

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

TIMOTHY MATTEI AND	:	CIVIL ACTION
FRANCES MATTEI	:	
	:	
vs.	:	
	:	
ATLANTIC RICHFIELD COMPANY	:	NO. 97-CV-7300

ORDER AND MEMORANDUM

ORDER

AND NOW, to wit, this 11th day of May, 1998, upon consideration of the Motion of Atlantic Richfield Company to Dismiss the Complaint (Document No. 5, filed February 5, 1998) and Plaintiffs' Brief in Opposition to Defendant's Motion to Dismiss (Document No. 7, filed March 13, 1998), for the reasons set forth in the following Memorandum, **IT IS ORDERED** that the Motion of Atlantic Richfield Company to Dismiss the Complaint is **DENIED**.

MEMORANDUM

1. The case arises out of plaintiff's' purchase of real estate in Philadelphia, Pennsylvania, from defendant in 1984 for use as a service station. Compl. at ¶ 4 and Agreement of Sale ("Agreement") at ¶ 17, appended to Compl. as Exhibit "A."

2. Plaintiffs alleged in the Complaint that, prior to signing the Agreement, defendant negligently and intentionally misrepresented to plaintiffs, through verbal statements, that "there had been no problems regarding leaks of any kind on the property." Compl. at ¶¶ 7-9. According to plaintiffs, while digging on the property in 1995 they discovered a leak of hazardous materials which had occurred prior to the sale. *Id.* at ¶ 12.

3. The Court has jurisdiction based on the diversity of the parties under 28 U.S.C. § 1332.

A federal court exercising diversity jurisdiction must apply the substantive law of the state whose laws govern the action. Kleinknecht v. Gettysburg College, 989 F.2d 1360, 1365 (3d Cir.1993). As this case involves real estate in Pennsylvania and a contract executed in Pennsylvania, Pennsylvania law governs this dispute.

4. Defendant filed the within Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(6), arguing that plaintiffs unjustifiably relied upon defendant's alleged oral representations because the Agreement stated that the buyer had “thoroughly examined” the property, that it was sold “as is,”¹ Agreement at ¶ 11, and that “[t]here are no representations, inducements, or understandings, oral or otherwise, except those as herein set forth. This Agreement embodies the whole Agreement . . .” Id. at ¶ 16. Furthermore, the Agreement states that plaintiffs were not relying on the results of the testing of tanks on the property by defendant and that defendant “. . . shall not be liable for the condition of any tank after title has passed to [Buyer] plaintiffs. Id. at 18.

5. When deciding at motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), “the court primarily considers the allegations in the complaint, although . . . exhibits attached to the complaint may also be taken into account.” 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure, Civil 2d § 1357 (1990); see also Chester County Intermediate Unit v. Pennsylvania Blue Shield, 896 F.2d 808, 812 (3d Cir.1990). In examining a complaint under Federal Rule of Civil Procedure 12(b)(6), a court must “accept as true the facts alleged in the complaint and all reasonable inferences that can be drawn from them.” Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir.1990) (citation omitted). A court may not dismiss a complaint

¹ The Agreement contains a typographical error and states that the property is sold in “as in” condition, rather than in “as is” condition. Agreement at ¶ 11.

on a Rule 12(b)(6) motion unless it “is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.” H.J. Inc. v. Northwest Bell Tel. Co., 492 U.S. 229, 249-50 (1989) (quoting Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)).

6. Plaintiffs' claims are based on defendant's alleged oral statements made before execution of the Agreement. That fact situation presents the question whether, under the allegations of the Complaint, such oral statements are admissible in evidence.

7. Absent “fraud, accident, or mistake,” the parol evidence rule prohibits the introduction into evidence of an oral statement made prior to or contemporaneously with the execution of a contract if the statement “adds to, modifies, contradicts, or conflicts with the written agreement between the parties.” Resolution Trust Corp. v. Urban Redev. Auth. of Pittsburgh, 638 A.2d 972, 975 (Pa. 1994).

8. A balancing test is employed to determine whether to apply the parol evidence rule to contracts involving real estate:

Where buyers allege that they were fraudulently induced to purchase a property through fraud or misrepresentation, the applicability of the parol evidence rule is determined by balancing “the extent of the party’s knowledge of objectionable conditions derived from a reasonable inspection against the extent of the coverage of the contract’s integration clause in order to determine whether the party could justifiably rely upon oral representations without insisting upon further contractual protection or the deletion of an overly broad integration clause.”

Myers v. McHenry, 580 A.2d at 864 (1990) quoting LeDonne v. Kessler, 389 A.2d 1123 (Pa.Super. 1978); see also 1726 Cherry Street, 653 A.2d 663, 669 n.6 (Pa.Super. 1995).

9. “Reasonable inspection” has been interpreted by Pennsylvania state courts as a “visual inspection” by the potential purchasers. See, e.g., LeDonne, 389 A.2d at 1129; Myers, 580 A.2d at 864. As examples, courts have ruled that purchasers are not expected to discover underground

conditions such as a malfunctioning septic system, LeDonne, 389 A.2d at 1129, or insufficient water flow from a well, Myers, 580 A.2d at 862, during a “reasonable inspection.”

10. The integration clause in the Agreement in this case provided that: “[t]here are no representations, inducements, or understandings, oral or otherwise, except those as herein set forth. This Agreement embodies the whole Agreement of the parties hereto.” Agreement at ¶ 16. Pennsylvania courts have applied the balancing test set forth in LeDonne to contracts including similar integration clauses and found that prior oral statements regarding conditions which were not easily ascertainable during a “reasonable inspection” are not barred by the parole evidence rule. See, e.g., Myers, 580 A.2d at 864-65; Mancini v. Morrow, 458 A.2d 580, 583-84 (Pa.Super. 1983); Glanski v. Ervine, 409 A.2d 425, 429 (Pa.Super. 1979); LeDonne, 389 A.2d at 1129.

11. The condition in this case involved underground leakage of hazardous material. Accepting plaintiffs’ allegations for the purpose of this Motion, the leakage was not discovered until they dug on the property in 1995. Compl. at ¶ 12. Based on the allegations of the Complaint, the Court concludes the leakage was not discoverable during a “reasonable inspection” prior to plaintiffs’ purchase of the property. On the present state of the record, the Court will, therefore, not rule that the oral statements on which plaintiffs allegedly relied are inadmissible under the parole evidence rule.

12. Defendant also argues that because the Agreement stated that the property was sold in “as is” condition, plaintiffs could not reasonably rely on defendant’s alleged prior oral statements about leaks on the property. However, the “as is” clause in the Agreement only required the plaintiffs to conduct a “reasonable” inspection prior to purchasing the property. Glanski, 409 A.2d at 429 n.4. The clause does not necessarily mean that plaintiffs were unjustified in relying on

defendant's alleged oral statements. Id.

13. Finally, defendant argues that the inclusion of a specific clause in the Agreement stating that plaintiffs were not relying on defendant's tests of tanks on the property means that plaintiffs could not rely on any representation by defendant concerning hazardous leaks on the property. See, e.g., Lenihan v. Howe, 674 A.2d 273 (Pa.Super. 1996) (holding that when Agreement of Sale specifically stated that purchaser would have to obtain a sewage permit, the parole evidence rule prevented introduction of evidence of contrary oral statements by sellers). In response, plaintiffs assert that their claims against defendant "have nothing to do with the existing tanks themselves." Plaintiffs' Memorandum at 6-7. Accepting plaintiffs' statement as true for the purposes of deciding this Motion, the testing of tanks is not related to plaintiffs' claims and the clause relating to the testing of tanks in the Agreement does not alter the Court's analysis of the parole evidence rule, supra.

14. To establish a prima facie case of misrepresentation under Pennsylvania law, a plaintiff must allege sufficient facts to establish that the defendant made a representation which was :

- a. false;
- b. material to the transaction;
- c. made with knowledge of its falsity or recklessness as to its truth (in a case of intentional misrepresentation) or with negligence as to its truth (in a case of negligent misrepresentation);
- d. made with the intent that the plaintiff would rely on it;
- e. justifiably relied upon by plaintiff; and,
- f. the proximate cause of an injury to plaintiff.

Gibbs v. Ernst, 647 A.2d 882, 889 (Pa. 1994), quoting W.Page Keaton, Prosser and Keaton on the

Law of Torts § 105 (5th ed. 1984).

15. Based on the allegations of the Complaint, and applying the balancing test set forth in LeDonne, plaintiffs have set forth a prima facie case of misrepresentation with respect to justifiable reliance on the alleged oral misrepresentations and the remaining elements of a claim of misrepresentation.²

BY THE COURT:

JAN E. DUBOIS, J.

²This conclusion does not prevent defendant from arguing in a motion for summary judgment or at trial that, under the evidence, there could be no justifiable reliance on the oral representations.