

a Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. On June 10, 1997, Plaintiffs answered Malone's Motion and filed a Cross-Motion for Summary Judgment. On June 11, 1997, after a hearing in open court, both Motions were denied by the Court and a non-jury trial commenced immediately thereafter.² From the testimony taken at the trial, I make the following:

FINDINGS OF FACT

1. Plaintiffs Robert I. Sharpless and Donna S. Sharpless reside in Avondale, Pennsylvania, and are the owners of an unimproved tract of land located in West Marlborough Township, Chester County, Pennsylvania, identified as Chester County Tax Parcel #48-9-7.2. (N.T. 6/11/97, p. 43).³

2. On September 25, 1986, the Plaintiffs entered into an Agreement of Sale with Defendant Malone, a resident of Wilmington, Delaware. (N.T. 6/11/97, pp. 43-44; 72).

3. The Agreement of Sale was contingent upon Malone's ability to get governmental approvals for the subdivision and development of the property. See Agreement of Sale, ¶ 5.B.

4. At the time the parties entered into the Agreement, of Sale, the Plaintiffs were experiencing financial difficulties arising out of the failure of their mushroom business. (N.T.

² Upon agreement of the parties, Malone withdrew his counterclaims against Plaintiffs. The parties also agreed to have a non-jury trial on Plaintiffs' Declaratory Judgment action. (N.T. 6/11/97, p.3).

³ N.T. refers to Notes of Testimony.

6/11/97, p. 44). Plaintiffs owed money to a number of creditors, including \$30,000 to Frezzo Brothers, Inc., ("Frezzo Brothers"), a former supplier to their mushroom business. Id. Frezzo Brothers also had attached a lien to the subject property. Id.

5. The Plaintiffs were concerned that Frezzo Brothers would execute on the property before Malone received subdivision approval. As a result, Malone was required to deposit money in escrow to satisfy the liens placed on the subject property. (N.T. 6/11/97, pp. 45-46).

6. Specifically, Malone was required to deposit \$15,000 by November 15, 1986; another \$15,000 by March 15, 1987; and to pay all balances in full to remove any liens by July 15, 1987. See Agreement of Sale, ¶ C.

7. Malone failed to make the required payment on or before November 15, 1986 and the Plaintiffs declared him in default. However, Malone's default was later cured by a payment on December 10, 1986. See Amendment to Agreement of Sale Dated September 25, 1986.

8. On January 5, 1987, the Board of Supervisors for West Marlborough Township rejected Malone's preliminary plan, filed on October 6, 1986, at its regularly scheduled meeting. See Malone v. West Marlborough Twp., 603 A.2d 708, 709 (Pa. Commw. Ct. 1992).

9. Malone failed to make the March 15, 1987 payment, resulting in another declaration of default by Plaintiffs. (N.T. 6/11/97, p. 47).

10. Several months later, on June 17, 1987, Malone filed a lawsuit against Plaintiffs arguing that they breached the Agreement of Sale by placing him in default. (N.T. 6/11/97, p. 48). In his suit, Malone sought specific performance of the Agreement of Sale. Id.

11. On October 7, 1987 the Court of Common Pleas for Chester County, Pennsylvania, entered an order directing the parties to perform in accordance with the Agreement of Sale dated September 25, 1986. See Malone v. Sharpless, No. 87-04603, Chester County C.C.P., Oct. 7, 1987 (unpublished opinion).

12. Malone then filed another plan which he designated as a "final plan of subdivision." This plan was also rejected by the Board of Supervisors. Id. at 710.

13. After being denied subdivision approval, Malone filed a statutory appeal and two separate mandamus actions which would deem approved the subdivision plans he submitted to the West Marlborough Township Board of Supervisors. (N.T. 6/11/97, p. 29).

14. Malone's efforts to get deemed approval of his subdivision plan proved unsuccessful and, in a decision dated February 13, 1992, the Pennsylvania Commonwealth Court held that Malone was required "to commence his subdivision plans anew." See Malone, 603 A.2d at 713.

15. Rather than filing his subdivision plans anew, Malone commenced two additional mandamus actions, one of which is identical to the mandamus action previously disposed of by the

Commonwealth Court. (N.T. 6/11/97, p. 30).

16. In the new litigation, Malone has failed to take any docketed action for approximately one year and eleven months. (N.T. 6/11/97 pp. 31-33; Docket Entries, Attached as Exhibit "D" to Plaintiffs' Cross-Motion for Summary Judgment). In addition, Malone failed to respond to the Township's discovery requests for approximately two (2) years. (N.T. 6/11/97, p. 41).

17. The Agreement of Sale provides that "time [is] of the essence," and further provides that should Malone fail to make additional payments as specified in paragraph 3 of the Agreement, or violate any other term or condition of the Agreement, then the Agreement shall be null and void. See Agreement of Sale, ¶ 14.

18. On March 8, 1990, Robert O'Neill ("O'Neill"), a builder, loaned Malone \$33,000 so that Malone could pay off the Frezzo debt. (N.T. 6/11/97, p. 70). Frezzo Brothers was subsequently paid in full, however, the lien on the subject property was assigned to O'Neill and still exists. Id.

19. Malone had paid some interest on the loan to O'Neill but ceased making payments in September of 1990. (N.T. 6/11/97, p. 63).

20. As a result of not being paid on the loan to Malone, O'Neill intends to execute his lien against the subject property. (N.T. 6/11/97, p. 65).

21. As of June 11, 1997, the date of the trial in this matter, not all of the liens on the subject property have been

satisfied as required under the Agreement of Sale. Although Frezzo Brothers was paid in full, the lien was assigned to O'Neill and continues to exist and is accruing interest. (N.T. 6/11/97, p. 10).

22. Plaintiffs continue to pay taxes on the property and to care for the property. (N.T. 6/11/97, p. 57).

CONCLUSIONS OF LAW

1. This Court has jurisdiction of this matter pursuant to 28 U.S.C. § 1332 in that the parties are of diverse citizenship and the amount in controversy is in excess of \$75,000.

2. Under the Agreement of Sale, Malone is obligated to use due diligence to remove contingencies. Jamison v. Concepts Plus, Inc. 552 A.2d 265 (Pa. Super., 1988).

3. "Where no time is fixed for performance of an Agreement or contract, performance is required within a reasonable time." Reagan v. D & D Builders, Inc., 419 A.2d 700, 702 (Pa. Super. 1980) (quoting L.C.S. Colliery, Inc. v. Globe Coal Co., 84 A.2d 776 (Pa. 1951)).

4. Reasonableness is a question for the fact-finder and determined by consideration of all existing circumstances. Reagan, 419 A.2d at 702.

5. Plaintiffs have done nothing to prevent Malone from applying to West Marlborough Township for subdivision approval. Malone has had approximately eleven (11) years in which to obtain subdivision approval and has failed to do so. Under the

circumstances, this is an unreasonable amount of time. As a result, Malone is in Default under the Agreement of Sale.

6. Malone has also failed to remove all liens on the subject property by July 15, 1987 as required under the Agreement of Sale. Specifically, the Frezzo Brothers' lien which was assigned to O'Neill. As a result, Malone is in Default under the Agreement of Sale.

Based on the foregoing, I shall enter the following Order:

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

ROBERT I. SHARPLESS and	:	CIVIL ACTION
DONNA S. SHARPLESS,	:	
	:	
Plaintiffs,	:	NO. 96-5100
	:	
v.	:	
	:	
ROBERT L. MALONE,	:	
	:	
Defendant.	:	

O R D E R

AND NOW, this 11th day of July, 1997, it is hereby ORDERED, ADJUDGED and DECREED that:

1. The Agreement of Sale dated September 25, 1986, and all amendments thereto between the above-captioned parties are declared NULL AND VOID.

2. Any and all rights which Defendant Malone may have had under the Agreement of Sale, or as equitable owner of the subject property in West Marlborough Township, Chester County, Pennsylvania, identified as Chester County Tax Parcel #48-9-7.2, are terminated.

BY THE COURT:

Robert F. Kelly, J.