

Contract

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE
SOUTHERN DISTRICT OF GEORGIA
Waycross Division

FILED

at 11 O'clock & 57 min. PM
Date 6/22/89
MARY C. E. D. CLERK
United States Bankruptcy Court
Savannah, Georgia 23

In the matter of:)
DARREL C. BOATRIGHT)
CAROLYN SUE J. BOATRIGHT)
Debtors)

Chapter 11 Case
Number 87-50217

MEMORANDUM AND ORDER ON OBJECTION TO CLAIM OF DONNA PITZO

The debtors-in-possession ("Debtors") filed an objection to the proof of claim filed by Donna Pitzo ("Pitzo"), an unsecured creditor. The controversy surrounding the proof of claim arises out of a contract to purchase the Debtors' property entered into by the Debtors and Pitzo. After consideration of the evidence adduced at trial, and the briefs submitted by the parties I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

1) On January 19, 1988 Pitzo filed a proof of claim as an unsecured creditor in the amount of \$12,623.30. The amount claimed arises out of the alleged improvements made by

Pitzo in contemplation of purchasing certain property of the Debtors. An understanding of the circumstances surrounding the contract to purchase and the inability of the parties to close the transaction are critical to determining the motion before the court.

2) On March 16, 1987 the Debtors and Pitzo entered into a contract wherein Pitzo agreed to purchase two acres from the Debtors and a building located thereon for the sum of \$28,000.00. (See Plaintiff's Exhibit P-1). Pursuant to paragraph "6" of the sales contract the transaction was scheduled to close on or before April 30, 1987. Pitzo and the Debtors entered into three subsequent contracts for the sale and purchase of the same two acres and building.¹ None of the contracts were closed on or before the date specified in the respective contracts. The sale apparently did not close as scheduled because the Farmers Home Administration had a lien on the property which was not released prior to the scheduled closings.

¹ The three subsequent contracts were signed on May 11, 1987 - scheduled to close July 31, 1987; August 20, 1987 - scheduled to close September 21, 1987; and September 25, 1987 - scheduled to close November 23, 1987. (See Plaintiff's Exhibits P-3, P-5, and P-6).

Pitzo testified that the only impediment to obtaining the necessary release from the Farmers Home Administration was the failure of Mrs. Boatright to sign the necessary authorization. Mrs. Boatright testified that she did everything which was required of her in obtaining the Farmers Home Administration approval, but that Pitzo backed off the deal.

Notwithstanding the failure to close the deal, the Debtors gave Pitzo permission to move onto the property. Pitzo took possession of the property on March 28, 1987 and remained thereon until the end of December, 1987, or the beginning of January, 1988 - approximately nine months. Pitzo paid no rent to the Debtors during this period. Mr. Boatright instructed Pitzo not to make any repairs until the deal went through. Pitzo remained in possession of the property for approximately nine months before she vacated. The estimated fair market rental value of the property is \$450.00 per month.

Notwithstanding the Debtors' directive, Pitzo cleaned, repaired, and made improvements on the building and the surrounding property. Pitzo cleaned the grounds and interior of the building, did electrical and plumbing repairs, built a well, put in a septic tank, fixed the roof, windows and carpeted the offices. Pitzo maintained a ledger which she testified shows over \$12,000.00 in expenses spent on the property including

\$5,396.06 in materials, \$6,858.98 in labor and \$368.00 in land improvements. Pitzo's testimony is unclear as to whether the \$12,000.00 in expenses included the cost of relocating refrigerant recovery equipment from her Florida property to the Debtors' property.² The inference from the combined testimony of Pitzo and Lawrence Goddard, however, is that the cost of relocating the equipment and a mobile home is included in the \$12,000.00 plus expense figure. Goddard, Pitzo's general manager, testified that over 200 pickup truck loads of trash were carted off from the premises, the building was rewired and repaired, all new plumbing fixtures were installed, the rear of the building was reinforced, new doors installed, new glass in all the windows, resin removed from the floor, the entire inside and outside was painted, ten to fifteen leaks in the roof were repaired and approximately 1,500 square feet of interior offices were installed.

When Pitzo moved on to the property there were approximately eight large wooden doors securing the building. Pitzo removed the existing doors, and replaced them with aluminum

² Relocation of the equipment required four semitrailer loads and two 28 foot U-Hauls.

or sheetmetal type doors. Upon vacating the premises, Pitzo removed the wellpump, fence, doors, PVC pipe for the plumbing, toilets and all fixtures. Pitzo essentially took down everything that had been installed in the building, left the property strewn with debris and dumped unspecified chemicals on the property. The building was left wide open with no doors to secure it.

3) The Federal Land Bank filed a timely acceptance of the plan on behalf of its secured claim, but failed to file another separate acceptance on behalf of its alleged unsecured claim for attorneys fees. Farmers Home Administration filed an acceptance of the plan which did not indicate whether it was voted on behalf of the secured or unsecured claim.

CONCLUSIONS OF LAW

As an initial consideration it must be noted that the evidence introduced is equivocal as to whether the contract was rescinded by either the Debtors or Pitzo for nonperformance, or whether the contract was mutually rescinded by consent of the contracting parties. See O.C.G.A. 13-4-62; 13-5-7. On the one hand, Pitzo testified that the Debtors failed to get the necessary approval from Farmers Home Administration to close the contract. On the other hand, Mrs. Boatright testified

that she did everything needed and got the Farmers Home Administration approval, but that Pitzo backed off the deal. The evidence is clear, however, that at some point at either the end of December 1987, or the beginning of January 1988, Pitzo vacated the property, and the Debtors subsequently re-entered and took possession of the property. The conduct of the parties suggest that they impliedly consented and agreed to rescind the contract for the purchase of the property. See McDaniel v. Gray, 69 Ga. 433 (1882); Haygood v. Kennedy, 27 Ga. App. 689, 109 S.E. 522 (1921). It is well established that a contract for the sale of land may be validly rescinded by parol agreement. Jay V. Sweatt, 8 Ga.App. 481, 70 S.E. 16 (1910); Tucker v. Baker, 88 Ga.App. 580, 77 S.E.2d. 92 (1953).

The Georgia Supreme Court announced in Lytle v. Scottish American Mortgage Co., 122 Ga. 458, 466, 50 S.E. 402 (1905), that "When a contract is rescinded, the parties are not to be left where the rescission finds them. The original status must be restored, or an equivalent therefor must be provided in the contract or furnished by the law. Generally speaking, rescission is in toto. It abrogates the contract not partially but completely. It leaves the rights of the parties and the amount of the damages, if any, to be determined, not by the rescinded contract, but by the court of equity." (Citations omitted).

The general rule of recovery is most cogently stated in Haygood, supra, wherein the court stated: ". . . in the absence of any agreement to the contrary in the subsequent contract of rescission, the rule governing a recovery is that the purchaser is entitled to a return of the partial payments plus the value of any improvements made, less a deduction of the rental value of the land and any injury or damage to the property during the term of occupancy." As a general rule, the vendee is entitled to the "enhancement value as the result of her money and labor in improving the land." Lytle, supra at 470. The vendor cannot be forced, however, "to pay for costly changes which he did not order and does not desire, and which, though valuable, are not of a character useful to him." Id. The vendor may elect to take back the property, return the purchase money plus the value of any improvements, less damages and rent, or the vendor can elect to have the property sold at a sheriff's sale. Id. at 470-471. In determining the "value of any improvements made" it appears that the standard is "what is equitable due for improvements." Id. at 470. (Emphasis added).

In the instant case Pitzo testified that \$12,623.30 in materials, labor, and land improvements were made. Further, Pitzo's general manager testified on direct examination that approximately \$1,000 in improvements including doors, PVC

pipe, toilets, and fixtures were removed when they vacated the premises. On cross examination Pitzo's general manager revised and increased his estimate to \$1,500 in materials. Although Pitzo testified that \$6,858.98 was spent on labor in installing the improvements on the property, no testimony was given wherein this labor figure can be allocated to the improvements which were subsequently removed or those which remained on the premises. The Debtor testified that Pitzo removed and took with her everything which she had put into the property. Further, the yard was strewn with debris, chemicals were dumped on the property, and the eight large doors which secured the building prior to Pitzo taking possession were also gone. The Debtor testified that the doors were worth approximately \$2,490.00 for the two back doors and \$2,670.00 for the four side doors. Pitzo's general manager testified that the doors were worth a total of \$300.00 in material. He made no estimate for the cost of labor. Further, that the fair market rental value of the premises was \$450.00 a month or \$4,050.00 for nine months. In analyzing the testimony given by Pitzo in its most favorable light, the \$12,623.30 claim for improvements should be reduced by \$4,050.00 in rent, \$1,500.00 in materials removed from the premises when vacated, and \$300.00 in materials for the doors resulting in a net claim for improvements in the amount of \$6,773.30. Taking the testimony in the light most favorable to the Debtors, Pitzo's claim should be reduced by \$4,050.00 in

rent, \$12,623.30 in removed improvements, and \$5,160.00 in doors for a total claim of \$9,210.00 owing to the Debtors, without taking into consideration the unspecified damages for the debris strewn on the property and the chemicals dumped thereon.

The conflicting testimony leaves some doubt as to how the rights of the parties should properly be adjusted so as to insure that the vendee receives what she is "equitable due" for the improvements. In many ways, the property appears to be in no better condition than when Pitzo went into possession of it, and may in fact be in worse condition. In particular, there are no doors, all the fixtures installed have been removed including the six windows at the front of the building (See Defendant's Exhibit D-2), the yard is strewn with debris and chemicals dumped on the property. Further, in considering what is "equitably due" consideration should be given to the uncontradicted testimony of Mrs. Boatright that when she allowed Pitzo to move onto the property she instructed Pitzo not to make any repairs until the deal went through. At the point in time when Pitzo took possession of the property, she was technically a "vendee in possession" who was granted a "license" to enter thereon. See Pindar, Georgia Real Estate Law and Procedure, §8-45, 48 (3rd Ed. 1986). "The licensee has the right to do any act which is necessary for the full enjoyment of the license, but the terms of the license must be strictly followed and cannot be

extended or varied by him." Id. at §8-48. The repairs and improvements which Pitzo made on the property in contemplation of the sales contract closing were made in direct contravention of the express terms of the license granted by the Debtor to her. Pitzo proceeded, therefore, to make repairs and improvements at her own risk, not under the authority or permission granted to her. To hold the Debtors liable for Pitzo's unauthorized conduct would be inequitable.

In determining the rights of the parties and adjusting them accordingly, I find that the refund of Pitzo's escrow money, and nine months of rent free possession of the property more than compensates her for any improvements left on the property, less any damages inflicted on the same. Moreover, consistent with the statutory directive that "equity considers that done which ought to be done and directs its relief accordingly", O.C.G.A. §23-1-8, I find that Pitzo, by acting in direct contravention of the express terms of her license, proceeded at her own risk, and that the Debtor will not be compelled to pay for Pitzo's unauthorized actions.

In light of my holding on the Debtors' objection to the Pitzo claim, the issue relating to the Federal Land Bank of Columbia's ballot is hereby rendered moot. By separate order, Debtors' plan will be confirmed inasmuch as all allowed claims have voted favorably on it.

O R D E R

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that the Debtors' Objection to the claim of Donna Pitzo is sustained.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 21st day of June, 1989.