

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

VILLAR MANAGEMENT, LLC,	:	OCTOBER TERM 2007
Plaintiff,	:	
	:	No. 1319
v.	:	
	:	
VILLA DEVELOPMENT, LLC and	:	COMMERCE PROGRAM
LAURENCE ANDREW MESTER,	:	
Defendants.	:	Control Nos: 121163, 121164

ORDER

AND NOW, this 10th day of June, 2008, upon consideration of the Preliminary Objections of Defendants Laurence A. Mester (“Mester”) and Villa Development, LLC (“Villa”), the response thereto, it hereby is **ORDERED** that said Preliminary Objections are **OVERRULED in part** and **SUSTAINED in part**:

- Defendant Mester’s Preliminary Objection that the Court lacks personal jurisdiction is **OVERRULED**;
- Defendant Villa’s Preliminary Objection that Plaintiff elected its sole remedy under the Agreement of Sale is **OVERRULED**;
- Defendants’ Preliminary Objection to Count IV is **OVERRULED**;
- Defendants’ Preliminary Objection to Counts II and V are **OVERRULED**;
- Defendants’ Preliminary Objection to strike punitive damages is **OVERRULED**;
- Defendants’ Preliminary Objection to strike plaintiff’s claim for attorney’s fees and costs is **SUSTAINED**.

BY THE COURT:

MARK I. BERNSTEIN, J.

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OPINION

Presently before the Court are the preliminary objections of defendants Laurence A. Mester (“Mester”) and Villa Development, LLC (“Villa”) to plaintiff Villar Management, LLC’s Amended Complaint. The preliminary objections are sustained in part and overruled in part.

On April 5, 2006, plaintiff and defendant Villa entered into an Agreement of Sale in which Villa agreed to sell to plaintiff the property located at 800-802 North 2nd Street, Philadelphia, Pennsylvania (the “Property”) for the purchase price of \$1,850,000.00. Simultaneously with the execution of the Agreement of Sale, plaintiff and Villa entered into an agreement for the conversion of the Property into a condominium. Pursuant to the Agreement of Sale, plaintiff deposited \$100,000.00 with Villa. As part of this security deposit, \$75,000.00 was to be held in an interest-bearing escrow account by defendant Mester as escrowee, and \$25,000.00 was to be turned over to Villa to compensate Villa for providing additional upgrades requested by plaintiff.

Plaintiff’s obligation to close under the Agreement of Sale was conditioned upon plaintiff’s ability to secure a mortgage commitment. In addition, Villa was required to

obtain and deliver a Certificate of Occupancy prior to closing. Plaintiff alleges that in the interim, unbeknownst to plaintiff, Villa sold one or more condominium units at the Property to a third party, thereby frustrating plaintiff's ability to secure full and specific performance under the Agreement of Sale. Plaintiff further alleges that despite plaintiff's requests for information, Villa fraudulently concealed from plaintiff the fact that it had secured the Certificate of Occupancy. On March 15, 2007, after Villa had sold one or more condominium units in the Property, Villa tendered a check to plaintiff for \$75,000.00. Plaintiff contends that this amount did not constitute a refund of the full security deposit because it neither included \$25,000.00 of plaintiff's original deposit, nor interest for the eleven months that the deposit was in defendants' possession. Plaintiff negotiated the \$75,000.00 check.

Plaintiff has brought the following claims against defendants in its Amended Complaint: breach of contract against Villa (Count I); unjust enrichment against Villa (Count II); specific performance and constructive trust against Villa (Count III); fraudulent misrepresentation against Villa and Mester (Count IV); and unjust enrichment against Villa and Mester (Count V). Villa and Mester each filed Preliminary Objections.

I. Defendant Mester's Preliminary Objection that the Court Lacks Personal Jurisdiction is Overruled.

First, Mester contends that the Court lacks personal jurisdiction because plaintiff did not perfect service of the Complaint upon him. The process server's Affidavit of Service states that the process server served the Complaint upon Mester by "hand delivery to Lee Churchill, Receptionist at the Mester Law Firm." Mester asserts that the receptionist was not authorized to accept service of process on his behalf. In support of his position, Mester submitted an affidavit in which he states the following: he is the sole

member of the Mester Law Firm, LLC; his law firm does not own the real property in his office building; his law firm rents a single office at a building and shares the building with two other law firms (Grossman Law Firm, P.C. and Fine & Staud) and seven solo practitioners; the receptionist is not an employee of the Mester Law Firm, nor does she receive any compensation from the Mester Law Firm; and the receptionist is not an agent or person in charge of the Mester Law Firm and is not authorized to accept service of process on behalf of Mester. He further avers that he believes that the receptionist did not represent to the process server that she was the person in charge of the Mester Law Firm.

Plaintiff submitted an affidavit from the process server, Regina Cipriani. Capriani's affidavit states that she advised the receptionist, Lee Churchill, that she had papers to serve upon Mester and was advised that Mester was not in. The affidavit further states that the receptionist indicated that she was the receptionist for everyone in the suite.

Plaintiff also submitted an affidavit from plaintiff's counsel, Richard A. Weisbord, in which Weisbord avers that he telephoned the law firm of Fine & Staud and asked to speak with Ms. Churchill. He states that Ms. Churchill advised him that she is employed by Fine & Staud, but is in charge of receiving all incoming mail packages and deliveries for everyone in the building, including Mester. Weisbord further avers that although Mester seeks to disassociate himself from any other individual or personnel in the building, Mester in fact shares a common fax and/or phone line with Fine & Staud and the Grossman Law Firm.

Pa. R.C.P. 402(a)(2)(iii) permits service of original process upon individuals “by handing a copy...at any office or usual place of business of the defendant to his agent or to the person for the time being in charge thereof.”¹ Pennsylvania courts interpreting the phrase “person for the time being in charge” have held that there must be a sufficient connection between the person served and the defendant to demonstrate that service was reasonably calculated to give the defendant notice of the action against it.²

The process server averred that the receptionist represented that she could accept the papers for Mr. Mester, as she was the receptionist for everyone in the suite. The receptionist was the person in charge at the time of service and the only one to receive documents. Mester’s preliminary objection is overruled.

II. Defendant Villa’s Preliminary Objection that Plaintiff’s Amended Complaint Should be Dismissed Because Plaintiff Elected Its Sole Remedy is Overruled.

Villa argues that plaintiff’s Amended Complaint fails to state a cause of action against Villa because plaintiff elected its sole and exclusive remedy under the Agreement of Sale when it accepted a return of the deposit. In support of its argument, Villa cites Paragraph 7.02 of the Agreement of Sale, which states:

Seller’s Default. If the Seller violates or materially fails to fulfill or perform any of the terms or conditions of this Agreement within the time or times provided herein, Buyer is entitled as its sole and exclusive remedies to either (a) the return of the Deposit; or (b) sue for specific performance and apply the Deposit towards the Purchase Price. In no event shall Buyer be entitled to recover money damages against Seller or to compel

¹ Pa. R.C.P. 424(2) (Service Upon Corporations and Similar Entities) is substantially similar to Pa. R.C.P. 402(a)(2)(iii). Pa. R.C.P. 424(2) permits service of original process upon corporations and similar entities “by handing a copy to...the manager, clerk or other person for the time being in charge of any regular place of business or activity of the corporation or similar entity.”

² In Cintas Corp. v. Lee’s Cleaning Services, 549 Pa. 84, 700 A.2d 915 (1997), the Pennsylvania Supreme Court held that where a receptionist expressly identified herself as “the person in charge” at the time of service, service was proper.

Seller to spend any sums of money in excess of those specifically required under this Agreement.

Villa contends that plaintiff exercised one of its two exclusive remedies under the Agreement of Sale when it accepted a refund of the deposit of \$75,000.00. Plaintiff, however, contends that its acceptance of the \$75,000.00 was not an election of a remedy since the \$75,000.00 did not constitute the full amount of the deposit that it was entitled to under the Agreement of Sale. Plaintiff states that it was simply attempting to mitigate its damages when it accepted the \$75,000.00. Plaintiff further asserts that Villa effectively precluded plaintiff from pursuing the other remedy of specific performance when Villa sold one or more of the condominium units to a third party.

In considering preliminary objections, all material facts set forth in the complaint as well as all inferences reasonably deducible therefrom are admitted as true for the purpose of this review. The question presented by a demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible. Any doubts as to whether a demurrer should be sustained shall be resolved in favor of overruling it.³ “The test on preliminary objections is whether it is clear and free from doubt from all the facts pleaded that the pleader will be unable to prove facts legally sufficient to establish his right to relief.”⁴

The return of the \$75,000.00 was not a return of the entire deposit. Villa’s preliminary objection is overruled.

III. Defendants’ Preliminary Objection to Count IV of Plaintiff’s Amended Complaint for Fraudulent Misrepresentation for Failure to Conform to Pa. R.C.P. 1019(b) is Sustained.

³ Employers Ins. of Wausau v. Penn. Dept. of Trans., 581 Pa. 381, 388, 865 A.2d 825, 829, n.5 (2005) (citations omitted).

⁴ Bourke v. Kazaras, 746 A.2d 642, 643 (Pa. Super. 2000).

Defendants contend that Count IV of plaintiff's Amended Complaint fails to set forth with particularity allegations of fact to support a claim fraudulent misrepresentation. Count IV alleges that Villa "fraudulently made material misrepresentations through its conduct and that of its agent Laurence Andrew Mester" and that "[p]laintiff reasonably relied upon the representations of the defendants."⁵ Count IV further alleges that "[d]efendants, by insisting that plaintiff was still bound by the Agreement of Sale and by retaining plaintiff's security deposit in their control while marketing and selling condominium units in violation of the Agreement of Sale, perpetuated a fraud upon the plaintiff."⁶

The elements of fraudulent misrepresentation are: (1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) resulting injury proximately caused by the reliance.⁷ Pursuant to Pa. R.C.P. 1019(b), averments of fraud must be pled with particularity.⁸

The Court finds that plaintiff has set forth sufficient facts to plead fraud. Accordingly, defendants' preliminary objection is overruled.

IV. Defendants' Preliminary Objection that Plaintiff's Amended Complaint Fails to State a Cause of Action for Unjust Enrichment is Overruled.

Counts II and V of plaintiff's Amended Complaint purport to state claims for unjust enrichment. In Count II, plaintiff alleges that Villa used plaintiff's \$25,000.00 security deposit to upgrade the Property, but retained the benefit of the upgrades for itself

⁵ See Amended Complaint, at ¶¶ 55-56.

⁶ *Id.* at ¶ 57.

⁷ *Porreco v. Porreco*, 571 Pa. 61, 69, 811 A.2d 566, 570 (2002).

⁸ *McClellan v. Health Maintenance Org. of Pa.*, 413 Pa. Super. 128, 143, 604 A.2d 1053, 1060 (1992).

by selling the condominium units and retaining all proceeds. In Count V, plaintiff alleges that Villa and Mester failed to hold the security deposit in an interest-bearing account as per the Agreement of Sale and thus, unjustly deprived plaintiff of its entitlement to interest on the deposit.

The elements of unjust enrichment include: “benefits conferred on defendant by plaintiff, appreciation of such benefits by defendant, and acceptance and retention of such benefits under such circumstances that it would be inequitable for defendant to retain the benefit without payment of value.”⁹ Defendants argue that because there is a written contract, the Agreement of Sale, the doctrine of unjust enrichment is not applicable. Although it is true that a plaintiff cannot recover on an unjust enrichment claim that is based upon a breach of a written contract,¹⁰ Pennsylvania Civil Procedure Rule 1020 allows a plaintiff to plead causes of action in the alternative. A plaintiff may properly plead causes of action for breach of contract and unjust enrichment in the same complaint. Defendants’ preliminary objection is overruled.

V. Defendants’ Preliminary Objection to Strike the Claim for Punitive Damages in Count IV is Sustained.

Punitive damages may be awarded for conduct that is outrageous, because of the defendant’s evil motive or his reckless indifference to the rights of others.¹¹ To award punitive damages, the defendant’s conduct must be “malicious, wanton, reckless, willful, or oppressive.”¹² A plaintiff cannot recover punitive damages for an action solely

⁹ *Schenck v. K.E. David, Ltd.*, 446 Pa. Super. 94, 97, 666 A.2d 327, 328 (1995).

¹⁰ *Birchwood Lakes Community Ass’n v. Comis*, 296 Pa. Super. 77, 86, 442 A.2d 304, 308 (1982).

¹¹ *Feld v. Merriam*, 506 Pa. 383, 395, 485 A.2d 742, 747 (1984), citing Restatement (Second) Torts § 908(2).

¹² *Id.* at 747-48.

sounding in breach of contract.¹³ However, plaintiff herein claims a fraudulent misrepresentation. Therefore, defendants' preliminary objection regarding punitive damages is overruled.

VI. Defendants' Preliminary Objection to Strike Plaintiff's Claim for Attorney's Fees and Costs is Sustained.

Under Pennsylvania law, "a litigant cannot recover counsel fees from an adverse party unless there is express statutory authorization, a clear agreement of the parties or some other established exception."¹⁴ As the Amended Complaint lacks any such allegations, plaintiff's request for attorney's fees and costs are stricken.

CONCLUSION

For the foregoing reasons, defendants' preliminary objections are overruled in part and sustained in part.

BY THE COURT,

MARK I. BERNSTEIN, J.

¹³ DiGregorio v. Keystone Health Plan East, 840 A.2d 361, 370 (Pa. Super. 2003).

¹⁴ Mosaica Acad. Charter Sch. v. Commonwealth, 572 Pa. 191, 206-07, 813 A.2d 813, 822 (2002).