation of the transactions contemplated by this Agreement, or (ii) terminate this Agreement, in which event (y) the Deposit, and any accrued interest, shall be immediately returned to Buyer, and (z) neither Seller nor Buyer shall have any further rights

> or obligations hereunder or liability to the other, except with respect to the provisions of this Agreement which survive termination.

ECF 1-2.

Defendant argues that under Section 7.3 of the contract, instead of closing and paying one-half of the realty transfer tax, Plaintiff could have either enforced specific performance or terminated the Agreement. Defendant contends Plaintiff chose neither option, and instead, proceeded to close on the real estate. Plaintiff concurs that when Defendant breached its obligation to pay the entire realty transfer tax as required by Section 4.5, Plaintiff could have "at its option" selected one of these two remedies – either enforced specific performance or terminated the Agreement. Plaintiff contends that it selected the first option (specific performance by Defendant) by writing a letter to Defendant and, in this writing, indicated that Plaintiff was "closing under protest," and "preserving all causes of action" and was "not releasing Defendant" of its obligation to pay the entire realty transfer tax. ECF 1, ¶ 20.

The Court finds that based on the allegations set forth in Plaintiff's Complaint, Platiniff has asserted a viable cause of action for declaratory judgment and breach of contract. In reaching this conclusion, the Court finds that the facts pled by Plaintiff support its theory of recovery, but must yet be proven in order to obtain recovery. For these reasons, the Court will deny Defendant's Motion to Dismiss predicated upon Section 7.3 of the Agreement.

IV. CONCLUSION

Based on the foregoing law and authority, the Court will deny the Defendant's Motion to Dismiss. An appropriate Order follows.

s/ Arthur J. Schwab
Arthur J. Schwab
United States District Judge

cc: All ECF Registered Counsel of Record