

SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. HENLEY GRAVES
RESIDENT JUDGE

SUSSEX COUNTY COURTHOUSE
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GEORGETOWN, DE 19947
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January 19, 2012

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RE: *Oakley et al. v. Toll Bros. Inc.*
C.A. No. S10C-05-021 THG (consolidated case)

Dear Counsel:

This is the Court's decision as to Defendant Toll Bros., Inc.'s (hereinafter, "Toll Bros.") request for attorney's fees following the Court's ruling in its favor after a bench trial held on November 30, 2011. A brief summary of the relationship between the parties is necessary.

Factual and Procedural Background

The Plaintiffs and Toll Bros. entered into a contract during the good economic times when builders could not develop and build fast enough. Toll Bros. agreed to purchase the Plaintiffs' real property for development purposes, with certain contingencies and conditions set forth in the contract. Toll Bros. gave a large deposit to the Plaintiffs but, if the settlement did not occur because the conditions were not met or at no fault of Toll Bros., the Plaintiffs were to return the deposit to Toll Bros. To secure the potential repayment, the Plaintiffs executed a mortgage on the real property in favor of Toll Bros.

Eventually, the deal soured due to problems and the expense of running sewer lines to the property.

Plaintiffs filed suit in Chancery Court seeking an order to compel Toll Bros. to satisfy the mortgage. Toll Bros. counterclaimed that the conditions of the contract had not been satisfied and, therefore, it was entitled to repayment pursuant to the contract as secured by the mortgage. In addition, Toll Bros. also filed a declaratory action seeking a judgment the Plaintiffs had breached the contract by not returning the deposit because the contract conditions had not been met and, thus, the Plaintiffs defaulted on the mortgage.

Toll Bros. then filed a mortgage foreclosure actions in Superior Court.

By way of stipulation, the Chancery Court action was transferred to Superior Court and subsequently consolidated with the mortgage foreclosure actions. Eventually trial took place on November 30, 2011.

The entire focus of the trial was the dispute between the parties as to whether or not the conditions of the contract had been met and whether or not Toll Bros. made a good faith effort to obtain sewer availability.

After ruling in favor of Toll Bros., the Court, *sua sponte*, raised the question of whether Toll Bros. should receive attorney's fees. The Court could not locate the usual attorney's fees language in the mortgage. When the attorneys could not point to it immediately, the Court gave Toll Bros. the opportunity to convince the Court why they should be entitled to the award of attorney's fees. The Court notes that in the pre-trial stipulation the parties agreed that, if Toll Bros. prevailed at trial, attorney's fee would follow. In the bench ruling, the Court informed the parties that, regardless of the stipulation, attorney's fees would not be awarded unless there was a legal basis for doing so. The Court would not gratuitously award fees due to the potential of a mistake by counsel. On December 23, 2011, the parties filed their final submissions on this issue.

Discussion

Toll Bros. claims it is entitled to attorney's fees based entirely upon the mortgage language. Pursuant to Paragraph F of the mortgage, if the property was sold, whether by the power to sell as contained in the mortgage agreement, or by virtue of judicial proceedings or mortgage foreclosure, the sale proceeds would be applied:

First: To the payment of the costs and expenses of such a sale including reasonable compensation to Mortgagee, Mortgagee's agents and counsel.

The mortgage language differs from the usual language that entitles the mortgagees to be awarded attorney's fees if it is necessary to foreclose on the mortgage. The language cited by Toll Bros. is limited to "the costs and expenses of such *sale*."¹ There has been no sale. If the Plaintiffs repay the deposit, there will be no sale.

The Court is not satisfied that the language allowing for counsel or attorney's fees in the actual sale of the property contemplates any situation other than that where the property is sold pursuant to the power of sale or a judicial decree. This language is limited. The mortgage does not contain the customary language permitting recovery of expenses and attorney's fees in the enforcement of the mortgage obligation. The Court cannot enter an award for counsel or attorney's fees pursuant to 10 *Del. C.* § 3912 unless the writing "expressly provides for the payment and allowance thereof."

Alternatively, it is important to understand that this case was hard-fought and tried not on the mortgage but on the contract of sale, which contains no attorney's fees language. The mortgage action was ancillary and contingent upon the outcome of the contract dispute. Simply put, if

¹ Emphasis added.

Plaintiffs prevailed on the contract action, the mortgage would have to have been satisfied by Toll Bros. If Toll Bros. prevailed, the mortgage lien continued to secure the obligation for Plaintiffs to repay the deposit, and Toll Bros. could proceed to judicial sale.

The pre-trial stipulation clearly outlines the issues in this contract dispute concerning the conditions of sewer availability. It would be wrong to require Plaintiffs to pay Toll Bros. attorney's fees when the fight was not about the mortgage, but about the contract of sale.

Toll Bros. confirmed this fact in its legal memo wherein it notes, "In this instance, the relationship between the parties is under a contract of sale or loan; there is no 'loan' involved". Toll Bros. further notes that the relationship between the parties "does not fit the sort of traditional loan-based debtor/creditor relationship as envisioned" in cases construing 10 *Del. C.* § 3912.²

Therefore, the Court denies the prayer for attorney's fees in this litigation.

Yours very truly,

/s/ T. Henley Graves

cc: Prothonotary

²As an aside, Toll Bros. argues that 10 *Del. C.* § 3912 permits it to obtain attorney's fees for the collection of principal and interest on the mortgage. Then Toll Bros. argues the 20% cap contained in § 3912 is not applicable because this is not a true debtor/creditor relationship. The logic of this argument appears flawed: if you remove yourself from the 20% cap, you remove yourself from the statute because the cap is integral to the statutory authorization.