Ellman v. Spruce Peak Realty, LLC, No. 195-8-08 Lecv (Reiss, J., June 26, 2009)

STATE OF VERMONT
LAMOILLE COUNTY

JONATHAN ELLMAN and BETH ANNE HALPERT, Plaintiffs, vs. SPRUCE PEAK REALTY, LLC, Defendant.	))))))))	LAMOILLE SUPERIOR COURT DOCKET NO. 195-8-08 Lecv

OPINION AND ORDER RE: PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

This matter came before the court on Plaintiffs' Motion for Partial Summary Judgment. Plaintiffs, Jonathan Ellman and Beth Anne Halpert ("Ellman and Halpert"), are represented by Richard Coutant, Esq. Defendant Spruce Peak Realty, LLC ("Spruce Peak"), is represented by Carl Lisman, Esq.

I. Undisputed Facts.

The following facts are undisputed. On July 12, 2005, the parties entered into a purchase and sale agreement (the "P & S Agreement") whereby Ellman and Halpert agreed to purchase from Spruce Peak an undivided one-eighth fee interest in a three bedroom condominium unit in the "Front Four Residences" located at Stowe Mountain Lodge ("SML") in Stowe, Vermont.

Pursuant to the P & S Agreement, Ellman and Halpert were required to place a $61,800 deposit in escrow (the "Deposit"). The P & S Agreement provided them with ten (10) days to review Spruce Peak's public offering statement ("POS") and either cancel the P & S Agreement, or execute and deliver it as well as the Deposit to Spruce Peak:

> Seller shall provide Purchaser with a Vermont Public Offering Statement covering Front Four Residences … the "Public Offering Statement")….

> Upon receipt of the Public Offering Statement … Purchaser shall have ten (10) business days to review the Public Offering Statement and either notify Seller of its dissatisfaction and cancel this Agreement or provide Seller with the executed and dated Purchase Price Notice and Affirmation of Purchase Agreement and POS Deposit. The date of Purchaser's execution of the Purchase Price Notice and Affirmation of Purchase Agreement shall be deemed to be the "Effective Date" hereof. Five (5) days after the Effective Date, this Agreement will become an enforceable contract between the parties on the terms and conditions set forth herein, as supplemented by the Purchase Price Notice and Affirmation of Purchase Agreement.

(Pl.'s Ex. C § (C)(7)(b) at 4).

> The stated intent of the POS is as follows:
>
> This Public Offering Statement is intended to describe the Stowe Mountain Lodge Condominium, the Front Four Residences and the Spruce Peak Master Community in accordance with the Public Offering Statement requirements of the Vermont Common Interest Ownership Act (the "Act").

(Pl.'s Ex. B at 7.). The POS sets forth the following commencement and completion dates for construction:

> **Construction of the Condominium by Declarant.** Declarant intends to commence construction of the Condominium Building and the related improvements in the Summer of 2005, and to complete construction on or about June 30, 2007; however, construction may be completed at an earlier date. The actual commencement and completion dates for construction of Stowe Mountain Lodge Condominium and related improvements are not known at this time, and depend upon a number of factors beyond the control of Declarant.
>
> This schedule is an estimate only and is subject to change from time to time; no assurance can be given that construction will be completed by the estimated date. *Declarant does, however, obligate itself to substantially complete construction of each Lodge Unit such that it is ready for occupancy in accordance with the Federal Interstate Land Sales Full Disclosure Act, no later than two (2) years from the date of execution by a purchaser of a purchase agreement for the purchase of a Lodge Unit*; subject, however, to delays caused by events which are legally recognized as defenses to contract actions under Vermont law based upon impossibility of performance . . . .

Id. § (B)(5) at 11 (emphasis supplied).

The two year period from the date of the execution of the P & S Agreement ended on August 7, 2007. Spruce Peak identifies no "delays caused by events which are legally recognized as defenses to contract actions under Vermont law based upon impossibility of performance…." It is undisputed that Ellman and Halpert's SML condominium unit was not "substantially complete" by August 7, 2007.

The P & S Agreement sets forth a different and more flexible "Completion Date:"

> **Completion Date.** Seller estimates that construction of Stowe Mountain Lodge building and all Front Four Residences improvements will be completed on or about June 30, 2007; however, construction may be completed at an earlier date. Purchaser acknowledges and agrees, however, that this estimate is given for convenience only and is subject to change from time to time for any reason and without creating any liability to Purchaser.

(Pl.'s Ex. C § (C)(20) at 10). The P & S Agreement further provides that: "The closing of the sale of the Fractional Interest to Purchaser (the '<u>Closing</u>') shall be held on a date within fifteen (15) days after the Seller notifies Purchaser in writing that the Front Four Residences project is substantially complete." *Id*. § (C)(8) at 5.

Pursuant to the P & S Agreement, "time is of the essence" and Spruce Peak's default entitles Ellman and Halpert to cancellation of the Agreement and a return of their Deposit:

> **Time is of the Essence/Default/Remedies.** Time is of the essence hereof. Extensions of time for performance of duties and obligations of either party hereunder must be agreed to in writing by each of the parties hereto. Performance under each Section of this Agreement which references a date shall be required absolutely by 5:00 PM . . . on the stated date. If any note or check received as a Deposit hereunder or any payment due hereunder is not paid or honored when due or if any other obligation hereunder is not performed or waived as herein provided, the following remedies shall apply:
>
> . . .
>
> b. If Seller is in default, Purchaser may elect to treat this Agreement as canceled in which case the Deposit and the interest earned thereon and any other payments received from Purchaser hereunder, if any, shall be

returned to Purchaser within ten (10) days of receipt of a notarized written notice of default from the Purchaser to the Seller and Escrow Agent.

Id. § (C)(29)(b) at 12-13.

The P & S Agreement contains a "merger" clause which purports to extinguish all prior or contemporaneous representations:

> **Entire Agreement**. The Recitals set forth at the beginning of this Agreement are incorporated herein by this reference. This Agreement (including any addenda or exhibits attached hereto), and, as of the Effective Date the provisions of the Front Four Governing Instruments, the Condominium Governing Instruments and the Vermont Warranty Deed, contain the entire agreement between the parties with respect to the sale and transfer of the Fractional Interest from Seller to Purchaser. This Agreement supersedes any prior or contemporaneous agreement or representations respecting the subject matter of this Agreement or the rights or duties of either party relating thereto, and any such terms, provisions or representations not expressly set forth in this Agreement, or the Front Four Governing Instruments, are null and void.

Id. § (C)(40) at 14.

In June of 2008, Ellman and Halpert sent a written notice of default addressed to Spruce Peak and the Escrow Agent.[1] Ellman and Halpert alleged violations of the POS and demanded the return of their Deposit. Spruce Peak refused to return it. On August 20, 2008, Spruce Peak sent Ellman and Halpert a letter entitled "Closing Date Notification" which stated that their condominium unit was "very close to completion" and setting a closing date for November 6, 2008. (Pl.'s Ex. H.).

II. Procedural Background.

On August 27, 2008, Ellman and Halpert filed suit against Spruce Peak. Their Complaint alleges that Spruce Peak breached the P & S Agreement by failing to construct their SML condominium unit within the time period specified by the POS. Ellman and Halpert further allege that Spruce Peak is liable to them under Vermont's Consumer Fraud Act.

On September 22, 2008, Spruce Peak filed an Answer, denying Ellman and

[1] There is a disputed issue of fact as to whether Ellman and Halpert sent the notice of default in compliance with the P & S Agreement. Spruce Peak asserts the notice of default went only to its counsel. The notice of default is not notarized. There is a further disputed issue of fact as to whether the notice of default was sent within a reasonable time period.

Halpert's allegations of breach of contract and consumer fraud. Spruce Peak asserted a number of affirmative defenses and counterclaimed that Ellman and Halpert breached the P & S Agreement by failing to close on their unit and pay the balance owed on it. Ellman and Halpert have not filed a reply to Spruce Peak's counterclaim.

In their summary judgment motion, Ellman and Halpert initially sought judgment on all claims in their Complaint. They have since clarified that they seek only partial summary judgment with regard to their breach of contract claim. Spruce Peak contends that summary judgment is not appropriate because it has had an insufficient opportunity for discovery and because the P & S Agreement supersedes the POS. In light of the now ample time for discovery, the court addresses only whether the P & S Agreement supersedes the POS.

III. Standard of Review.

When addressing a motion for summary judgment, the court derives the undisputed facts from the parties' statements of fact under V.R.C.P. 56(c)(2). Facts in the moving party's statement are deemed undisputed when supported by the record and not controverted by facts in the nonmoving party's statement which are also supported by evidence in the record. *Boulton v. CLD Consulting Engineers, Inc.,* 175 Vt. 413, 427 (2003) (citing *Richart v. Jackson,* 171 Vt. 94, 97 (2000)).

"Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, … referred to in the statements required by Rule 56(c)(2), 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). The party moving for summary judgment has the burden of proof, and the opposing party must be given the benefit of all reasonable doubts and inferences in determining whether a genuine issue of material facts exists. *Price v. Leland,* 149 Vt. 518, 521 (1988). However, summary judgment is mandated where, after an adequate time for discovery, a party fails to make a showing sufficient to establish the existence of an element essential to its case and on which it has the burden of proof at trial. *Poplaski v. Lamphere,* 152 Vt. 251, 254-55 (1989). If the party with the burden of proof "can offer nothing in support of the allegations in his [or her] pleadings when the moving party has shown that [its] position is supported by evidence, then judgment should be entered without the time and expense of trial." Reporter's Notes, V.R.C.P. 56.

IV. Conclusions of Law.

In this case, Spruce Peak contends that the merger clause negates Ellman and Halpert's ability to rely on the construction dates set forth in the POS and renders the more flexible dates in the P & S Agreement operative. At best, Spruce Peak contends that Ellman and Halpert may be able to create a genuine issue of material fact as to

whether the parties intended the representations in the POS to survive the merger clause. In support of this argument, Spruce Peak cites *Hoeker v. Department of Social and Rehabilitation Services*, 171 Vt. 620 (2000) (mem.). In *Hoeker*, the Vermont Supreme Court followed the Restatement of Contracts in holding that, "[t]he merger clause confirms that the contract is 'adopted by the parties as a *complete and exclusive* statement of the terms of the agreement.'" *Id*. at 621 (quoting Restatement (Second) of Contracts § 210 (1981)). The corresponding section of the Restatement states, "[w]hether a writing has been adopted as an integrated agreement is a question of fact to be determined in accordance with all relevant evidence." Restatement (Second) of Contracts § 209 cmt. c (1981); see also *Soursby v. Hawkins*, 763 P.2d 725 (Or. 1988) ("We hold that there are issues of fact whether the disclaimer "merged" into the deed and whether the plaintiffs' reliance on the representation was reasonable."). Notably, Spruce Peak does not cite any authority for holding that a merger clause may be invoked to extinguish the mandatory provisions of a public offering statement issued pursuant to a consumer protection act.

Ellman and Halpert counter that the POS is enforceable because it is specifically referenced in the P & S Agreement and because the representations set forth in the POS cannot be waived by the declarant under the Vermont Common Interest Ownership Act, Title 27A V.S.A. (the "VCIOA" or the "Act"). The court agrees with both of these contentions.

The VCIOA, which is based on the Uniform Common Interest Ownership Act of 1994, provides that:

> Except as expressly provided in this title, provisions of this title may not be varied by agreement, and rights conferred by this title may not be waived. A declarant may not act under a power of attorney or use any other device to evade the limitations or prohibitions of this title or the declaration.

27A V.S.A. § 1-104. According to its plain language, the Act thus unequivocally prohibits the use of a contractual provision to alter its requirements. The Official Comment underscores this interpretation by noting that Section 1-104 "adopts the approach of prohibiting variation by agreement except in those cases where it is expressly permitted by the terms of the Act itself." Official Comment 1, 27A V.S.A. § 1-104. Furthermore,

> except for certain waivers of implied warranties of quality (see Section 4-115) and certain exemptions from public offering statement and resale certificate requirements (see subsection (b)), no express waiver of the protections of this article with respect to the purchasers of residential units is permitted by this subsection. *Accordingly, by operation of Section 1-104, the rights provided by this article may not be waived in the case of residential purchasers.*

Official Comment 1, 27A V.S.A. § 4-101 (emphasis supplied).

Spruce Peak's reliance upon the merger clause in the P & S Agreement constitutes a de facto claim that such clause waives the purchaser's rights set forth in the POS. The court concludes, as a matter of law, that under the VCIOA, a merger clause may not be used for this purpose. This conclusion is consistent with the Act's remedial purpose and furthers its objectives:

> The best 'consumer protection' that the law can provide to any purchaser is to insure that he has an opportunity to acquire an understanding of the nature of the products which he is purchasing. Such a result is difficult to achieve, however, in the case of the common interest community purchaser because of the complex nature of the bundle of rights and obligations which each unit owner obtains. For this reason, the Act, adopting the approach of many so-called 'second generation' condominium statutes, sets forth a lengthy list of information which must be provided to each purchaser before he contracts for a unit. This list includes a number of important matters not typically required in public offering statements under existing law. The requirement for providing the public offering statement … provides purchasers with cancellation rights and imposes civil penalties upon declarants not complying with the public offering statement requirements of the Act.

Official Comment, 1, 27A V.S.A. § 4-103. A construction completion date is among the information required to be included in a POS. See 27A V.S.A. § 4-103(a)(2). The merger clause in the P & S Agreement, insofar as it pertains to information required by the Act to be set forth in the POS, is therefore unenforceable as a matter of law.[2]

The court next turns to the question of whether a violation of the POS constitutes a violation of the P & S Agreement. The POS is specifically referenced in the P & S Agreement and thus its provisions are incorporated therein. See *Newton v. Smith Motors Inc.*, 122 Vt. 409, 412 (1961) ("It is of course well established that a contract may be reached with reference to another writing, and the other document, or so much of it as is referred to, will be interpreted as a part of the main instrument.").

The VCIOA required Spruce Peak to provide Ellman and Halpert with a POS "conforming to the requirements of . . . this title before offering any interest in a unit to the public." 27A V.S.A.§ 4-102(a). The Act mandates that the POS contain the following information:

[2] Cf. Vermont's Condominium Ownership Act, 27 V.S.A. § 1362 ("No lease or rental agreement, oral or written, shall contain any provision by which the tenant or leaseholder prospectively waives any of his or her rights under this subchapter. Any such waiver shall be deemed contrary to public policy and shall be unenforceable and void.").

> [A] public offering statement shall contain or fully and accurately disclose all the following: . . . (2) A general description of the common interest community, including to the extent known, . . . declarant's schedule of commencement and completion of construction of buildings. . . .

Id. § 4-103(a)(2). According to the Official Comment, "[t]he estimated schedule of commencement and completion of construction dates provides a standard for judging whether a declarant has complied with those requirements." Official Comment 2, 27A V.S.A. § 4-103. The Act imposes upon the declarant a duty to "promptly amend the public offering statement to report any material change in the information required by the section." Id. § 4-103(c). Accordingly, had Spruce Peak needed to adjust the completion dates set forth in the POS, it had an obligation to do so promptly. It is undisputed that Spruce Peak did not adjust the dates set forth in the POS. It is further undisputed that it failed to complete construction in accordance with the completion dates set forth therein. Accordingly, Spruce Peak breached its obligations under both the POS and the Act.

In order to further find that a breach of the POS constitutes a breach of the P & S Agreement, the court must next determine whether there is an appropriate nexus between a violation of the Act, Ellman and Halpert's reliance upon the representations set forth in the POS, and their subsequent notice of default. A Connecticut appellate decision is instructive.

In *Fruin v. Colonnade One at Old Greenwich Ltd. Partnerhship*, 662 A.2d 129 (Conn. App. Ct. 1995), the plaintiff purchased a yet-to-be-constructed condominium from defendant and tendered a down payment. After defendant did not complete construction of the condominium on time, plaintiff attempted to rescind the contract. Specifically, in his complaint, plaintiff alleged that:

> (2) due to variances in the initial public offering statement and final recorded declaration of condominium, the defendants did not construct the unit for which the plaintiff contracted, (3) the defendants violated the CIOA [common interest ownership act], and (4) there were material variances between the recorded declaration of condominium and the copy set forth in the public offering statement.

Id. at 131 n.1. The defendant in *Fruin*, like Spruce Peak here, counterclaimed for breach of contract when the plaintiff failed to close on the condominium when it was completed.

Connecticut has adopted a common interest ownership act largely modeled on the uniform act adopted by Vermont. In addressing the plaintiff's claim, the *Fruin* court framed the issue as "whether violations of CIOA are alone sufficient to excuse a purchaser from performance, or whether there must be a nexus between the claimed

violations of CIOA and the plaintiff's breach of the purchase agreement. We hold that such a nexus must exist . . . ." *Id*. at 134. In *Fruin*, the plaintiff brought the alleged statutory violations to the defendant's attention after plaintiff breached the contract. *Id*. at 136. The plaintiff stated that the sole reason for his default was that he changed his mind and that the variances between the offering statement and the declaration of condominium had no effect on his decision to default. *Id*. The *Fruin* court observed that if the proper nexus existed, it would have ruled in plaintiff's favor:

> This is not a case in which the plaintiff brought the alleged CIOA violations to the defendants' attention prior to a closing date or a case where the plaintiff*, prior to his breach of the contract*, claimed violations concerning the quality, condition, or appurtenances of the unit bargained for, as, for example, the use of a particular parking space, or a physical change in the unit. Whether there actually were any violations of CIOA in this case is irrelevant because the plaintiff did not assert these violations until *after* he had breached the agreement by refusing to close on the property. Had the plaintiff been in breach by anticipatory repudiation of his contract, which is not the case here, the defendants would have had the choice either of correcting the alleged CIOA violations or of rescinding the contract.

Id. at 136.

In the instant case, Ellman and Halpert relied upon the construction completion date set forth in the POS as they were entitled to do under the Act. See Official Comment 2, 27A V.S.A. § 4-103 (The public offering statement's "estimated schedule of commencement and completion of construction dates provides a standard for judging whether a declarant has complied with those requirements."); see also *Coastal Group v. Planned Real Estate Dev. Section, Dep't of Cmty. Affairs*, 630 A.2d 814, 815 (N.J. Super. Ct. App. Div. 1993) ("While the Purchase Agreement refers to an estimated closing date, the Public Offering Statement makes clear that the date is, in fact, intended to be the controlling date for purposes of the purchaser's contractual obligation to close."). They notified Spruce Peak of its failure to adhere to the POS construction deadlines in their notice of default well in advance of any claimed default by them. The instant case thus presents the required nexus described in *Fruin*. Accordingly, the court concludes that, in this case, Spruce Peak breached the P & S Agreement when it failed to complete construction in accordance with the POS.

V. Disputed Issues of Fact.

There remains a disputed issue of fact as to whether Ellman and Halpert complied with the P & S Agreement's provision regarding the sending of the notice of default. The notice in question appears to be directed to the proper parties, but it is not notarized. Spruce Peak asserts that it was only sent to its counsel. There is a further issue of fact

regarding whether Spruce Peak has waived strict compliance with the notice provisions.

Spruce Peak further contends that there is a genuine issue of material fact as to whether Ellman and Halpert are entitled to rescission in light of the delay between Spruce Peak's violation of the POS and their notice of default. See *Sterrett Enterprises v. Yankee Chapman, Inc.,* 146 Vt. 112, 115 (1985) ("The right of rescission must be exercised within a reasonable time after discovery of the grounds therefore."); *Evarts v. Beaton,* 113 Vt. 151, 154 (1943) ("It is stated that this right of rescission must be exercised within a reasonable time after the discovery of the fraud."); *Brown v. Aitken,* 88 Vt. 148, 153 (1914) ("one entitled to rescind must do so within a reasonable time."). What is "reasonable" in a particular case "is usually a question of fact." *Brown,* 88 Vt. at 153; see also *Spencer v. Lyman Falls Power Co.*, 109 Vt. 294, 301 (1938) ("What is a reasonable time depends upon the circumstances and is ordinarily, at least, a question of fact for the trier of the cause."); *Farmers' Feed & Grain Co. v. Longway*, 103 Vt. 327, 329 (1931) ("What is a reasonable time in a given case depends upon the circumstances, and is usually a question of fact . . . ."); *Brainard v. Van Dyke*, 71 Vt. 359, 365 (1899)("In this State, what is a reasonable time in which to repudiate a contract induced by fraud or duress, has usually been held to be a question of fact to be submitted to the jury or found by the trier of the issues of fact.").

Here, it is undisputed that Ellman and Halpert waited almost a year after Spruce Peak's failure to complete construction as required by the POS before sending their notice of default. The court finds that this time period is sufficient to preclude the court from holding, as a matter of law, that their alleged delay was "reasonable." This issue of fact must thus await an evidentiary hearing.

For the reasons stated above, Plaintiffs' Motion for Partial Summary Judgment is hereby GRANTED in part insofar as the court has concluded that: (1) the merger clause contained in the P & S Agreement is unenforceable to the extent it purports to supersede or negate information required by the VCIOA to be set forth in the POS; (2) the P & S Agreement incorporates the POS; (3) Spruce Peak breached the P & S Agreement when it failed to complete construction of Ellman and Halpert's SML condominium unit by the deadline set forth in the POS; and (4) Ellman and Halpert have established the proper nexus between Spruce Peak's violation of the POS, their reliance, and their notice of default.

This matter shall be set for a status conference to determine the further proceedings to be scheduled before the court.

SO ORDERED.

Dated at Hyde Park, Vermont, this __ day of June, 2009.

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Hon. Christina Reiss
Lamoille Superior Court