IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

JIM COLEMAN AUTOMOTIVE OF FREDERICK, LLC,	:	
Plaintiff	:	
v.	:	**Case No. 286684-V**
HAROLD OAKES, et al,	:	
Defendants.	:	

MEMORANDUM AND ORDER

The Plaintiff seeks reconsideration of the Court's Order of February 4, 2008, requiring the Plaintiff's legal claims, Counts I-IV, to be tried before a jury and the claim in Count V, styled as a request for a declaratory judgment, to be decided by the Court in a single proceeding. In support of that decision, the Court cited *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962); *Higgins v. Barnes*, 310 Md. 532 (1987) and *Hashem v. Taheri*, 82 Md. App. 269 (1990). (DE # 73). Urging a number of errors by this Court, the Plaintiff asks that on the trial date, May 19, 2008, the Court first determine all issues as to Count V, the declaratory judgment claim, before allowing a jury to decide the legal claims, Counts I-IV. (DE # 75). The Plaintiff also asks the Court to "separate for decision" Count V from Counts I-IV. (DE # 76). The Plaintiff's two motions are virtually identical. The Defendant opposes these motions. No hearing is necessary. *Phillips v. Venker*, 316 Md. 212, 219 & n. 2 (1989).

I.

On June 17, 2002, the Plaintiff leased certain real property from the Defendants to be used for an automobile dealership ("the Lease Agreement"). The Lease Agreement had an initial term of five years and a second term for an additional five years. The rent for the first five-year term was $9,000 per month, payable on the first of every month commencing July 1, 2002. The rent for the second five years was $13,000 per month commencing on July 1, 2007.

The Lease Agreement has a number of other key provisions. Paragraph 25 granted to the Plaintiff a right of first refusal if the Defendants received a bona fide purchase offer during the term of the lease. Upon receipt of an offer, the Defendants were obligated to afford the Plaintiff the right to match and perform the terms of the offer. To exercise this right, the Plaintiff had to follow a number of steps, including delivering to the Defendants a signed contract and earnest money deposit within fifteen days of receiving notice of the offer.

Paragraph 26 granted to the Plaintiff an option to purchase the property during the second five-year term, for cash, in an amount equal to the then fair market value of the property. The option was to be exercised by submitting an offer to purchase to the Defendants, with a closing not more than 120 days after acceptance of the offer. If the Defendants did not accept the Plaintiff's offer, the Plaintiff could elect to have the property appraised, and each party was required to designate an appraiser. If the two appraisers did not agree, they would designate a third appraiser. In that event, the fair market value for purposes of the purchase option would be the average of the three appraised values. There also were a number of other steps in the process.

On July 19, 2007, the Plaintiff purported to exercise the purchase option under ¶ 26 of the Lease Agreement. The Defendants did not accept the offer because the amount, in their view was too low and, in addition, they contended that the Plaintiff was delinquent in rent and therefore in breach of the Lease Agreement. Believing (or at least contending) that the Plaintiff no longer had option rights under ¶ 26 of the Lease Agreement, the Defendants entered into a sale agreement with a third-party on July 24, 2007, thus triggering the Plaintiff's right of first refusal.

After the "overdue" rent was paid, the Defendants extended the Plaintiff's right of first refusal a number of times, to and including August 21, 2007. The Plaintiff purported to exercise its right of first refusal on August 21, 2007, but this is disputed by the Defendants.

The Defendants contend they properly rejected the Plaintiff's purchase offer under ¶ 26 of the Lease Agreement and that the Plaintiff did not follow the requirements of this option regarding appraisals and other matters. The Plaintiff disagrees and contends that he literally (or substantially) complied with the purchase option. The Plaintiff also contends the Defendants' purported triggering of the right of first refusal is in breach of the Lease Agreement, in bad faith and simply an attempt to obtain a higher price for the land.

II.

The Plaintiff filed suit on September 11, 2007. (DE # 1). The complaint alleges five causes of action,[1] all of which arise out of the parties' Lease Agreement, dated June 17, 2002. In Counts I through IV of the complaint, the Plaintiff seeks money damages from the Defendants, arising out of the Defendants' alleged breach of the Lease Agreement. Count I is for breach of contract, Count II is for breach of the implied covenant of good faith,[2] Count III is for negligent misrepresentation, and Count IV alleges fraud. The Plaintiff seeks $5,000,000 in actual damages and $3,000,000 in punitive damages.

In Count V of the complaint, the Plaintiff seeks a declaratory judgment stating it properly exercised its right in July 2007 to purchase 3.21 acres of land in Frederick, Maryland under ¶ 26 of the Lease Agreement. The Plaintiffs also allege the Defendants wrongly refused

[1] In contrast with Fed. R. Civ. P. 8(a), Maryland Rule 2-303(b) and Maryland Rule 2-305 require that a complaint contain "a *statement of facts* essential to state a cause of action." P. Niemeyer & L. Schuett, Maryland Rules Commentary 184 (3d ed. 2003 (emphasis in original). *See Scott v. Jenkins*, 345 Md. 21, 27-28 (1997).

[2] The Court expresses no opinion as to whether Count II states a cognizable cause of action separate from the breach of contract claim. Even if it does, Count II seeks relief in the form of money damages, making it a legal claim.

to honor that right and breached the option clause and other provisions of the lease by entering into a contract to sell the land to another purchaser. In this regard, the Plaintiff specifically seeks to "[c]ompel Defendants to honor the exercise of the preemptive and irrevocable right to purchase the Property under the Lease Agreement."

By Consent Order for Preliminary Injunction, entered September 19, 2007, (DE # 13), the status quo was frozen to enable the case to be set for trial at the earliest possible date. Over the Defendants' objection, the Administrative Judge set a trial on February 4, 2008, *only* for Count V. (DE # 59). The Defendants timely filed an answer on October 22, 2007, and demanded a jury trial on all claims. Maryland Rule 2-325. (DE # 16). By Order dated January 14, 2008, the Administrative Judge denied the Defendants' motion for a continuance, motion to reassign the case to Track IV and motion to issue a new Scheduling Order (DE # 46, # 47).

At a hearing on January 23, 2008, the Court (Rowan, J.) granted the Plaintiff's motion to strike the Defendants' jury demand as to Count V, but not as to Counts I-IV. In so ruling, Judge Rowan concluded, at least implicitly, that Count V alleged an equitable claim. *See* § 3-404 of the Courts Article (preserving the right to a jury trial in a declaratory judgment action when the claim is legal in nature).

By Order dated February 2, 2008, this Court denied the Plaintiff's motion for partial summary judgment as to Count V and the Defendants' motion for summary judgment on all counts. (DE # 69, # 70).

III.

Before taking evidence on February 4, 2008, this Court asked the parties whether it was permissible for the Court to first hold a bench trial on Count V, in view of the pendency of the four legal claims in the complaint, the Defendants' timely demand for a jury trial on those claims, and the jury trial guarantee of Article 23 of the Maryland Declaration of Rights. The

Court observed that a request for a declaratory judgment was simply a procedural device and that the request may sound in law or in equity depending upon the nature of the relief sought. *Himes v. Day*, 254 Md. 197, 206 (1969). This Court also observed that Count V seemed to request equitable relief in the nature of specific performance of the option clause of the Lease Agreement to purchase the land at fair market value on the date of the option's exercise.[3] *See Kann v. Kann*, 344 Md. 689, 699-702 (1997). The Court also observed that factually all claims asserted in the complaint appeared to be inextricably intertwined. Since, Counts I-IV plainly were triable before a jury, the Court reasoned that the entire case should be tried at one time, with a jury deciding Counts I-IV and the Court deciding Count V.

The Plaintiff argued that the Defendants had consented to an inverted trial when they signed the Consent Injunction in September 2007. The Defendants disagreed, arguing that they never waived their jury trial rights and that all causes of action should be decided in a single proceeding, with the jury first deciding Counts I-IV.

The Plaintiff also argued that the Court was without power to "overrule" the decisions of other judges who, at least implicitly, had determined the Plaintiff could first try Count V to the Court and later try Counts I-IV to a jury. The Plaintiff further argued that Count V presented pure questions of law and all it was seeking was a declaration of the parties' "rights" under the Lease Agreement. The Defendant countered that any decision by the Court on Count V -- whether the Plaintiff was entitled to exercise the option and, if so, was the option properly exercised -- necessarily would decide certain facts relevant to, and possibly decide some if not all of, the Plaintiff's claims under Counts I-IV. For these reasons, the Defendants contended

[3] Specific performance of a contract sounds only in equity, for which there is no right to a jury trial. *Calabi v. GEICO*, 353 Md. 649, 653-57 (1999). It is highly doubtful that the plaintiff can seek both specific performance of the option to purchase the land and money damages for the defendants' breach of the option contract. An election between specific performance and money damages will likely be necessary before trial. *See Benjamin v. Erk*, 138 Md. App. 459, 470-80 (2001); *Merritt v. Craig*, 130 Md. App. 350, 360-68 (2000).

they were entitled, as prayed, to a jury trial on the Plaintiffs' claims that sought money damages before the Court ruled on Count V.

III.

Manifestly, a party in a civil case can waive a right to a jury trial. Such a waiver typically occurs when a party does not timely request a jury trial under Maryland Rule 2-325. *See Bringe v. Collins,* 274 Md. 338, 347 (1975). In this case however, the Defendants timely elected a jury trial (for all claims triable to a jury) when they filed their answer to the complaint. This timely election was confirmed by Judge Rowan's ruling of January 23, 2008.

The Plaintiff says the Defendants nevertheless waived their right to have the legal claims considered in the same trial as the declaratory judgment claim when counsel for the Defendants signed the Consent Injunction. The Court disagrees. There is insufficient evidence of record to support a finding that the Defendants knowingly and intentionally surrendered their rights under Article 23 of the Maryland Declaration of Rights when they signed the Consent Injunction. *Johnson v. Zerbst*, 304 U.S. 458, 464-65 (1938). In other words, the Court is not satisfied and cannot find on this record that there has been "an intentional relinquishment or abandonment of a known right or privilege." *Smith v. State*, 375 Md. 365, 379-80 (2003).

Next, the Plaintiff complains that the Court has "overruled" the decisions of other circuit court judges by requiring Counts I-IV and Count V to be tried in the same proceeding. The Court's review of the record discloses that this specific question was never squarely presented when other judges made their rulings in the case. In any event, those rulings are interlocutory and this Court, respectfully, is not bound by those rulings. *Gertz v. Anne Arundel County,* 339 Md. 261, 273 (1995); *Carey v. Chessie Computer Services, Inc.*, 141 Md. App.

228, 241 (2001); *Fountain Square Properties, LLC v. Grosvenor House Associates*, LP, 2007 WL 3237448 (August 27, 2007).[4]

VI.

A Plaintiff is the master of its complaint. The Plaintiff in this case could have filed a single-count complaint seeking only a declaratory judgment. *Layman v. Layman*, 282 Md. 92, 95 (1978). Had such been done, the Plaintiff likely could have achieved the result it attempted in this case. *See Owens-Illinois, Inc. v. Lake Shore Land Company*, 610 F.2d 1185 (3d Cir. 1979); *State v. Attman/Glazer P.B. Co.*, 323 Md. 592, 607 (1991); *Shapiro v. County Commissioners*, 219 Md. 298, 302-03 (1958). Indeed, the Court of Appeals has stated, "the statutory scheme expressly permits a party to bring one action requesting only a declaratory judgment and then to bring a separate action for further relief based on the rights determined by the judgment." *Bankers & Shippers Ins. Co. v. Electro Enterprises, Inc.*, 287 Md. 641, 653 (1980). *Compare Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239-41 (1937) *with Calderon v. Ashmus*, 523 U.S. 740, 746-49 (1998).

Nevertheless, the Plaintiff did not do so in this case. Instead, the Plaintiff elected to allege in a single complaint four legal claims seeking millions of dollars in money damages, along with a fifth claim styled as a request for a declaratory judgment. Having done so, it cannot then divest the Defendants of their constitutional right to have the legal claims asserted in Counts I-IV of the complaint heard by a jury before the Court considers and rules upon the request for a declaratory judgment. *Edwards v. Gramling Engineering Corp.*, 322 Md. 535, 542-43 (1991); *Chesley v. Goldstein & Baron, Chartered*, 145 Md. App. 605, 629-34 (2002);

[4] Contrary to the Plaintiff's contention, this Court has not "overruled" the Administrative Judge. When the Court made its February 4, 2008 ruling, the parties were advised that the new date for a single trial would be submitted for approval to the Administrative Judge before a new Scheduling Order was entered. The new Scheduling Order entered by this Court was approved before its entry. (DE # 72).

Hawes v. Liberty Homes, 100 Md. App. 222, 228-30 (1994).[5] Further support for this unremarkable conclusion is found in § 3-404 of the Courts Article, which provides: "The fact that a proceeding is brought under this subtitle does not affect a right to a jury trial which otherwise may exist."[6]

Contrary to the Plaintiff's contention, the Court has neither misread nor misapplied *Higgins v. Barnes*, 310 Md. 532 (1987). In that case, Judge McAuliffe was quite clear in stating a defendant need not file a counterclaim to preserve his jury trial rights when the plaintiff's claims in the complaint are predominately legal in nature; such matters are properly raised, as was done here, by the answer and a timely demand for a jury trial. *Higgins*, 310 Md. at 535 n. 1. In this case, the factual issues raised in the complaint are all inextricably intertwined because they all turn on whether the parties properly fulfilled (or breached) their duties under the Lease Agreement.

Under the complaint filed, the Plaintiff cannot demand that "its rights" under the Lease Agreement first be determined by a court, by way of a declaratory judgment, thereby depriving the Defendants of their constitutional right to have certain facts decided by a jury. To proceed otherwise would be manifest error. *Lytle v. Household Manufacturing, Inc*., 494 U.S. 545, 550-54 (1990); *Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp.*, 294 F.2d 486, 489-91 (5th Cir. 1961). As stated by Justice Marshall: "When legal and equitable claims are joined in the same action, 'the right to jury trial on the legal claim, including all issues common to both

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[5] The federal courts have commented upon the difficulty in certain circumstances of deciding whether certain claims are legal as opposed to equitable in nature, thus implicating the Seventh Amendment right to a jury trial. *See, e.g., City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 707-21 (1999); *Curtis v. Loether*, 415 U.S. 189, 192-97 (1974); *Barber v. Kimbrell's, Inc.*, 577 F.2d 216, 224-26 (4th Cir. 1978).

[6] The danger to a defendant of the application of claim or issue preclusion if factual issues in an equitable action are adjudicated adversely to it before a jury trial on the legal claims is quite substantial. *Lytle v. Household Manufacturing, Inc*., 494 U.S. 545, 550-54 (1990); *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 333-36 (1979).

claims, remains intact.'" *Lytle*, 494 U.S. at 550, *quoting in part Curtis v. Loether*, 415 U.S. at 196 n. 11.

"Jury decisions of disputed legal issues are clearly favored, and whenever practicable the jury determination of any issue common to both legal and equitable claims should precede court consideration of the equitable issues." *Higgins*, 310 Md. at 541. The Court will leave to the parties and the trial judge to decide the form, if any, of special interrogatories to be submitted to the jury. The trial judge will then decide whether and to what extent to base his or her decision regarding Count V "on any applicable factual determinations made by the jury." P. Niemeyer & L. Schuett, *Maryland Rules Commentary*, 224 (3d ed. 2003).[7]

For the reasons set forth above, it is this 22nd day of February, 2008, **ORDERED** that he Plaintiff's motion for reconsideration (DE # 75) and motion for separate decision (DE # 77) are **DENIED**.

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RONALD B. RUBIN, JUDGE
Circuit Court for Montgomery County, Maryland

[7] Regarding whether the option in question was properly exercised in this case, the parties' attention is directed to the recent decision of the Court of Appeals in *Elderkin v. Carroll*, No. 57 September Term, 2007 (February 14, 2008), as well as *Bramble v. Thomas*, 396 Md. 443 (2007).