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IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA  
Division No. 1

**TERRA FIRMA COMPANY, a  
West Virginia company and a  
wholly-owned subsidiary of  
CONSOL ENERGY, INC.,  
a Delaware corporation,**

**PETITIONER/COUNTERCLAIM DEFENDANT,**

v.

**Case No. 06-C-13**

**ROBERT MORGAN and  
VICKIE MORGAN, husband  
and wife,**

**RESPONDENTS/COUNTERCLAIM PLAINTIFFS.**

**ORDER GRANTING TERRA FIRMA'S MOTION FOR SUMMARY JUDGMENT**

On a previous day the Petitioner/Counterclaim Defendant, Terra Firma Company, by counsel, filed a Motion for Summary Judgment pursuant to Rule 56 of the West Virginia Rules of Civil Procedure, seeking judgment in its favor and against the Respondents/Counterclaim Plaintiffs, Robert and Vickie Morgan, as to liability and damages asserted in the counterclaims filed in this case. For the reasons set forth below, the Court grants Terra Firma's Motion for Summary Judgment and dismisses the Morgans' counterclaims with prejudice.

**PROCEDURAL HISTORY**

On or about January 6, 2006, Terra Firma instituted the above-styled action by filing its "Petition for Wrongful Occupation of Residential Real Estate" ("Petition") and "Notice of Hearing" in the Circuit Court of Monongalia County, West Virginia, based on the Morgans' failure to vacate and failure to pay back rent on real property that is at the heart of this action,

property that was conveyed by the Morgans in December of 2004 to Terra Firma Company, ("Subject Property"). The Morgans received proper notice of the Petition by virtue of the court summons personally served upon Mrs. Morgan on January 9, 2006.

On or about January 13, 2006, the Morgans served their "Answer and Counterclaim." The Morgans' counterclaim purported to seek damages based upon Terra Firma's alleged retaliation as well as damages based on the Morgans' claim for reformation of the deed. Additionally, the Morgans filed a "Motion to Dismiss the Petition of Petitioner," claiming the alleged "farm use" character of the Subject Property exempted it from eviction proceedings under W. Va. Code § 55-3A-1, *et seq.*

On January 18, 2006, the parties, in person and through counsel, appeared before this Court. During that hearing, the Court denied the Morgans' "Motion to Dismiss the Petition of Petitioner" and ordered the Morgans to vacate the Subject Property on or before March 31, 2006, and to pay Terra Firma back-rent from August 2005 through January 2006. The Court also ordered the Morgans' Counterclaims to remain pending pursuant to the West Virginia Rules of Civil Procedure. Terra Firma filed and served "Petitioner's Answer to Respondents' Counterclaims" on or about January 20, 2006.

On March 31, 2006, both parties, personally and through counsel, appeared before this Court for hearing on "Petitioner's Motion to Dismiss," which was directed toward the reformation and retaliation claims presented by the Morgans. During that hearing, the Court treated the motion as a "Motion for More Definite Statement" and ordered the Morgans to amend their second counterclaim to account for the allegation of misrepresentation by Terra Firma, first announced that day in Court by the Morgans' counsel. On or about April 7, 2006, the Morgans served and filed "Respondents' More Definitive Statement of Counterclaim of Respondents." Based on the Morgans' more definitive statement, they sought reformation of the real estate transaction with Terra Firma based upon alleged misrepresentations made to them and their realtor and damages for alleged retaliation by Terra Firma.

On or about June 8, 2006, Terra Firma filed and served: "Petitioner's Motion for Summary Judgment," seeking dismissal of the Morgans' claims for "reformation" and "retaliation" based on the undisputed record that had been produced during the parties'

discovery. On or about June 16, 2006, the Morgans filed a "Motion for Continuance," alleging that summary judgment should be denied as additional discovery was warranted. Terra Firma responded by filing and serving "Petitioner's Reply in Support of Petitioner's Motion for Summary Judgment / Petitioner's Response to Respondents' Motion for Continuance" on or about June 26, 2006. On June 29, 2006, both parties, by counsel, appeared before this Court, which granted the "Respondents' Motion for Continuance," and between that time and the present, discovery has been on-going and is now complete.

On or about May 29, 2007, Terra Firma renewed its "Motion for Summary Judgment." The Morgans served "Respondents' Reply to Petitioner's Motion for Summary Judgment" on or about June 4, 2007. Therein, the Morgans abandoned their claim alleging retaliatory eviction. The next day, June 5, 2007, Terra Firma filed and served "Petitioner's Reply in Support of Motion of Summary Judgment." Both parties appeared before this Court on June 7, 2007, in person and through counsel, for hearing on "Petitioner's Motion for Summary Judgment" with respect to the sole remaining claim for reformation of the deed.

After careful review of the documents submitted, the arguments of the parties, and the record developed in this matter, the Court is of the opinion and does hereby GRANT the Motion for Summary Judgment, and finds as follows:

#### STANDARD OF REVIEW

Summary judgment is mandated if the record, when reviewed most favorably to the nonmoving party, discloses "that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." *Painter v. Peavy*, 451 S.E.2d 755, 758 (W.Va. 1994). Summary judgment is appropriate where the non-movant fails to present evidence sufficient to allow a reasonable juror to conclude that his position, more likely than not, is true. *Gentry v. Mangum*, 466 S.E.2d 171, 177-78 (W.Va. 1995) (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)).

As explained by the West Virginia Supreme Court of Appeals in *Painter v. Peavy*, "the party opposing summary judgment must satisfy the burden of proof by offering

more than a mere 'scintilla of evidence,' and must produce evidence sufficient for a reasonable jury to find in a nonmoving party's favor." *Id.* at 758-59.

[W]hile the underlying facts and all inferences are viewed in the light most favorable to the nonmoving party, the nonmoving party must nonetheless offer some "concrete evidence from which a reasonable . . . [finder of fact] could return a verdict in . . . [its] favor" or other "significant probative evidence tending to support the complaint."

*Id.* at 759 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)).

More recently, in *Barbina v. Curry*, 2007 W. Va. LEXIS 4 (W. Va. 2007), the Supreme Court explained

We have made clear that "[u]nsupported speculation is not sufficient to defeat a summary judgment motion." *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 61, 459 S.E.2d 329, 338 (1995) (quoting *Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1128 (4th Cir. 1987)). While it is true that "the nonmoving party is entitled to the most favorable inferences that may reasonably be drawn from the evidence, [such evidence] 'cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another.'" *Marcus v. Holley*, 217 W. Va. 508, 516, 618 S.E.2d 517, 525 (2005) (quoting *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985)). Further, "[t]he evidence illustrating the factual controversy cannot be conjectural or problematic." *Williams*, 194 W. Va. at 60, 459 S.E.2d at 337.

*Barbina*, 2007 W. Va. LEXIS at 22-23.

To be clear, the *Williams* Court mandated summary judgment where "the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." *Syl. Pt. 2, Williams v. Precision Coil, Inc.*, 459 S.E.2d 329 (W. Va. 1995).

#### DISCUSSION OF LAW

The Morgans ask this Court to reform the purchase price, a term agreed to in the Real Estate Purchase Agreement, and formalized in the deed conveying the Subject Property to

Terra Firma. West Virginia's Supreme Court has spoken to the plausibility and appropriateness of deed reformation, holding that such a remedy is generally reserved for cases of mutual mistake, but leaving open the possibility of reformation upon a clear and convincing showing of unilateral mistake by one party and fraud or inequitable conduct by the other party.

"[A] court of equity *should not reform a contract for the sale of land, which is clear and unambiguous in its terms*, nor enlarge the provisions of a deed made in conformity with the contract, which would give to the grantees in the deed more land than they contracted for." *Eiland v. Powell*, 65 S.E.2d 737, 742 (W. Va. 1951) (emphasis added).

Where a party alleges fraud or inequitable conduct as the basis for their prayer for reformation, West Virginia law imposes upon that party an imposing burden of proof.

The jurisdiction of equity to reform written instruments, where there is a mutual mistake or *mistake on one side and fraud or inequitable conduct on the other, if the evidence be sufficiently cogent to thoroughly satisfy the mind of the Court, is fully established and undoubted.* (Italics supplied). In order to authorize reformation, the instrument must fail to express the parties' agreement or intention, either because of mutual mistake or because of *mistake, inadvertence, or accident on one side and fraud or inequitable conduct on the other.* (Italics supplied) To warrant such reformation, the proof must be strong, clear and convincing.

*Lusher v. Sparks*, 122 S.E.2d 609, 615 (W. Va. 1961).

A deed is an instrument executed with formality and imports full and complete exposure of the intent of the parties. It speaks the final agreement by the clearest and most satisfactory evidence. In some instances the courts have gone so far as to hold that it would be an extreme case where it would reform a written instrument upon the uncorroborated testimony of a party thereto, even if such testimony is not contradicted. The books are full of cases which reveal the high degree of caution which courts exercise in such matters. The relief will be denied whenever the evidence is loose, equivocal, or contradictory, or is open to doubt or opposing presumptions.

*Donato v. Kimmins*, 139 S.E. 714, 715-716 (W. Va. 1927).

In evaluating the validity of a deed, the West Virginia Supreme Court adopted the following rule: "A deed must be upheld if possible. All instruments must be so construed as to pass an estate, when such was the intention; and it will be presumed from the making of a deed that the grantor intended to convey some property by it." *Heartland, L.L.C. v. McIntosh Racing Stable, L.L.C.*, 632 S.E.2d 296, 301 (W. Va. 2006), quoting Syl. Pt. 7 *Proudfoot v. Proudfoot*, 591 S.E.2d 767 (W.Va. 2003). A deed will not be set aside for misrepresentation or fraud upon the part of the grantee, except upon a clear showing of one or more of these facts by the evidence. *Id.* citing *Hardin v. Collins*, 23 S.E.2d 916 (1942). Once the trial judge finds that an otherwise valid deed was not obtained by fraud or duress, the court is required to find the deed valid and the grantor will be left with no legal remedy. *Proudfoot v. Proudfoot*, 591 S.E.2d 767, 772 (W.Va. 2003).

Whether the Morgans seek rescission or reformation of the deed at issue, *Lusher* requires them to establish their own mistake, as well as some "fraud or inequitable conduct" by Terra Firma. Their claim is based upon an alleged misrepresentation by Terra Firma's agent, Mr. Burton. Consequently, in addition to proving their own mistake, they must prove all of the necessary elements of a misrepresentation claim to establish the "fraud or inequitable conduct" required by *Lusher*. Importantly, a prayer for deed reformation imposes an increased burden of proof, requiring the Morgans to establish each element by "strong, clear and convincing" evidence. *Lusher*, 122 S.E.2d at 615.

In order to establish a claim for misrepresentation, the Morgans must prove: (1) that a misrepresentation was committed by Terra Firma or induced by it; (2) that the misrepresentation was material and false; (3) that the Morgans relied upon the misrepresentation and were justified under the circumstances in doing so, and (4) that the Morgans were damaged because of their reliance. *Kidd v. Mull*, 595 S.E.2d 308 (W.Va. 2004).

Based on the substantiated, undisputed material facts presented by the parties in this case, the Court makes the following findings of facts and conclusions of law:

- (1) In 1996, the Morgans purchased the Subject Property for \$185,000.00;

(2) In 2004, Terra Firma retained the services of William H. Burton, Jr., a licensed real estate agent, to act as a buying agent for the purpose of acquiring properties in the western part of Monongalia County;

(3) The only contact Mr. Burton had with Terra Firma was through James Russell, Esq., acting as president of Terra Firma. Mr. Russell never informed Mr. Burton of what Terra Firma intended to do with the properties that Burton was purchasing;

(4) In September, 2004, the Morgans engaged Nancy Kincaid and J.S. Walker & Associates for the purpose of offering the Subject Property for sale; a Competitive Market Analysis was prepared and the property was placed on the market with a list price of \$640,000.00;

(5) On September 29, 2004, Mr. Burton, acting as Terra Firma's agent, researched the Subject Property on the Multi-List Service;

(6) On October 4, 2004, Mr. Burton, as Terra Firma's agent, conveyed Terra Firma's offer to purchase the Morgans' property to Ms. Kincaid, the Morgans' agent, for \$480,000.00; on October 9, 2004, the offer was rejected by the Morgans;

(7) On October 14, Mr. Burton, as Terra Firma's agent, conveyed Terra Firma's offer to purchase the Morgans' property to Ms. Kincaid, the Morgans' agent, for \$500,000.00; the offer was rejected by the Morgans;

(8) On November 1, 2004, Mr. Burton, as Terra Firma's agent, conveyed Terra Firma's offer to purchase the Morgans' property to Ms. Kincaid, the Morgans' agent, for \$525,000.00;

(9) On November 2, 2004, at the Morgans' instruction, Ms Kincaid faxed the contract to Kevin Neiswonger, the Morgans' attorney;

(10) On November 3, 2004, the Morgans accepted Terra Firma's offer and executed a valid Real Estate Purchase Agreement to convey the Subject Property to Terra Firma for \$525,000.00; the deed of conveyance and lease agreement were executed at closing on December 15, 2004;

(11) A "Notice of Agency Relationship" was executed contemporaneously with the Real Estate Purchase Agreement;

(12) Pursuant to the "Notice of Agency Relationship," Mr. Burton owed his principal, Terra Firma, "the duty of outmost care, integrity, honesty and loyalty";

(13) Pursuant to the "Notice of Agency Relationship," Mr. Burton owed to both Terra Firma and the Morgans "[a] duty of honest and fair dealing and good faith";

(14) Pursuant to the "Notice of Agency Relationship," Mr. Burton was required to "disclose all facts *known to the agent* materially affecting the value or desirability of the property" (emphasis added);

(15) Pursuant to the "Notice of Agency Relationship," Mr. Burton was "not obligated to reveal to either party any confidential information obtained from the other party which does not involve the affirmative duties set forth above";

(16) All of the negotiations for the Morgans were handled by the Morgans' realtor, Nancy Kincaid. At the time of the execution of the Real Estate Purchase Agreement, the Morgans had no contact with Terra Firma, or any of its representatives, including Mr. Burton;

(17) Mr. Morgan's deposition indicates the "important things" negotiated in reaching the agreement to sell the Subject Property were price, a leaseback provision, and hunting rights; neither Terra Firma's corporate structure, nor Terra Firma's intended use of the property were ever addressed by the negotiations;

(18) The Real Estate Purchase Agreement contained a provision with a blank line to identify the grantee of the property being conveyed;

(19) The Morgans signed the Real Estate Purchase Agreement without objecting to the identification of the grantee as "contact purchasers attorney"; this provision would have allowed Terra Firma to title the property in any name that it wanted, had it chosen to do so;

(20) Mr. Burton's undisputed testimony is that he never told Ms. Kincaid what Terra Firma intended to do with the property;

(21) Ms. Kincaid's undisputed testimony is that Mr. Burton never told her what Terra Firma intended to do with the property;

(22) Because Mr. Burton received no notice whatsoever that Terra Firma's intended use of the property was material to the Morgans' decision to sell the Subject Property, and because Mr. Burton made no misrepresentations regarding Terra Firma's intended use of the property, he did not violate the duties imposed upon him by the "Notice of Agency Relationship";

(23) The Morgans do not seek rescission of the contract to sell; rather, they seek an "equitable adjustment," or reformation of the deed in order to increase the price they agreed to;

(24) Ms. Kincaid's undisputed testimony is that the Mr. Morgan suspected that Terra Firma was engaged in the business of coal and with that knowledge, he "held out for the price he wanted";

(25) The Morgans do not assert that they would not have sold to Consol Energy, Inc., or that the possibility the land would be mined for coal would have altered their decision to sell the Subject Property;

(26) Under West Virginia law, reformation of a deed is only available upon a "strong, clear and convincing" showing of "mutual mistake or mistake on one side and fraud or inequitable conduct on the other." *Lusher v. Sparks*, 122 S.E.2d 609, 615 (W. Va. 1961);

(27) To survive summary judgment, the Morgans must produce "concrete," or "significant probative evidence" from which a reasonable finder of fact could return a verdict in their favor. *Painter v. Peavy*, 451 S.E.2d 755, 758 (W.Va. 1994);

(28) The Morgans have produced no evidence of a unilateral mistake on their part in the negotiation, preparation, or execution of the Real Estate Purchase Agreement, or the deed that formalized their decision to convey the Subject Property to Terra Firma;

(29) To meet the legal definition of "mistake" called for by *Lusher*, the Morgans' mistake or ignorance of fact regarding Terra Firma's corporate structure and intended use of the property must be material, and such that the Morgans could not have discovered the facts through reasonable diligence. *Simmons v. Looney*, 24 S.E. 677, 678 (W. Va. 1896);

(30) There is no indication in the record that Terra Firma's corporate structure or intended use of the property were material to the negotiations that culminated with the execution of the Real Estate Purchase Agreement. By Mr. Morgan's own admission, only price, hunting rights, and the leaseback provision were "important";

(31) The record is devoid of any inquiries directed by the Morgans to Terra Firma regarding Terra Firma's corporate structure and intended use of the property prior to the execution of the Real Estate Purchase Agreement. The Morgans did not demonstrate "reasonable diligence" to cure their ignorance of fact with regard to the issues they now raise. *Simmons*, 24 S.E. at 678;

(32) In the event the Morgans produced sufficient evidence of a unilateral mistake, they would also have to produce evidence of inequitable conduct by Terra Firma. *Lusher*, 122 S.E.2d at 615. Considering the Morgans' allegation of misrepresentation as an allegation of inequitable conduct, the West Virginia law of reformation, requires the Morgans to produce evidence sufficient to create a material issue of fact as to whether they can establish each element set forth in *Kidd v. Mull*, 595 S.E.2d 308 (W.Va. 2004) by "strong, clear and convincing" evidence. *Lusher*, 122 S.E.2d at 615;

(33) To establish misrepresentation by Terra Firma, the Morgans must prove: (1) that a misrepresentation was committed by Terra Firma or induced by it; (2) that the misrepresentation was material and false; (3) that the Morgans relied upon the misrepresentation and were justified under the circumstances in doing so, and (4) that the Morgans were damaged because of their reliance. *Kidd v. Mull*, 595 S.E.2d 308 (W.Va. 2004);

(34) As to the first element, the Morgans assert two instances of misrepresentation by Terra Firma: 1. Statements made by their realtor regarding Terra Firma's intended use of the Subject Property; and 2. A statement made by "a man across from" Mr.

Morgan at the closing that the Subject Property was being acquired "for land development purposes only";

(35) The undisputed testimony of Mr. Burton and Ms. Kincaid, the Morgans' realtor, is that Terra Firma's intentions regarding the Subject Property were never discussed in the course of the negotiations. Any speculation by Ms. Kincaid, herself, regarding Terra Firma's intent, that she communicated to her clients, the Morgans, cannot be characterized as a misrepresentation committed, or induced by Terra Firma. *Kidd*, 595 S.E.2d at 313;

(36) Even if it is accepted that the "land development" statement was made by an agent of Terra Firma, the statement hardly rises to the level of the "extreme case" required to "reform a written instrument upon the uncorroborated testimony of [Mr. Morgan], even if such testimony is not contradicted." *Donato v. Kimmins*, 139 S.E. at 715. Moreover, this statement, if it occurred, came after the contract was executed, not as an inducement to its execution;

(37) As to the second element, the Morgans have failed to produce evidence establishing that the identity of the buyer and/or the intended use of the Subject Property was material to their decision to sell the Subject Property to Terra Firma. Any alleged misrepresentation or alleged failure to reveal an undisclosed principal cannot be characterized as material misrepresentations because Terra Firma received no notice or indication whatsoever that these issues were material to the Morgans' decision to sell the Subject Property;

(38) As to the third element, the Morgans simply cannot establish reliance on any alleged misrepresentation by Terra Firma because they had absolutely no contact with any representative of Terra Firma during the period of inducement prior to the execution of the Real Estate Purchase Agreement;

(39) Any reliance by the Morgans on statements by their agent, Ms. Kincaid, is irrelevant because Ms. Kincaid's undisputed testimony is that her statements, or presumptions regarding the Subject Property were not induced by Terra Firma, or its agent, Mr. Burton;

(40) Any reliance by the Morgans on the alleged misrepresentation by the unidentified party to the closing is irrelevant because the statement had no bearing on the Morgans' decision to sale the property to Terra Firma. That decision was made and rendered

legally enforceable by the execution of the Real Estate Purchase Agreement approximately six weeks earlier. The deed signing at closing constituted a mere formality of the previously executed contract;

(41) As to the fourth element, the Morgans cannot establish they were damaged by their reliance on Terra Firma's misrepresentation because there were no misrepresentations made and hence, no possibility of reliance;

(42) Even if the Morgans could demonstrate reliance on a misrepresentation by Terra Firma, they have failed to proffer any evidence that they were damaged in any way by a transaction that netted them a \$340,000.00 return on their eight year investment in the Subject Property; and

(43) Simply, seller's remorse based on the discovery that one's neighbors may have negotiated better terms in similar transactions does not constitute "damage" in the sense contemplated by the claim asserted by the Morgans.

#### CONCLUSION

To prevail on their claim for reformation of the price term contained in the Real Estate Purchase Agreement and subsequent deed of conveyance, the Morgans must be able to prove by clear and convincing evidence the existence of a mistake on their part, and fraud or inequitable conduct by Terra Firma. There are no issues of material fact with respect to the existence of a unilateral mistake by the Morgans, as the simple mistake or ignorance of fact at issue does not rise to the level of mistake contemplated by the element of mistake set forth in *Lusher*. There are no issues of material fact with respect to the existence of fraud, misrepresentation, or inequitable conduct by Terra Firma, as the Morgans have failed to produce evidence sufficient to allow a reasonable jury to find the elements of *Kidd* satisfied and return a verdict in their favor.

ACCORDINGLY, it is hereby ORDERED and ADJUDGED that Petitioner Terra Firma Company's Motion for Summary Judgment is hereby GRANTED and that Respondent Morgans' counterclaims against Terra Firma are hereby DISMISSED WITH PREJUDICE. The Court notes the Respondents' objections and exceptions to this ruling. The

issues in this case having been fully resolved, the Court further ORDERS this case DISMISSED from the docket.

The Clerk is ORDERED to enter the foregoing as of the date hereinafter written and transmit an attested copy of this Order to Counsel of Record.

ENTER:

June 15, 2007

Robert B. Stone  
JUDGE ROBERT B. STONE

STATE OF WEST VIRGINIA SS:

I, Jean Friend, Clerk of the Circuit Court and Family Court of Monongalia County State aforesaid do hereby certify that the attached Order is a true copy of the original Order made and entered by said Court.

Jean Friend Clerk

**CERTIFICATE OF SERVICE**

Service of the foregoing *Docketing Statement* was made this 15<sup>TH</sup> day of October, 2007,  
by facsimile and by forwarding a true copy thereof via regular United States mail, postage prepaid,  
to counsel for the Petitioner/Counterclaim Defendant addressed as follows:

Kimberly S. Croyle, Esq.  
Bowles, Rice, McDavid, Graff & Love, LLP  
7000 Hampton Center, Suite K  
Morgantown, WV 26505  
Facsimile: (304) 285-2526



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Martin J. Wright, Jr.