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

CHARLES E. MOSCONY and	:	**CIVIL ACTION**
PATRICIA A. MOSCONY	:	
	:	
v.	:	
	:	
QUAKER FARMS, LP, QUAKER	:	
DEVELOPMENT CORP. and	:	
EDWARD W. WEINGARTNER, JR.	:	**NO. 00-2285**

MEMORANDUM ORDER

Presently before the court is plaintiffs' Motion for a Preliminary Injunction in this construction contract dispute. Defendants have asked that the motion be summarily denied. The parties' dispute arises from an agreement for the sale of land and the construction of a house on that land. The agreement was executed in Pennsylvania and contains a Pennsylvania choice of law provision.

Defendants are engaged in the business of real estate development. On May 14, 2000 plaintiffs and defendants entered an "Agreement of Sale" whereby plaintiffs agreed to purchase from defendants a parcel of land in a residential subdivision upon which defendants agreed to construct a residence (the "Agreement"). The lot that formed the subject of the Agreement was #1105 Whispering Drive in Chester County, Pennsylvania. The Agreement incorporated by reference a Floor Plan and a list of "Optional Extras" or optional features, with corresponding prices, that plaintiffs could later choose to incorporate by

submitting a written authorization along with payment. At the time of this action, plaintiffs had made several payments pursuant to the Agreement, including a payment of $19,300 for optional extras they had selected.

Plaintiffs allege that the parties had agreed, apparently orally, to change the lot constituting the subject matter of the Agreement from #1105 Whispering Drive ("lot #1105") to #905 Whispering Drive ("lot #905"). Plaintiffs allege that after selecting options which were accepted by defendants, they have refused to complete the house or convey title unless plaintiffs paid amounts for the options in excess of those agreed upon. Plaintiffs allege that only the frame of the house has been completed. Plaintiffs claim that they are equitable owners of the property and that the market value now exceeds the contract price by $110,000.

Plaintiffs seek relief under the Interstate Land Sales Full Disclosure Act, 15 U.S.C. §§ 1701 et seq. ("ILSFDA"), as well as damages for breach of contract and treble damages under Pennsylvania's Unfair Trade Practices and Consumer Protection Law, 73 P.S. §§201-1 et seq.. In their preliminary injunction motion, they seek to compel defendants either to complete the house or to protect the frame from the elements during the pendency of the action.

Defendants avers that plaintiffs have attempted unilaterally to modify the Agreement to substitute lot #905 for lot #1105. They point to a clause in the Agreement which requires that any contract modification be in writing and note that plaintiffs have made no showing or allegation of any written modification. Defendants maintain that plaintiffs breached the Agreement by refusing to accept lot #1105 and insisting on a different parcel of land than that specified in the Agreement. Defendants assert that plaintiffs thus have no legal right or interest in lot #905 on which any relief could be predicated.

To obtain a preliminary injunction, a plaintiff must show a likelihood of success on the merits; that he will suffer irreparable harm if the injunction is denied; that granting the relief will not result in greater harm to the defendant; and, that granting the relief is consistent with the public interest. See Nutrasweet Co. v. Vit-Mar Enters., Inc., 176 F.3d 151, 153 (3d Cir. 1999); Allegheny Energy, Inc. v. DQE, Inc., 171 F.3d 153, 158 (3d Cir. 1999); Maldonado v. Houstoun, 157 F.3d, 179, 184 (3d Cir. 1998), cert. denied, 119 S. Ct. 1802 (1999); Pappan Enters., Inc. v. Hardee's Food Systems, Inc., 143 F.3d 800, 803 (3d Cir. 1998); Gerardi v. Pelullo, 16 F.3d 1363, 1373 (3d Cir. 1994). The issuance of a preliminary injunction is an "extraordinary remedy" which should be confined to "limited circumstances." Instant Air Freight Co. v. C.F. Air Freight,

Inc., 882 F.2d 797, 800 (3d Cir. 1989). A preliminary injunction should be granted only if the plaintiff demonstrates that all four factors favor such relief. See AT&T v. Winback & Conserve Program, Inc., 42 F.3d 1421, 1427 (3d Cir. 1994); Opticians Association of America v. Independent Opticians of America, 920 F.2d 187, 192 (3d Cir. 1990).

The essential function of a preliminary injunction is to maintain the status quo pending a final determination of the parties' rights and obligations. See Acierno v. New Castle County, 40 F.3d 645, 647 (3d Cir. 1994). For this reason, courts are wary about granting mandatory injunctive relief, particularly when this would effectively give the plaintiff what he ultimately seeks in the underlying lawsuit. See Phillip v. Fairfield Univ., 118 F.3d 131, 133 (2d Cir. 1997); Acierno, 40 F.3d at 647; Iron City Indus. Cleaning Corp. v. Local 141, Laundry & Dry Cleaners Int'l. Union, 316 F. Supp. 1373, 1376 (W.D. Pa. 1970). A preliminary injunction is generally inappropriate when legal remedies, including money damages, are available to the plaintiff. See Anderson v. Davila, 125 F.3d 148, 163 (3d Cir. 1997); Acierno, 40 F.3d at 653; Dice v. Clinicorp., Inc., 887 F. Supp. 803, 809 (W.D. Pa. 1995).

Plaintiffs appear to assume that if they sustain their ILSFDA or contract claim, they will be entitled ultimately to specific performance.

ILSFDA, however, provides courts with broad discretion to award a variety of remedies, only one of which may be specific performance. See 15 U.S.C. § 1709(a); Terre Du Lac Ass'n v. Terre Du Lac, Inc., 772 F.2d 467, 471 (8th Cir. 1985). Plaintiffs claim that defendants violated ILSFDA by failing to provide a property report and to have in effect a statement of record prior to the execution of the Agreement. See 15 U.S.C. § 1703(a). If proven, this may warrant an order compelling compliance or permitting revocation by plaintiffs. Plaintiffs do not explain, however, how this could justify an order compelling completion of the contemplated house by defendants and conveyance of the property to plaintiffs.

Courts have frequently refused to award specific performance in cases involving breaches of construction contracts, because this would involve the courts in supervising construction projects and because money damages generally provide an adequate remedy for breach of such contracts. See Dworman v. Mayor & Bd. of Aldermen, 370 F. Supp. 1056, 1078 (D.N.J. 1974); Petry v. Tanglwood Lakes, Inc., 522 A.2d 1053, 1056 (Pa. 1987); Athens Rest. v. Steinman, 103 Pitts. L.J. 331 (Pa. Comm. Pl. 1955); Anthony v. Reditt, 40 Del. Co. 242 (Pa. Comm. Pl. 1953). This is not, however, an inflexible rule. See Franklin Point, Inc. v. Harris Trust & Savings Bank, 660 N.E.2d 204, 206-09 (Ill. App. Div. 1995) (allowing plaintiff opportunity to demonstrate

that specific performance of building contract could be achieved without court supervision); Brindisi v. Downs Circle, Inc., 48 Del. Co. 311 (Pa. Comm. Pl. 1961) (specific performance available where plaintiff had material interest in execution of contract which was not susceptible of compensation in damages). Also, courts have recognized that money damages may prove inadequate when the subject of the contract is of unique value. See Petry, 522 A.2d at 1056 & n.7.

Plaintiffs' own submission suggest that their loss is quantifiable in money damages. They have calculated the present market value of the property in question. They do not claim that there are no comparable properties available or that the desired house could not be replicated somewhere else at an ascertainable cost.

As to the alternative request to compel defendants to protect the house frame, there is no specific allegation that they are failing to do so. Defendants would appear to have their own strong motive to preserve this fruit of their efforts and expense regardless of the outcome of this litigation.

Moreover, the Agreement expressly limits defendants' liability for a default to rescissionary damages, e.g., repayment of sums advanced by plaintiffs and reimbursement of incidental title or mortgage application expenses. A breaching party is liable for actual damages resulting from the breach "unless the

contract provides otherwise." Logan v. Mirror Printing Co., 600 A.2d 225, 226 (Pa. super. 1991); (citing Taylor v. Kaufhold, 84 A.2d 347, 351 (Pa. 1951)). Limitation of liability provisions are routinely enforced unless the limitation is so drastic as to remove the incentive to perform with due care. See Valhal corp. v. Sullivan Associates, Inc., 44 F.3d 195, 203-04 (3d Cir. 1995).

On the other hand, defendants presume that there is no likelihood plaintiffs can prevail on the merits because the Agreement provides that any modification must be in writing and no written modification referencing lot #905 was ever executed. To the contrary, even a contract prohibiting non-written modifications may be orally modified although such a modification must be proven by clear and convincing evidence. See First Nat. Bank of Pa. v. Lincoln Nat. Life Ins. Co., 824 F.2d 277, 280 (3d Cir. 1987); Nicolella v. Palmer, 248 A.2d 20, 23 (Pa. 1968).

It appears unlikely from the present record that plaintiffs can make a showing which would entitle them to the preliminary injunctive relief sought.

Nevertheless, unless the evidence submitted by the parties leaves no relevant factual issue unresolved, a hearing is generally appropriate. See Bradley v. Pittsburgh Bd. of Educ., 910 F.2d 1172, 1176 (3d Cir. 1990); Williams v. Curtiss-Wright Corp., 681 F.2d 161, 163 (3d Cir. 1982) (per curiam). Some discovery in connection with a preliminary injunction request is

also generally appropriate. See Philadelphia Newspapers, Inc. v. Gannett Satellite Info. Network, Inc., 1998WL 404820, *2 (E.D. Pa. July 15, 1998); Ellsworth Assocs. v. United States, 917 F. Supp. 841, 844 (D.D.C. 1996).

ACCORDINGLY, this day of December, 2000 upon consideration of plaintiffs' Motion for Preliminary Injunction (Doc. #4) and defendants' opposition thereto, **IT IS HEREBY ORDERED** that the parties shall have until December 27, 2000 to conclude discovery pertinent to the motion; the parties shall submit proposed findings of fact and conclusions of law by January 2, 2001; and, a hearing will be held on plaintiffs' Motion for Preliminary Injunction on January 3, 2001 at 4:00 p.m. in Courtroom 9B, Ninth Floor, U.S. Courthouse, 601 Market Street, Philadelphia.

BY THE COURT:

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JAY C. WALDMAN, J.