

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

CLAUDIA PARKER LIVINGSTON)	CASE NO. CV 07 625535
)	
Plaintiff)	JUDGE JOHN P. O'DONNELL
)	
-vs-)	<u>JOURNAL ENTRY</u>
)	
VANINE SINGLETON)	
)	
Defendant)	

John P. O'Donnell, J.:

I. STATEMENT OF THE CASE

Plaintiff Claudia Parker Livingston¹ filed her complaint against defendant Vanine Singleton on May 29, 2007. The complaint asserts that the defendant breached a contract to buy the plaintiff's four-unit brick apartment building located at 1247 East 124 Street.

On February 20, 2008, the plaintiff filed a motion for summary judgment. That motion was granted in part on April 14, 2008. The court found that the defendant breached the real estate purchase agreement and set the case for an evidentiary hearing on damages and the appropriate remedy.

The bench trial was held on May 6, 2008.

II. FACTS

The plaintiff Claudia Parker owned the four-unit apartment building at 1247 East 124 Street, Cleveland. She had retired and was planning to move to Tampa and so decided, around early 2004, to sell the building. She began negotiating a sale with defendant Vanine Singleton in late spring or early summer of 2004 and they ultimately signed a real estate purchase contract

¹ Meyer Hass was originally named as a plaintiff but his claims were voluntarily dismissed on December 26, 2007.

with an eventual closing date, after an addendum requiring the plaintiff to tear down an existing garage, of October 25, 2004.

The building's four apartments were all rented as of June, 2004. The total rent for those units combined was \$2,000. The plaintiff testified that all of her tenants had lived at the building for quite some time and that she had never had to evict a tenant in the approximately 20 years she owned the building.

The plaintiff introduced Exhibit 1 into evidence at the trial. Exhibit 1 consists of six handwritten ledger notebook pages with writing on both sides. The pages contain a listing of the building's tenants beginning in January, 2004 and ending April, 2008. The notebook shows the following occupancy history:

<u>Date</u>	<u>Number of Units with Tenants</u>	<u>Total Rent</u>
1/04 through 3/04	4 tenants	\$1,650 total rent
4/04 through 6/07	3 tenants	\$1,650 total rent
7/04 through 6/05	4 tenants	Varying ²
7/05 through 12/05	3 tenants	Varying
1/06 through 12/06	2 tenants	Varying
1/07 through 4/08	1 tenant	0 ³

The ledger appears to show the amount of rent the plaintiff actually received during the months shown, but those figures do not jibe with the amounts testified to by the plaintiff, leaving some ambiguity about how much income the building actually produced before and after the sale agreement. She testified that eventually the tenants stopped paying rent and they all had to be evicted. However, she did not produce any documentary evidence to support the fact of her receipt of rental income, either historically or after the purchase contract was breached. The

² The rents during this period ranged from 0 in April, 2005 to \$1,782 in July, 2004.

³ During this period only one tenant has resided at the building and serves as a caretaker. In exchange for services as a caretaker his rent is forgiven.

plaintiff did not provide income tax returns or similar information that could have documented the income and expense associated with owning and operating the building. She did testify to some of these numbers; for example, her mortgage payment was apparently \$703.68 in November and December, 2004, and then was \$958.14 in April, May and June 2005, and thereafter fell to \$673.62 from July, 2005 through the present.

Similarly, the plaintiff testified to the amount of her electric⁴ and water⁵ bills but did not produce invoices, canceled checks or other documentary evidence of the amounts billed and paid.

The evidence was similarly deficient on the subject of the plaintiff's efforts to find a new buyer after the defendant breached the contract. She testified that she attempted to sell the building but could find no buyers. She noted that the building was advertised in the newspaper and with signs in the window. However, she could provide no documentary evidence of having advertised the building. Moreover, she testified that she did have two offers to purchase the building in 2007 but details of those offers were not described.

Meyer Hass also testified on behalf of the plaintiff. He described himself as a real estate broker although his broker's license is in escrow. He does have an active real estate agent's license. He testified that he has expended approximately \$20,300 in time and materials to manage and maintain the building since the breach of contract. As with the other claims for damages, evidence to support this claim that can be reasonably inferred to exist – *i.e.*, invoices, receipts, estimates, canceled checks, etc. – was not produced at trial.

Hass also testified that he had a “steady supply” of potential tenants for the building but declined to rent units to any of them. As for offers to purchase the building, he recalled two or three offers but summarily described them as inadequate without offering further details.

⁴ \$315.88 in 2006 and \$205 in 2007

⁵ \$323.73 in 2004, \$1,169.69 in 2005, \$607.07 in 2006, and \$1,622.67 in 2007

The plaintiff seeks the equitable remedy of specific performance (*i.e.*, that the defendant be ordered to go through with the purchase of the building) and the legal remedy of monetary damages in the amounts of: \$12,500 for mortgage payments since the sale contract was breached; \$19,500 for repairs and expenses on the building since the sale was breached; “somewhat shy” of \$4,000 for utility payments since the time of the breach; legal fees in the amount of \$2,200; and interest on \$120,000 since October 25, 2005. The plaintiff concedes that these claimed monetary damages should be offset by total rent collected since the time of the breach in the amount of \$12,372.

III. LAW

The existence of the contract and a breach by the defendant were decided by summary judgment before the trial and it is therefore not necessary to address any issue other than damages.

A. Specific Performance

Specific performance is an equitable remedy. By contrast, monetary damages are a remedy at law. The foundation of equitable jurisdiction is the inadequacy of the common law to afford necessary relief and it is sometimes said that equity has jurisdiction in all cases wherein there is not an adequate remedy at law. *Northern Ohio Patrolmen’s Benevolent Association v. The County of Cuyahoga* (1985), Cuyahoga App. No. 49656, unreported, 1985 Ohio App. LEXIS 8856. Because the plaintiff here has an adequate legal remedy (see discussion below) the equitable remedy of specific performance is not appropriate.

Additionally, the court notes that the practical difficulties of enforcing an order that the defendant purchase the property as originally promised would be likely to be of such magnitude as to make any order of specific performance unenforceable.

B. Monetary Damages

It is well established that when a breach of a real estate contract occurs the proper measure of damages for a buyer's breach is the difference between the original contract price and the fair market value of the property at the time of the breach. *Poppy v. Whitmore*, 2004-Ohio-4759, Cuy. App. No. 84011. This measure of damages clearly requires a seller to establish by evidence the fair market value of the property at the time of the breach. By way of illustration only, the contract price here was \$120,000. If the asset had a fair market value of \$100,000, the plaintiff's damage would be her \$20,000 lost profit.

However, the plaintiff did not establish by a preponderance of the evidence the fair market value of the property, either at the time of the breach or today. In fact, the only evidence remotely touching upon the fair market value of the premises was offered by witness Meyer Hass, who noted that "it's hard to say" how much the property is currently worth.

As to the plaintiff's claim for all manner of expenses incurred in connection with owning and maintaining the property from the time of breach through the present, the court is not convinced that the evidence established that she is entitled to any judgment.

The plaintiff did not offer definitive evidence that the property was profitable before she entered into the sales contract with the defendant. However, the plaintiff did testify that the building was fully occupied throughout her ownership, suggesting that her income was greater than her expenses, *i.e.* that the apartment building was a profitable enterprise. The plaintiff cannot then use the defendant's breach of a contract to buy the building as an excuse to mismanage the property and operate it at a loss. In the absence of evidence to the contrary, the court must conclude that the property is capable of being economically productive and the defendant, although she did break her promise to buy the building, cannot be held indefinitely

responsible for the mismanagement of the property to the point where expenses regularly exceed income.

The plaintiff also seeks her legal fees in connection with pursuing a remedy for the defendant's breach. A review of the purchase agreement (which was not introduced as an exhibit at trial by either party but is before the court as Exhibit A to the complaint) shows no agreement by the defendant to pay the plaintiff's attorney's fees in the event of a breach. Additionally, the evidence at trial did not prove that the defendant acted in bad faith, a finding that may have supported an award of attorney's fees. Finally, attorney's fees cannot be awarded as costs. See, *e.g.*, *Sorin v. Board of Ed. Of Warrensville Heights School Dist.* (1976), 46 Ohio St.2d 177.

A review of the contract does show that the defendant deposited \$1,000 as earnest money, apparently with Realty One, Inc. The contract provides that the earnest money is to be credited against the purchase price. However, the contract does not describe the further disposition of the earnest money except to note that it will not be returned to the buyer or forfeited to the seller without a mutual written release.

Earnest money is generally used to insure a buyer's good faith in performing her obligations under the contract. The buyer deposits the earnest money with the expectation that it, or a portion of it, will be lost in the event the buyer breaches the contract. Earnest money can be seen as a down payment by the defendant on damages for a breach of contract. However, those damages still must be proven and they were not in this case. Nevertheless, in a contract action, even if a party fails to prove the amount of damages arising from the breach of contract, the party is entitled to nominal damages. *Carter v. New Buckeye Redevelopment Corp.* (1998), Cuyahoga App. No. 72501, 1998 Ohio App. LEXIS 1414, unreported. Additionally, the defendant's counsel suggested in closing argument that the plaintiff should be allowed to keep the earnest

money. Therefore, the court finds it appropriate that the \$1,000 in earnest money be awarded to the plaintiff.

IV. CONCLUSION

For all of the foregoing reasons, judgment is hereby entered in favor of plaintiff Claudia P. Livingston and against defendant Vanine Singleton in the total amount of \$1,000 and the costs of this action.

Non-party Realty One, Inc. is ordered to distribute the earnest money to plaintiff Claudia P. Livingston upon being served by the plaintiff with a time-stamped copy of this journal entry.

The plaintiff is entitled to interest on this judgment at the statutory rate, however interest will not begin to accrue until 30 days after the entry of judgment since the payment of the judgment is dependent upon the cooperation of non-party Realty One, Inc.

IT IS SO ORDERED.

Date: August _____, 2008

JOHN P. O'DONNELL, JUDGE

CERTIFICATE OF SERVICE

A copy of the foregoing Journal Entry was sent by regular U.S. Mail this _____ day of August, 2008, to the following:

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