

Bischoff v. Bletz, No. 308-6-06 Rdcv (Cohen, J., Mar. 23, 2009)

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**STATE OF VERMONT
RUTLAND COUNTY**

WILLIAM BISCHOFF, DAVID BISCHOFF and PETER BISCHOFF)	Rutland Superior Court
)	Docket No. 308-6-06 Rdcv
)	
Plaintiffs,)	
v.)	
)	
DONALD BLETZ, SR., and BRUCE VAN GUILDER)	
)	
)	
Defendants)	
DONALD BLETZ, SR.)	
)	
Third-party Plaintiff,)	
)	
v.)	
)	
RODNEY WHITE)	
)	
Third-party Defendant)	

**DECISION ON THIRD PARTY PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT, FILED OCTOBER 14, 2008, and
THIRD-PARTY DEFENDANT'S MOTION FOR PARTIAL SUMMARY
JUDGMENT, FILED NOVEMBER 17, 2008**

This matter came on before the Court on third-party plaintiff Donald Bletz, Sr.'s Motion for Summary Judgment, filed October 14, 2008. In his motion, third-party plaintiff argues that there is no material issue of fact concerning third-party defendant Rodney White's failure to appropriately exercise his right of first refusal on the parcels of land in question. Third-party defendant filed a Memorandum in Opposition on

November 12, 2008. Third-party plaintiff filed a Response on November 25, 2008.

On November 17, 2008, third-party defendant filed a Motion for Partial Summary Judgment on Count II of his counterclaim, seeking a declaratory judgment that Mr. White is only obligated to pay \$27,201.52 and \$188,780.48 at closing in exercise of a right of first refusal to purchase two parcels of land in Fair Haven, Vermont. Mr. Bletz filed a Response to Mr. White's Motion for Partial Summary Judgment on December 4, 2008. Mr. White filed a reply memorandum on December 18, 2008. Mr. Bletz filed a response to Mr. White's reply on December 23, 2008.

Third-party plaintiff Donald Bletz, Sr. is represented by John J. Welch, Esq. Third-party defendant Rodney White is represented by Andrew M. Carter, Esq.

Summary Judgment Standard

Summary judgment is appropriate where there is no genuine issue of material fact and the party is entitled to judgment as a matter of law. V.R.C.P. 56(c)(3). In response to an appropriate motion, judgment must be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, ... show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." V.R.C.P. 56(c)(3). In determining whether a genuine issue of material fact exists, the Court accepts as true allegations made in opposition to the motion for summary judgment, provided they are supported by evidentiary material. *Robertson v. Mylan Labs, Inc.*, 2004 VT 15, ¶ 15, 176 Vt. 356. The nonmoving party then receives the benefit of all reasonable doubts and inferences arising from those facts. *Woolaver v. State*, 2003 VT 71, ¶ 2, 175 Vt. 397.

Background

In 1978, Rodney White received a deed from Robert V. Van Guilder conveying to him a 5.885 acre parcel in Fair Haven, Vermont. The deed was properly recorded in the town land records. The deed provides that:

The grantor also conveys to the herein grantee the right of first refusal, so-called, to purchase the lands and premises of the Grantor located adjacent to the 5.885 acre parcel conveyed herein and parcel of land which is located the septic system and leach field referred to above under the terms and conditions of a certain purchase and sale agreement dated July 6, 1978.

The two parcels referenced in the right of first refusal paragraph in the deed are a 14.86 acre parcel, more or less, on the Westside of Airport Road and a 107.7 acre parcel, more or less, on the east side of Airport Road. Under the conditions of the right of first refusal, the Sellers (Mr. Bletz, Sr., Mr. Gordon Van Guilder, and the Estate of Van Guilder), upon receipt of a "bona fide offer" for the adjacent land, agree to give written notification to Mr. White by registered mail. Mr. White then has 20 days from the date of the mailing to exercise his right of first refusal, by written notice and filed in the office of Fair Haven Town Clerk. The closing is required to take place within 60 days from the date of acceptance by Mr. White. The acceptance by Mr. White must be under the same terms and conditions as the original bona fide offer. If the right of first refusal is not exercised within 20 days and filed with the town clerk then it is null and void and considered automatically extinguished.

In 2003, with no notice to Mr. White, Donald Bletz, Sr., Mr. Van Guilder, and the Estate of Van Guilder agreed to sell the subject properties to Bischoff Development Company. The transaction was never closed upon.

In March 2005, an option agreement was entered into between Donald Bletz, Sr., and William Bischoff, David Bischoff, and Peter Bischoff (the “Bischoffs”). The agreement provides the Bischoffs the right to purchase the 14.86 acre parcel subject to Mr. White’s right of first refusal for a purchase price of \$31,000 in exchange for consideration paid of \$1,266.16, which was non-refundable. The option agreement provides that “[i]f this option is exercised, this sum shall be credited towards payment of the purchase price at the time of closing.” Furthermore, the option agreement could be extended after one-year for another payment of \$1,266.16, also non-refundable, but applicable toward the purchase price. The Bischoffs could extend the option agreement a second time for another payment of \$1,266.16, once again non-refundable, but this payment would not be credited towards the purchase price.

Also in March 2005, Mr. Bletz Sr., Mr. Bruce Van Guilder and the Bischoffs entered into an option agreement to provide the Bischoffs the right to purchase the 107.7 acre parcel subject to Mr. White’s right of first refusal for a purchase price of \$215,000 in exchange for consideration paid of \$8,739.84, which was non-refundable. The option agreement provides that “[i]f this option is exercised, this sum shall be credited towards payment of the purchase price at the time of closing.” Furthermore, the option agreement could be extended after one-year for another payment of \$8,739.84, also non-refundable, but applicable toward the purchase price. The Bischoffs could extend the option agreement a second time for another payment of \$8,739.84, once again non-refundable, but this payment would not be credited towards the purchase price.

In April 2006, Attorney Welch presented to Mr. White a purchase and sale agreement executed by the Bischoff Development Corporation referencing the 14.86 acre

parcel. The purchase and sale agreement was not signed by Mr. Bletz. The purchase and sale agreement presents a purchase price of \$31,000 and a \$3,798.48 credit to be applied to the purchase price at closing (the same amount as the consideration paid by the Bischoffs for the option and extensions), and a balance of \$27,201.52 to be paid at closing. Mr. Bletz disputes this amount, and contends that \$28,467.68 is due at closing.

In April 2006, Attorney Welch presented to Mr. White a purchase and sale agreement executed by the Bischoff Development Corporation referencing the 107.7 acre parcel. The purchase and sale agreement was not signed by Mr. Bletz or Mr. Van Guilder. The purchase and sale agreement presents a purchase price of \$215,000 and a \$26,219.52 credit to be applied to the purchase price at closing (the same amount as the consideration paid by the Bischoffs for the option and extensions), and a balance of \$188,780.48 to be paid at closing. Mr. Bletz disputes this amount, and contends that the Bischoffs, consistent with the argument advanced by Mr. White, should be required to pay \$197,520.32 for the balance due.

On April 20, 2006, Mr. White's attorney sought immediate clarification from defendants regarding the actual purchase price for these lots given that the Bischoffs appeared to be receiving credit at closing for option payments. It does not appear that Mr. Bletz, Sr., or Mr. Van Guilder responded to this request. On April 28, 2006, Mr. White provided written notice that he intended to exercise his right of first refusal and he agreed to pay identical terms for both parcels, subject to confirmation of the specific terms of the offer and the actual amount of consideration that would be due from plaintiffs at closing.

Mr. Bletz, Sr. and Mr. Van Guilder apparently intended to go forward with the sale to Mr. White, but before any closing could occur, the Bischoffs filed a complaint against Mr. Bletz, Sr. and Mr. Van Guilder, raising claims of breach of contract, breach of warranty, misrepresentation, and negligence. The Bischoffs asserted that Mr. Bletz, Sr. and Mr. Van Guilder were prepared to convey the subject properties to Mr. White, and they believed that Mr. White would not be allowed to purchase this property because he had not agreed to pay the same price as the Bischoffs.

Discussion

I. Declaratory Judgment as to Count II of Rodney White's Complaint

Mr. White seeks declaratory judgment that he is only obligated to pay \$27,201.52 and \$188,780.48 at closing in exercise of a right of first refusal to purchase two parcels of land in Fair Haven, Vermont. Specifically, Mr. White argues that the payments made by the Bischoffs in consideration for the option agreement and subsequent extensions lowered the “net amount” to be paid at closing to \$27,201.52 and \$188,780.48 for the two parcels. Mr. White contends that he must only match the “net amount” due at closing in order to match the terms of the bona fide offer.

Mr. White classifies the option and extension payments as a “kickback scheme,” yet he has proffered no evidence that the arrangement between third-party plaintiffs and the Bischoffs was anything other than an arm-length transaction. Mr. White does not allege any facts to support this assertion in his statement of undisputed facts.

Mr. White presents the issue in this case “as whether the holder of a right of first refusal need only agree to pay the “net amount” to be received by a seller from a third-party after offsets under earlier options contracts are credited.” What Mr. White

overlooks, however, is that the purchase price of the properties according to the options agreements were \$31,000 and \$215,000. Any option payment made by the Bischoffs which could have possibly been credited toward the purchase price was non-refundable and *fully at risk* subject to Mr. White's right of first refusal. Whether selling an "option to buy contract" on parcels of land already burdened by a right of first refusal is "generally irresponsible, if not fraudulent," is a matter that concerns third-party plaintiffs and the Bischoffs, but in no way affects the price which Mr. White must pay in order to exercise his right of first refusal.

Furthermore, under Mr. White's theory of the case, a third-party purchaser of land could conceivably keep putting his own money at risk by purchasing the type of option extensions present in this case to the benefit of the holder of the right of first refusal. The more the third-party purchaser puts at the risk, the less the holder of the right of first refusal has to pay.

Put simply, the purchase price of the small parcel and large parcel as stated in the option agreements are \$31,000 and \$215,000 respectively. There is no evidence that this transaction was anything less than arms-length. Mr. White must match this price under the terms of the sales agreement.

II. Donald Bletz, Sr.'s Motion for Summary Judgment

In his motion for summary judgment, Donald Bletz, Sr. argues that there is no genuine issue of material fact as to Mr. White's failure to match the Bischoff's offer and thus his failure to appropriately exercise his right of first refusal. Because there was a dispute as to the actual terms which Mr. White was required to match and it does not appear that Mr. Bletz, Sr. or Mr. Van Guilder responded to this request, the Court does

not find there are no genuine issues of material fact as Mr. White's failure to properly exercise his option. Furthermore, Mr. Bletz, Sr. and Mr. Van Guilder apparently intended to go forward with the sale to Mr. White after written notice was provided that he intended to buy the property. The only issue was the purchase price, which this Court has now ruled upon. Accordingly, summary judgment is not appropriate in this matter. Mr. White must be given an opportunity to match the bona fide offer now that the Court has declared the amount due.

ORDER

Third-party plaintiff Donald Betz, Sr.'s Motion for Summary Judgment, filed October 14, 2008, is DENIED.

Third-party defendant Rodney White's Motion for Partial Summary Judgment as to Count II Declaratory Judgment, filed November 17, 2008, is DENIED.

The Court declares that Rodney White is obligated to pay \$31,000.00 and \$215,000.00 for the two parcels of land in dispute if he wishes to match the terms of the bona fide offer and execute his right of first refusal.

Rodney White has twenty (20) days commencing on March 25, 2009, to abide by the notification requirement of the right of first refusal.

Dated at Rutland, Vermont this _____ day of _____, 2009.

Hon. William Cohen
Superior Court Judge