STATE OF MAINE
SAGADAHOC, ss.

BUSINESS AND CONSUMER DOCKET
LOCATION: West Bath
DOCKET NO. BCD-WB-RE-08-20

DENNIS KANE, ET AL,

Plaintiffs

v.

ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON COUNTS I, II, III, IV, V and VIII

FRED POTTER, ET AL

Defendants

Before the Court is the Motion of Defendants, Fred and Mertie Potter ("Potters"), Rangeley Ventures, LLC and Rangeley Holdings, LLC (collectively, "Defendants"), for Summary Judgment on Counts I, II, III, IV, V and VIII of Plaintiffs' Complaint.

FACTUAL BACKGROUND

Except where noted, the following facts are undisputed for the purposes of Defendants' Motion for Summary Judgment:

In May 2005, the parties entered into a Purchase and Sale Agreement (the "2005 P&S Agreement") for the sale of a parcel of waterfront property (the "waterfront parcel") owned by Plaintiffs on Rangeley Lake in Maine. (Supp. S.M.F. ¶ 1, Opp. S.M.F. ¶ 1). Pursuant to the 2005 P&S Agreement, on August 24, 2005, the Potters paid $1.35 million for the waterfront parcel and took title in the name of Defendant Rangeley Ventures, LLC. (Supp. S.M.F. ¶ 4, Opp. S.M.F. ¶ 4).

The initial listing of the waterfront parcel included a reference to the availability of a contiguous parcel (the "Judkins Road Lot"). (Supp. S.M.F. ¶ 6, Opp. S.M.F. ¶ 6). The Potters

and Plaintiffs entered into an option agreement for the purchase of the Judkins Road Lot by the Potters for $750,000 (the "Option Agreement"). (Supp. S.M.F. ¶ 7, Opp. S.M.F. ¶ 7). The Option Agreement originally appeared as an addendum to the 2005 P&S Agreement and provided that the option must be exercised on or before March 1, 2007, with a closing no more than ninety (90) days thereafter. (*See* Supp. S.M.F. ¶ 8, Opp. S.M.F. ¶ 8). The Option Agreement also included language regarding Plaintiffs' right to acquire an easement across the waterfront parcel to Rangeley Lake for the benefit of the Judkins Road Lot parcel (the "Easement Agreement"). (Supp. S.M.F. ¶ 11, Opp. S.M.F. ¶ 11). That agreement required Defendants to place in escrow an easement deed granting Plaintiffs an easement across the waterfront parcel and,

> in the event that the Potters did not exercise the Option to purchase [the Judkins Road Lot] or failed to complete the purchase of the land after exercise of the Option, the [Plaintiffs] could then have the option on any date between March 1, 2007 and March 1, 2008 to purchase [for $1] the easement from the Potters allowing waterfront access to [the Judkins Road Lot] across [the waterfront parcel].

(Supp. S.M.F. ¶ 13, Opp. S.M.F. ¶ 13).

At the closing of the waterfront parcel on August 24, 2005, Rangeley Ventures, LLC executed an easement deed and the Potters placed it in escrow as called for in the Easement Agreement. (Supp. S.M.F. ¶ 12, Opp. S.M.F. ¶ 12). Pursuant to the Option Agreement, the Potters also placed in escrow a $50,000 earnest money deposit as prepayment towards the purchase price for the Judkins Road Lot. (Supp. S.M.F. ¶ 14, Opp. S.M.F. ¶ 14).

In February 2007, the Potters informed Plaintiffs, through the latters' real estate broker, that the Potters wished to exercise the option to purchase the Judkins Road Lot but did not have sufficient funds to do so. (Supp. S.M.F. ¶ 18, Opp. S.M.F. ¶ 18). In this action, Defendants assert that Plaintiffs responded, through their authorized agents, Carolyn Smith and Howard

Postal, by offering seller financing to the Potters. Supp. S.M.F. ¶ 19. Defendants further contend that the Potters continued to negotiate the specific terms of seller financing with Plaintiffs, through Smith and Postal; that they successfully negotiated a binding amendment to the Option Agreement; and that the closing on the Judkins Pond Lot was postponed until May 31, 2007 ("the 2007 Negotiations"). Supp. S.M.F. ¶¶ 19-35.

Plaintiffs, however, deny that either Smith or Postal were their agents in the alleged 2007 Negotiations. Opp. S.M.F. ¶¶ 19-20. Plaintiffs also dispute that either a binding amendment to the Option Agreement or a new purchase agreement were made. Opp. S.M.F. ¶¶ 19, 22, 23, 27, 28, 32.

Plaintiffs' original complaint contained the following claims: (Count I) Declaratory Judgment regarding the P&S; (Count II) Specific Performance seeking to unwind the P&S transaction; (Count III) Breach of the Option Agreement; (Count IV) Breach of the Easement Agreement; (Count V) Declaratory Judgment regarding the Easement; (Count VI) Interference with Prospective Business Relations; (Count VII) Violation of Maine's Unfair Trade Practices Act, 5 M.R.S. §§ 205-A-214; and (Count VIII) Unjust Enrichment.

As a result of this court's earlier Order on Defendants' motion to dismiss, Counts VI and VII of the Complaint were dismissed and Count II was recast as one for rescission rather than specific performance. Defendants now seek summary judgment on all remaining claims.

DISCUSSION

M.R. Civ. P. 56(c) provides that summary judgment is warranted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." M.R. Civ. P. 56(c)). For purposes of summary judgment, a "material fact is one having the potential to affect the outcome of the suit." *Burdzel*

v. Sobus, 2000 ME 84, ¶ 6, 750 A.2d 573, 575. "A genuine issue of material fact exists when there is sufficient evidence to require a fact-finder to choose between competing versions of the truth at trial." *Lever v. Acadia Hosp. Corp.*, 2004 ME 35, ¶ 2, 845 A.2d 1178, 1179. If ambiguities in the facts exist, they must be resolved in favor of the non-moving party. *Beaulieu v. The Aube Corp.*, 2002 ME 79, ¶ 2, 796 A.2d 683, 685.

Counts I and II – Declaratory Judgment & Rescission

Count I of the Complaint seeks a declaration that the 2005 P&S Agreement is invalid and, therefore, should be rescinded because it was breached by Defendants. Complaint at ¶ 46. Count II similarly seeks to rescind the 2005 P&S Agreement based on an alleged breach of the contract. Although not entirely clear from the Complaint or from Plaintiffs' opposition to the instant motion, it appears that the breach upon which Counts I and II rely is Defendants' alleged failure to purchase the Judkins Road Lot within 90 days of March 1, 2007 as required by the Option Agreement. *See* Pls.' Opp. at 12. According to the Complaint, Counts I and II seek a return of the waterfront parcel to Plaintiffs. *See* Complaint at ¶¶ 46 & 52.

Defendants seek summary judgment on Counts I and II based, first, upon the fact that Plaintiffs "Dennis Kane and Mary Kane testified at deposition that in this litigation neither seeks to rescind the 2005 transaction in which [the waterfront parcel] was sold to the Potters." Supp. S.M.F. ¶ 82. Plaintiffs contend that this statement of fact is excludable because it "sets forth a legal conclusion," Opp. S.M.F. ¶ 82, and is not relevant to the claim for rescission, which is a legal issue. Pls.' Opp. at 18 n.2. To the contrary, the court concludes that the reference to Plaintiffs' testimony is not an impermissible legal conclusion. It is a proper statement of fact – i.e., Mr. and Mrs. Kane gave testimony on a particular point – and it is supported by a record citation. It is also relevant to the issue of whether Plaintiffs have waived their rescission claims.

The foregoing aside, the court concludes that it is not necessary to reach the issue of whether the Kane's testimony constituted a waiver because Defendants are entitled to summary judgment on Counts I and II based on the doctrine of merger by deed and the "collateral agreement" exception to that doctrine.

Plaintiffs assert that the 2005 P&S Agreement and the Option and Easement Agreements are not separate or severable contracts and that a breach of the Option warrants rescission of the entire 2005 P&S Agreement. They argue that, because the 2005 P&S Agreement did not contain a severability clause – presumably severing the Option Agreement from the P&S Agreement – the conveyance of the waterfront parcel did not render the P&S Agreement "closed." Instead, according to Plaintiffs, the P&S Agreement and Option Agreement remained executory until such time as the Option Agreement was either exercised or it expired. Therefore, Plaintiffs assert that a breach of the Option Agreement constitutes a breach by Defendants of the entire 2005 P&S Agreement and entitles Plaintiffs to rescind the entire contract, including the sale of the waterfront parcel. Pls.' Opp. at 18.

The court does not agree. The lack of a severability clause in the 2005 P&S Agreement did not render the entire contract executory until such time as Defendants exercised the option or the option expired. Under the well-established doctrine of merger by deed, "once a . . . deed is accepted it becomes the final statement of the agreement between the parties and nullifies all provisions of the purchase-and-sale agreement." *Bryan v. Breyer*, 665 A.2d 1020, 1022 (Me. 1995) (quoting *Haronian v. Quattrocchi*, 653 A.2d 729, 730 (R.I. 1995)). With significance to this case, there is an exception "to the effect that promises in the original agreement which are additional or collateral to the main promise to convey the land and are not inconsistent with the deed as given are not necessarily merged in the deed, but may survive it and be enforced after the deed is given." *Lipson v. Southgate Park Corp.*, 189 N.E.2d 191 (1963) (cited with approval in

Wimmer v. Down East Properties, Inc., 406 A.2d 88, 90 (Me. 1979)). *See* also Waterville Indus., Inc. v. Fin. Auth. of Me., 2000 ME 138, ¶ 16, 758 A.2d 986, 990. Under this exception, to the extent that the Option and Easement Agreements were collateral to the sale and possession of the waterfront parcel, and to the extent that the parties intended those agreements to survive the deed, the Option and Easement Agreements will survive.

The parties' statements of fact demonstrate that the Option and Easement Agreements were intended to survive the closing. *See* Supp. S.M.F. ¶¶ 9-11 & Opp. S.M.F. ¶¶ 9-11. Indeed, at the 2005 closing on the waterfront parcel, the parties executed and recorded a Memorandum of Option pursuant to which the parties agreed that the terms and conditions set forth in the Option Agreement as it appeared at Appendix B to the 2005 P&S Agreement "shall survive the closing of the land subject to said purchase and sale agreement." (Supp. S.M.F. ¶¶ 9-11, Opp. S.M.F. ¶¶ 9-11, and Defs.' Exh. 104). Thus, while the Option and Easement Agreements survived the closing, the remainder of the terms in the P&S Agreement merged, by operation of law, into the deed conveying title to the waterfront parcel. Accordingly, the court agrees with Defendants that the 2005 P&S Agreement, at least as it relates to the waterfront parcel, is essentially a "closed agreement" and the Option and Easement Agreements are distinct from and collateral to that conveyance.

As already noted, Counts I and II of the Complaint seek to rescind the entire 2005 P&S Agreement and the sale of the waterfront parcel.

> Rescission is essentially the "unmaking" of a contract. The contract can be rescinded by mutual agreement of the parties, by one of the parties declaring rescission of contract without the consent of the other if a legally sufficient ground for doing so exists, or by either party applying to court for a decree of rescission. It is an equitable remedy available only on justifiable grounds such as fraud, mistake, mental incapacity or . . . [one party's] failure to perform.

Maine Civil Remedies §§ 14-3(a) & 14-5(b) at 290-91 & 299 (citations omitted). However, in order to "unmake" the 2005 P&S Agreement, Plaintiffs must allege and prove a failure to perform under the terms of that contract, not a failure to perform under a contract that is, by operation of law, collateral to and distinct from the P&S. There is no dispute that the Defendants performed their obligations under the 2005 P&S Agreement to purchase the waterfront parcel. Defendants paid the price and Plaintiffs conveyed title to that property. Supp. S.M.F. ¶ 4; Opp. S.M.F. ¶ 4.

Based upon the foregoing, the court concludes that the terms in the 2005 P&S Agreement relating to the sale of the waterfront parcel have been nullified and Plaintiffs may not rescind the contract for the conveyance of that parcel based on an alleged breach of the Option Agreement. Defendants are entitled to summary judgment on Counts I and II of the Complaint.

Count III – Breach of the Option Agreement

Count III alleges that Defendants breached the Option Agreement "by not exercising their option in accordance with the terms of the contract, misleading [Plaintiffs] into thinking they were able to exercise the Option and breaching other material terms of the Option Agreement." Complaint at ¶ 55. Here, Plaintiffs appear to claim that, even if Defendants exercised the option, they failed to perform under the terms outlined in the 2005 P&S Agreement. Instead, according to Plaintiffs, Defendants sought to exercise the option under the alleged terms of the 2007 Negotiations, which, Plaintiffs maintain, were not binding.

Defendants assert that the 2007 Negotiations resulted in a binding amendment to the Option Agreement. They further contend that they effectively exercised the Option Agreement, as amended, and attempted to close the deal, but Plaintiffs reneged. Finally, Defendants claim that the amendments superseded the 2005 Option Agreement and, therefore, Defendants cannot be liable for breaching the superseded terms.

The parties' dispute over the claims in Count III turns on the nature of the 2007 Negotiations and whether they resulted either in an amendment to the original Option Agreement or in an entirely new, binding contract. It also turns on whether the Option Agreement, in whatever form, was ever effectively exercised.

Although the parties appear to agree that the 2007 Negotiations took place, there are fundamental disputes of fact underlying the legal significance of those negotiations. For example, the parties dispute the authority of Smith and Postal to bind Plaintiffs to any amended terms (Supp. S.M.F. ¶¶ 21, 47-27, 50; Opp. S.M.F. ¶¶ 21, 24-27). They also dispute whether there was a meeting of the minds regarding many of the terms being negotiated (Opp. S.M.F. 122; Reply S.M.F. ¶ 122). Without an understanding of the existence, nature and extent of the parties' respective obligations under either the 2005 Option Agreement, an amended option agreement, or an entirely new contract for the conveyance of the Judkins Road Lot, the court cannot determine as a matter of law whether Defendants failed to perform or otherwise breached a contract. In light of the dispute over facts fundamental to such a determination, the court concludes that summary judgment on Count III is inappropriate.[1]

Counts IV and V – Easement Agreement

Count IV alleges that Defendants breached the Easement Agreement. Plaintiffs assert that they became entitled to the easement over the waterfront parcel when Defendants allegedly failed to exercise the Option Agreement and that Defendants impermissibly refused to release the easement deed. Count V seeks a declaration that, by virtue of Defendants' alleged failure to exercise the option, an easement exists over the waterfront parcel.

[1] The parties also argue about the extent to which the 2007 Negotiations and any resulting agreement are subject to and comport with the statute of frauds. Specifically, Plaintiffs argue that if an agreement for the purchase and sale of the Judkins Road Lot was reached, that agreement is not binding because it does not satisfy the statute of frauds. However, in light of the fundamental disputes of fact relating to the authority of Smith and Postal to engage in binding negotiations in the first place, the court does not reach the statute of frauds issue at this stage.

Contrarily, Defendants contend that Plaintiffs' right to the easement deed expired when they failed to demand the easement deed prior to March 1, 2008. In fact, Plaintiffs' counsel affirmed the March 1, 2008 deadline in a letter dated June 20, 2007.

> Under the terms of the Agreement, my client may exercise the easement option '[o]n any date set by the Seller between March 1, 2007 and March 1, 2008.' In this regard, my client intends to give his formal notice to exercise the option under separate cover in the near future.

Supp. S.M.F. ¶ 79 (emphasis added). Plaintiffs do not dispute that assertion. Opp. S.M.F. ¶ 79. And, a fair reading of the letter makes clear that Plaintiffs' attorney was not then exercising the Easement Option on behalf of his clients

Defendants then assert that "March 1, 2008 passed without any exercise by the Kanes of the option to purchase the Easement . . .." Supp. S.M.F. ¶ 80. Although Plaintiffs purport to deny that statement of fact, they fail to cite any record evidence supporting their denial. *See* Opp. S.M.F. ¶ 80. In light of Plaintiffs' failure to properly refute the assertion that they did not timely exercise the Easement Option,, Defendants' assertion is admitted and the court concludes, as a matter of law, that Plaintiffs' right to exercise the easement option has expired and Defendants were not obligated to release the deed. As such, Plaintiffs' claim that Defendants breached the terms of the Easement Agreement fails and Defendants are entitled to summary judgment on Count IV.

Finally, given that any rights Plaintiffs may have had to the easement deed expired, by Plaintiffs' own admission, on March 1, 2008, Defendants are similarly entitled to summary judgment on Count V.

Count VIII – Unjust Enrichment

Count VIII of the Complaint alleges that Defendants "have been unjustly enriched by receiving the property (the Waterfront Lot) without fulfilling obligations under their contract to

purchase that Lot, by being the disputed beneficiaries of the $50,000 non-refundable deposits they made in exchange for the Option, for being the beneficial owners of an easement free Waterfront Lot, and by being disputed holders of property rights for which they have provided no consideration." Complaint at ¶ 76. In other words, Plaintiffs contend that it is unjust for Defendants to retain the $50,000 deposit and the easement deed without purchasing the Judkins Road Lot.

In support of their motion for summary judgment, Defendants contend that damages for unjust enrichment are not available when the parties' agreement is governed by a contract. Defs. Mot. at 15 (citing *A.S.A.B., Inc. v. Town of Old Orchard Beach*, 639 A.2d 103, 106 (Me. 1994)). *See also Lynch v. Ouellette*, 670 A.2d 948 (Me. 1996). According to Defendants, the Option Agreement ". . . provided for the release of the $50,000 under various scenarios. The Option Agreement also detailed the Kanes' right to exercise their option to obtain the easement. Since there was an enforceable contract in this case, the Kanes cannot recover under an unjust enrichment theory." Defs. Mot. at 15. The court agrees.

In *Lynch v. Ouellette*, 670 A.2d 948 (Me. 1996), which similarly dealt with the proper disposition of an earnest money deposit for the purchase of real estate, the Law Court explained the limits of a claim of unjust enrichment. In that case, the Law Court sustained summary judgment in favor of the defendants on an unjust enrichment claim and in so doing explained that "[u]njust enrichment describes recovery for the value of the benefit retained *when there is no contractual relationship*, but when, on the grounds of fairness and justice, the law compels performance of a legal and moral duty to pay." *Id.* at 950 (emphasis in the original) (citations omitted). According to the court in *Lynch*, "[t]he existence of a contractual relationship between . . . [the parties] precludes . . . [Plaintiff] from recovery under an unjust enrichment theory." *Id.* (citing *Top of the Track Associates v. Lewiston Raceways, Inc.*, 654 A.2d 1293, 1296 (Me.

1995)). *See also In re Wage Payment Litig. v. Wal-Mart Stores, Inc.*, 2000 ME 162, ¶ 19, 759 A.2d 217, 224.

In light of the Law Court's express holding in *Lynch* and the fact that the parties in this case are alleged to have had a contractual relationship that governed both the easement deed and the earnest money deposit, the court concludes that Plaintiffs are precluded, as matter of law, from recovery under an unjust enrichment theory. This conclusion, however, does not resolve the issue of which party is entitled to the $50,000 deposit. Rather, whether Plaintiffs are entitled to the $50,000 deposit turns on whether Defendants effectively exercised the option and, if so, which party is responsible for the failure of that transaction to close. As outlined in the discussion of Count III above, whether the option was exercised at all and, if so, whether it was exercised in its original form or under binding, amended terms turn on questions of fact that must be resolved at trial. Should Plaintiffs prevail in their claim that Defendants failed to timely exercise the original Option Agreement and that no binding amended option became operational, then they may prevail under Count III and recover under the terms of the parties' Agreement. Recovery under an unjust enrichment theory, however, is not available to Plaintiffs as a matter of law.

DECISION

Based on the foregoing, and pursuant to M.R. Civ. P. 79(a), the Clerk is directed to enter this Order on the Civil Docket by a notation incorporating it by reference, and the entry is

> Defendants' Motion for Summary Judgment is GRANTED as to Counts I, II, IV, V, and VIII, and Judgment is entered in favor or Defendants; and
>
> Defendants' Motion for Summary Judgment is DENIED as to Count III.

Dated: February 9, 2009

Thomas E. Humphrey
Chief Justice, Superior Court