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IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE

TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

C

REBECCA LEE SCIVALLY,)
)
Plaintiff,)
)
V.) No. 95-2631-II
)
MICHAEL BOURINI,)
a/k/a MOHAMMED AL BOURINI,)
)
Defendant.)

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ORDER OF JUDGMENT AND DECREE VESTING TITLE

This cause came on for hearing on the 29th day of January 1998, based on the Amended Complaint of the plaintiff, Rebecca Lee Scivally (herein referred to as "the plaintiff"), for rescission of a quitclaim deed obtained by the defendant, Michael Bourini a/k/a Mohammed Al Bourini (herein referred to as "the defendant") and for monetary damages. At the end of the proof, the plaintiff's counsel moved the Court, pursuant to Rule 15.02 of the Tennessee Rules of Civil Procedure, for the pleadings to conform to the evidence introduced at trial and thus include a cause of action for breach of contract and for quasi-contract as to the conveyance to the defendant of an interest in real property owned by the plaintiff. The motion was granted without objection. After careful consideration of the evidence submitted by the parties in the form of witness testimony, documents, and after further consideration of the pleadings, briefs, arguments of counsel for the parties, and the entire record in this case, the Court finds as follows:

A. FINDINGS OF FACT

In 1990 or 1991, the defendant, Michael Bourini, sought to purchase a Department of Housing and Urban Development ("HUD") property, a duplex, located at 4266 LaVergne-Couchville Pike in Antioch, Davidson County, Tennessee, but failed to qualify for a home mortgage loan. The defendant persuaded the plaintiff, Rebecca Lee Scivally, his girlfriend of several years, to purchase the real property. To induce the

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plaintiff to purchase the property the defendant told the plaintiff he would marry her, he would pay fifty percent (50%) of the mortgage payments and related expenses on the duplex, and his parents would purchase the property at a later date.

Prior to the purchase of this property, the parties had lived together and equally shared their apartment rent and living expenses. Plaintiff had a reasonable expectation that defendant would continue to make an equal financial contribution as he promised.

In order to purchase the real property, the plaintiff applied and qualified for a loan from Commercial Federal Mortgage Corporation in the amount of $58,150.00, which included a sum to "fix-up" the property to meet HUD standards. The plaintiff was the sole obligor on this note. On or about June 6, 1991, the plaintiff purchased in fee the real property located at 4266 LaVergne-Couchville Pike, Antioch, Tennessee for $52,279.00, and she was listed as the sole purchaser on the deed.

At the closing on the real property, the defendant became angry and threatened to stop the closing because his name was not on the warranty deed to the property. To pacify the defendant so that the closing could continue, Robert Notestine, the closing attorney, furnished a blank quitclaim deed form to the defendant, explained what a quitclaim does and how to fill it out. The parties moved into the duplex but the defendant never paid anything towards the note.

After the closing, to induce the plaintiff to complete the quitclaim deed so as to convey to him a fifty percent interest in the real property, the defendant repeatedly made several representations to the plaintiff, including a promise that he would pay fifty percent of her obligation to the mortgage company, as well as fifty percent of related living expenses. At trial, the defendant readily admitted that he had agreed to pay fifty percent of the mortgage and related expenses. The plaintiff testified that in reliance on the defendant's promise and under duress from his constant verbal abuse, harassment and threats both at home and work, she executed the quitclaim deed. The Court finds

that the plaintiff's execution of the quitclaim was induced by duress, that his promise was a material term of the parties' agreement, and that the plaintiff would not have executed the quitclaim deed absent the defendant's duress and fraudulent representation that he would pay fifty percent of the plaintiff's obligation to the mortgage company.

The defendant never intended to make any payments and further failed to make any payments toward satisfaction of the plaintiff's debt to Commercial Federal Mortgage Corporation. The defendant failed to fulfill his part of the parties' agreement in any other fashion. The evidentiary proof of defendant's Chapter 13 bankruptcy file reveals that the defendant had extensive personal debt which contradicted the defendant's testimony that he fulfilled his agreement by advancing substantial monies toward the maintenance of the real property. At trial, the defendant acknowledged his financial difficulties prevented him from paying fifty percent of the mortgage as he had promised.

The Court specifically finds that defendant fraudulently induced the plaintiff to include his name on the property by way of the quitclaim deed, there being no credible evidence that he had the means to pay or intended to uphold his promise, although he did intend to produce the end result, her execution of the quitclaim deed.

The plaintiff alone made all the mortgage payments on the real property from her purchase of it in 1991 through the present.

The Court finds that during the defendant's past occupancy of the real property located at 4266 LaVergne-Couchville Pike, in Antioch, Tennessee, he was a tenant-at-will, and no agreement ever existed between the parties concerning rents. The Court therefore allows no recognition or recovery for unpaid rents.

The Court finds that the defendant, Michael Bourini, has acknowledged that he borrowed money from the plaintiff, Rebecca Lee Scivally, which he has not repaid, and that the plaintiff advanced monies to the defendant in reliance upon the defendant's promise that he would repay these monies. The Court thus finds in favor

of the plaintiff. However, the Court further finds that the defendant, Michael Bourini, spent $2,713.00 on improvements to the real property at issue and that the plaintiff's judgment should be reduced by that amount, making the plaintiff entitled to a judgment in the principal amount of $13,163.00.

B. CONCLUSIONS OF LAW

This case involves an oral agreement, the essential terms of which both parties agreed at trial were that in exchange for the plaintiff executing a quitclaim deed conveying to the defendant a fifty percent interest in real property located at 4266 LaVergne-Couchville Pike in Antioch, Tennessee, the defendant would pay fifty percent of the plaintiff's obligation on a home mortgage loan from Commercial Federal Mortgage Corporation. This agreement between the parties was binding and enforceable. *See Downing v. Brinkley*, 1966 Tenn. Ct. App. LEXIS 12 (Tenn. Ct. App. January 12, 1996)(holding that an oral agreement to a debtor to answer for his debt to a third party is an enforceable contract).

Based on the parties' testimony, the Court finds that the defendant's agreement to make these payments was the consideration for the conveyance of an interest in the real property to him. A party may establish by parol evidence the existence of consideration for a deed other than what is expressly stated in the recital of the deed. *Whitaker v. McMinn County*, 491 S.W.2d 844, 846 (Tenn. 1973).

The Court finds that the defendant failed to perform his end of the bargain and did not make any payments toward satisfaction of the plaintiff's mortgage obligation. The Court concludes that this constitutes complete failure of consideration. *See Lloyd v. Turner*, 602 S.W.2d 503, 509 (Tenn. App. 1980).

The Court concludes that the crux of the agreement between the parties was that the defendant would pay fifty percent of the mortgage, and that the plaintiff would not have executed the quitclaim deed without the agreement and expectation that the defendant would satisfy one-half of the plaintiff's debt to the mortgage company.

The defendant's failure to perform was thus a material breach that goes to the very root of the contract between the parties. *See James Cable Partners v. Jamestown*, 818 S.W.2d 338, 345 (Tenn. App. 1991); *see also, German-American Monogram Mfrs. v. E.B. Johnson*, 133 Tenn. 571, 182 S.W. 595, 596 (Tenn. 1915).

A contract may be rescinded for substantial non-performance or breach, and even partial failure of consideration is grounds for rescission if the consideration is such an essential part of the contract that the contract would not have been entered into had that default been contemplated. *Farrell v. Third Nat'l Bank*, 20 Tenn. App. 540, 101 S.W.2d 158, 163 (1936).

Rescission involves the avoidance or setting aside of a transaction *Mills v. Brown*, 568 S.W.2d 100, 102 (Tenn. 1978). It is an equitable remedy, available where the contract was induced by fraud or duress. *Belote v. Henderson*, 45 Tenn. 471, 474 (1868)(duress); *Graham v. First American Nat'l Bank*, 594 S.W.2d 723, 726 (Tenn. Ct. App. 1979)(fraud). It is intended to return the parties to the positions they were in before the transaction took place. *Lindsey-Davis Co. v. Siskin*, 210 Tenn. 339, 342-43, 358 S.W.2d 331, 333 (1962); *Lloyd v. Turner*, 602 S.W.2d 503, 510 (Tenn. Ct. App. 1980); *Arledge v. Ridge*, 12 Tenn. App. 415, 417-18 (1930).

The Court therefore concludes that, for all the reasons stated above, this is proper case for rescission and that the quitclaim deed at issue be set aside.

ACCORDINGLY, it is herewith ORDERED, ADJUDGED and DECREED that:

1. The quitclaim deed recorded at Book 8602 Page 462 with the Register of Deeds of Davidson County, Tennessee, is hereby rescinded and, in accordance with the Court's authority granted pursuant to Rule 70 of the Tennessee Rules of Civil Procedure and Tennessee Code Annotated § 16-1-108, all right, title and interest of Michael Bourini is hereby divested out of him, and is hereby vested in Rebecca Lee Scivally as an indefeasible inheritance and fee simple, forever, of the

following described tract of land:

> A tract of land in the 2nd, formerly 3rd, Civil District of Davidson County, Tennessee, described according to a copy of survey thereof made March 11, 1946, by Z.J. Wilkinson, Surveyor as follows:
>
> Beginning at a stake in the West margin of LaVergne-Couchville Pike, at the Northeast corner of this tract and the Southeast corner of the land of Azilee Hill; thence with the West margin of the Couchville Pike, South 7 degrees West 601.6 Feet to a stake along Vaughn's Northeast corner of a 1 acre tract; thence along Vaughn's North line North 86 degree 45' West 210 feet to a point at a inner corner of land of J.E. Hill and continuing with said J.E. Hill's new line as follows: North 83 degrees West 100 feet to a stake North 2 degrees 45' West 587 feet to a stake in the South line of the land of Azilee Hill; thence with her south line South 88 Degrees 10' East 405.7 feet to the beginning

2. The Clerk & Master of this Court, as Commissioner, shall give to the plaintiff, Rebecca Lee Scivally, a certified copy of this decree for registration with the Register of Deeds of Davidson County, Tennessee, and this decree shall operate to transfer sole and exclusive possession of, and all right, title and interest to said property to the plaintiff, Rebecca Lee Scivally. The costs of said certified decree shall be paid by the plaintiff;

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3. Plaintiff, Rebecca Lee Scivally, have and recover from defendant, Michael Bourini, judgment in the sum of $13,163.00; and

4. The costs of this cause shall be paid by the defendant, Michael Bourini, for which execution may issue if necessary.

It is so ORDERED.

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CLAUDIA C. BONNYMAN REGISTER
DAVIDSON COUNTY, TN.
IDENTIF. & REFERENCE
041987

Carol L. McCoy

CAROL L. MCCOY
CHANCELLOR

cc: Pamela King
John M. Price
James H. Flood

I hereby certify that this is a true copy of original instrument filed in my office
This 2 day of March 1998
CLAUDIA C. BONNYMAN Clerk & Master
By Deputy Clerk