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STATE OF NEW YORK
SUPREME COURT COUNTY OF WAYNE

JONATHAN M. SIMMONDS and
CATHERINE A. SIMMONDS,

Plaintiffs,

-vs-

KAREL J. AMBROZ, II and
KAREN J. AMBROZ,

Defendants.

DECISION AND ORDER

Index No. 71442
9012

Dibble & Miller, P.C.
G. Michael Miller, Esq., of counsel
Attorneys for Plaintiffs

Ernstrom & Dreste, LLP
Timothy D. Boldt, Esq., of counsel
Attorneys for Defendant

The Defendants ("Ambroz") have filed a motion in the above action, seeking an order granting summary judgment against the Plaintiffs ("Simmonds") and dismissing the Amended Complaint. The Plaintiffs have opposed the motion in its entirety and requested an order directing the Plaintiffs to pay the legal fees incurred in this matter by the Defendants, based upon allegations that the commencement of the action constitutes "frivolous conduct" on the part of Simmonds. After initial oral argument, the

Court continued the motion pursuant to CPLR §3212(f), in order to permit the Plaintiffs to complete depositions. Upon completion, the parties then presented additional oral argument and written submissions to the Court.

The facts are generally not in dispute. The Plaintiffs' claims arise from a real estate transaction involving the sale and purchase of vacant land located in Walworth, New York. The property was the subject of an IRS auction, which was held on April 1, 2009. The parties, who are neighbors, decided to bid on the property. They had discussions prior to the auction as to how the land would be divided; in fact, they walked the property, observing the natural boundaries as possible lines of division. Nothing was ever put in writing. It was agreed that Mr. Ambroz would do the actual bidding at the auction, and, in fact, he was the successful bidder on the land for the sum of $13,000.00. (A third couple was also involved in this transaction, but these individuals are not involved in this dispute).

In November 2009, the parties met to finalize the plans for subdividing the land. Negotiations deteriorated when it became clear that, in the interim, Mr. Ambroz had "changed his mind" and decided that he wanted additional land, which included portions of the property, including a dirt access road, which the Plaintiffs had originally intended to buy. As matters worsened, Mr. Ambroz indicated that he would return the money paid to him by the Plaintiffs and keep the entire parcel.

Despite their dissatisfaction with the outcome of the negotiations, the Plaintiffs chose to proceed with the transaction. They received a survey map dated December 30, 2009, from the Plaintiffs prior to execution of the Purchase and Sale Contract on January 12, 2010. The map clearly showed the intended boundaries. At the time they executed the Contract, the Plaintiffs were represented by their own attorney. Another survey map dated January 27, 2010, was provided to the Plaintiffs as well as a copy of the proposed deed. The Plaintiffs also executed a Real Property Transfer Report, which was filed in the Wayne County Clerk's Office, as part of the transfer process.

The Plaintiffs never commenced any legal proceedings against the Defendants until July 23, 2010 when they filed the Summons and Complaint in the instant action, some three (3) months after the property was transferred. The Defendants filed an Answer, and the Plaintiffs subsequently served an Amended Complaint. Substantial discovery was conducted, and this motion ensued.

In the Amended Complaint the Plaintiffs set forth four causes of action:

1) breach of "partnership or joint venture agreement";

2) specific performance;

3) imposition of a constructive trust;

4) fraud (in the inducement).

In essence the Plaintiffs maintain that the conversations between the parties prior to the auction created an oral "Joint Venture/Partnership Agreement," containing terms regarding the purchase and division of the parcel. Since it was agreed that Mr. Ambroz would do the actual bidding at the auction, as well as handle the arrangements for the transfer of title to the other parties at a later date, the Plaintiffs maintain that Mr. Ambroz assumed a fiduciary duty toward the others. Based on his alleged violation of that duty the Plaintiffs seek to impose a constructive trust on the property. They also seek specific performance of the "contract" between the parties. Finally, the Plaintiffs maintain that Mr. Ambroz made fraudulent misrepresentations to the Plaintiffs regarding the intended division of the land upon which the Plaintiffs relied, to their detriment.

In their motion for summary judgment, the Defendants maintain that the causes of action set forth by the Plaintiffs are not supported by credible evidence, even when considered in the light most favorable to the Plaintiffs, and are subject to dismissal as a matter of law. Further, the Plaintiffs argue that the doctrine of merger is controlling, and that the Defendants have raised no legitimate issues to render that doctrine inapplicable.

The doctrine of merger is well-settled, having been recognized by the courts for over 100 years. Under the doctrine, all agreements made between parties to a real estate transaction are deemed as a matter of law to merge into the deed upon filing with the County Clerk. In effect, the deed extinguishes all other prior obligations and agreements upon closing. Merger can also result from the inclusion of specific language in a contract, providing that all prior representations shall not survive the transfer of title.

In this action, there are actually two documents which have caused the Defendants to invoke the doctrine. The first involved the signing of the Purchase and Sale Agreement on January 12, 2010. That agreement contains the following language:

> This Contract when signed by both Buyer and Seller will be the record of the complete agreement between the Buyer and Seller concerning this purchase and sale of the property. No oral agreements or promises will be binding. Seller's Representations in this Contract shall not survive after closing.

Pursuant to this provision, all prior pre-auction conversations between the parties merged in the written agreement, unless the Plaintiffs are able to demonstrate that some other theory of law renders the doctrine inapplicable. (The Plaintiffs' arguments are discussed below).

The second merger occurred at the time of the actual transfer of the real property by Ambroz to the Plaintiffs. The Plaintiffs received two survey maps showing that portion of the parcel to be transferred to them. They also received a copy of the proposed deed. They registered no objection to any of these documents – they even executed a RPTR as part of the filing process with the Wayne County Clerk. In Boxer v Boxer, 237 AD2d 924 (4th Dept, 1997), the Appellate Division held as follows:

> "It is well settled that, where a contract for the sale of land has been executed by a conveyance, the terms of the contract concerning the nature and extent of the property conveyed merge into the deed and the contract terms are extinguished upon the closing of title and acceptance of the deed" '[A]ny inconsistencies between the contract and the deed are to be explained and governed solely by the deed, which is presumed to contain the final agreement of the parties'" (emphasis added) (citations omitted).

Here, there are no inconsistencies between the purchase contract and the deed – merely alleged inconsistencies between the deed and prior oral conversations which are legally moot. Moreover, as the Defendants argue, any oral promises are also rendered inadmissible by the Statute of Frauds, which requires that an agreement regarding the transfer of real property must be in writing.

The Plaintiffs attempt to take the matter outside the Statute of Frauds by attempting to invoke the doctrines of equitable estoppel and substantial part performance. However, based upon the uncontroverted actions of the Plaintiffs, the Court finds that, as a matter of law, these defenses are inapplicable. Given the documentation, the Plaintiffs' reliance, if any, on oral negotiations, was misplaced, and not a basis for estoppel. Any issue regarding part performance would have had to have been raised prior to the signing of the purchase offer.

As to the Plaintiffs' four causes of action as set forth in the Amended Complaint, the Court concludes as follows:

1) Oral Joint Venture/Partnership Agreement - "The essential elements of a joint venture are an agreement manifesting the intent of the parties to be associated as joint venturers, a contribution by the coventurers to the joint undertaking (i.e., a combination of property, financial resources, effort, skill or knowledge), some degree of joint proprietorship and control over the enterprise, and a provision for the

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sharing of profits and losses" (citations omitted). Based upon the Plaintiffs' deposition testimony, the Court finds that the relationship between the parties does not fall within this definition as a matter of law. These people were neighbors, not business associates, who agreed to purchase real property for their personal use. Further, there was never any discussion between the parties regarding "profit and loss."

2) Specific Performance - The Plaintiffs maintain that Mr. Ambroz should be directed to comply with the terms of the oral "joint venture" agreement, and that they are prepared to fulfill their obligations under that agreement. However, the Court has concluded that the only enforceable contract is the Purchase and Sale Agreement, which the parties have previously consummated by the filing of the deed and the transfer of the property.

3) Constructive Trust - The essential elements of a Constructive Trust are: (1) a confidential or fiduciary duty; (2) a promise; (3) a transfer in reliance on the promise; and (4) unjust enrichment. However, the Court finds as a matter of law that the facts do not support the creation of a relationship that rises to the level of a fiduciary duty on the part of Mr. Ambroz. Moreover, the Plaintiffs cannot argue reliance on prior promises

of Mr. Ambroz, in that they were subsequently presented with documentation which clearly delineates the property to be transferred and which they chose to accept, in spite of the clear discrepancies between the negotiations and the documents. Any reliance obviously would have been misplaced.

4) Fraud - The Defendants argue that the Plaintiffs have failed to plead the necessary elements of a cause of action for fraud in the Amended Complaint, as required by CPLR §3016. However, the Court need not address the sufficiency of the Amended Complaint, as the Plaintiffs have failed to raise a triable factual issue regarding their "reasonable reliance" on early oral representations made by the Defendants, which were directly contradicted by subsequent documentation, of which the Plaintiffs were well aware before proceeding with the transaction. Moreover, the Defendants are correct in maintaining that the courts have held that the failure to keep a promise of future intent is not a basis for an action in fraud. For example, in Cerabono v Price, 7 AD3d 479 (2nd Dept, 2004), the Appellate Division held that "(t)he general rule is that fraud cannot be predicated upon statements that are promissory in nature at the time they are made and which relate to future

actions or conduct" (citations omitted). The Defendants' failure to fulfill that promise may be morally reprehensible but it is not legally actionable.

Finally, in his reply affirmation, counsel for the Plaintiffs attempts for the first time to raise a cause of action for duress. The Plaintiffs did not plead duress in either Complaint. However, even were the Court to entertain the theory at this belated date, based upon the circumstances as set forth above, the Court finds as a matter of law that Mr. Ambroz' actions did not compel the Plaintiffs to execute the Purchase and Sale Agreement, whatever their thoughts may have been regarding the transaction. Also, counsel for the Plaintiffs is correct in maintaining that a threat to breach a contract is insufficient to support a claim of economic duress. (See e.g. Friends Lumber, Inc. v Cornell Development Corp. 243 AD2d 886 (3rd Dept 1997)). The Plaintiffs had other legal remedies which they could have chosen to pursue at that time.

The record indicates to this Court that it was Mr. Ambroz' conduct subsequent to the auction which set in motion a series of events ultimately resulting in this action. Unfortunately, however, not every person who breaks a promise or ignores a handshake can be made accountable in a court of law. Perhaps, had the Plaintiffs commenced this action prior to signing the purchase offer and accepting the deed, there might have been factual issues raised which would have been sufficient to defeat a motion for summary judgment. However, this Court cannot engage in such speculation. Given the sequence of events and the conduct of the parties, the Court must find that the Plaintiffs are bound by the doctrine of merger, and the Amended Complaint is found to be without merit.

However, the Court further finds that the Defendants are not entitled to counsel fees. While the Plaintiffs' theories of law were insufficient to support any cause of action against the Defendants, the Court finds that commencement of the lawsuit did not constitute "frivolous conduct" as that terms is used in the Uniform Court Rules. Therefore, the Defendants' application for legal fees incurred in this action is denied.

Therefore, the Defendants motion for Summary Judgment is granted, and the Plaintiffs' Amended Complaint is dismissed.

This Decision constitutes the Order of the Court.

Dated: January 14, 2013
Lyons, New York

Honorable Dennis M. Kehoe
Acting Supreme Court Justice