



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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May 11, 2018

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**Re: *Liam Daly and Brandee Daly v. Gulick Group, Inc.*, CL-2018-214
Demurrer; Letter Opinion**

Dear Counsel:

A real estate purchaser may unilaterally rescind a purchase contract within three days of receiving a property owners' association disclosure packet under Virginia Code § 55-509.4(A), (C). The relevant issue that the instant Demurrer raises is whether a real estate purchaser may unilaterally rescind a purchase contract more than three days after receiving an *incomplete* or *outdated* disclosure packet. This Court holds that a purchaser cannot rescind a contract for those reasons, and sustains the Demurrer.

Liam and Brandee Daly ("Plaintiffs") contracted with Gulick Group, Inc. ("Defendant") to buy real estate on September 29, 2017. The parties agreed on a final price of \$2.3 million with a \$150,000 deposit. The Settlement Date was to be July/August 2018. Compl. Ex. 1 ¶ 9.

A property owners' association controls the relevant real estate, which is in turn controlled by Virginia's Property Owners' Association Act ("POAA"). Virginia Code § 55-509.4(A) "requires the seller to obtain from the property owners' association an association disclosure packet and provide it to the purchaser" and allows the purchaser "to cancel the

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contract within three days after receiving the association disclosure packet or being notified that the association disclosure packet will not be available.”

Defendant provided disclosure documents to Plaintiffs on September 29, 2017, but Plaintiffs assert that the disclosure did not include the following materials, as required by Virginia Code § 55-509.5:

- A current reserve study or summary of the reserve status, and any portion of the funds allocated by the board of directors for a specified project.
- A 2017 summary of the association’s current budget, a copy of its profit and loss statement, and a copy of the balance sheet for the last fiscal year, including a statement of the balance due of any outstanding loans of the association. Plaintiffs acknowledge that they received a 2016 budget and seek a 2017 update.
- A copy of the association’s current certificate of annual filing with the Common Interest Community Board. Plaintiffs assert that the certificate they received expired on March 31, 2017.

On November 29, 2017, Plaintiffs requested what they asserted was an updated or complete disclosure packet for these items. On December 8, 2017, Defendant responded that Plaintiffs’ request was untimely, and declined to provide an updated disclosure packet. On December 11, 2017, Plaintiffs attempted to cancel the contract pursuant to Virginia Code § 55-509.4(A), and demanded a return of their deposit. On December 22, 2017, Defendant notified Plaintiffs of its objections to the cancellation. Plaintiffs’ January 5, 2018 Complaint seeks a declaratory judgment and rescission of the contract, as well as a finding for breach of contract and attorneys’ fees. Defendant filed a Demurrer alleging that the deadline for rescission was October 2, 2017, long prior to Plaintiffs’ November 29, 2017 request for an updated or complete disclosure packet.

I. Defendant’s Arguments.

Defendant asserts that when property subjected to the POAA is being sold, Virginia Code § 55.509.4(C) governs when a purchaser may cancel a sales contract. Specifically, that cancellation must occur either within three days of receipt of the disclosure packet, or at any time prior to the receipt of the disclosure packet.

Defendant argues that because Plaintiffs received the disclosure packet on September 29, 2017, they then had until October 2, 2017, to cancel the contract, but did not attempt do so until December 11, 2017. Defendant notes that no part of the POAA allows for the cancellation of a contract for an *incomplete* disclosure packet, but rather only allows for cancellation in the event of the failure to deliver *any* disclosure packet. Defendant argues that any deficiency regarding

completeness can only be cured through Plaintiffs' right to cancel the contract within three days after its receipt.

Defendant recognizes that a purchaser has "an unqualified right to cancel the contract within the three-day period for any reason whatever, or for no reason at all." *Reistroffer v. Person*, 247 Va. 45, 49 (1994). However, it asserts that such cancellation must be done within three days to be effective. Defendant further notes that this Court has spoken on this precise issue as well, stating that "[e]ven if [the] disclosure packets were deficient . . . [the purchaser's] remedy was to cancel the Sales Agreement within three days of the receipt of the incomplete disclosure packet." *Davis v. Horton*, 63 Va. Cir. 621, 626 (Fairfax 2002) (Roush, J.).

Defendant also points to Plaintiffs' signatures on an Acknowledgement of Receipt of Association Disclosure Packet on September 29, 2017. That document advised Plaintiffs to review the attached disclosure packet, and referenced a list of documents that Plaintiff was entitled to receive.¹ Compl. Ex. 5.

Defendant believes that while this issue relates specifically to the rescission count, it should be dispositive of the remaining counts as well.

II. Plaintiffs' Arguments.

Plaintiffs concede that this Court's *Horton* case supports Defendant's position, but argues that since that 2002 decision, the relevant provisions of the POAA have changed, thereby calling into question the continued vitality of *Horton*. Plaintiffs note that what originally was Virginia Code § 55-511 did not directly address the issue of seeking an updated disclosure packet, beyond stating that "the purchaser has a right to request an update of such disclosure packet in accordance with § 55-512(B)[.]" Further, Virginia Code § 55-512(B) stated that "purchasers may submit a copy of the contract to the association with a request for assurance that the information required by this section previously furnished remains materially unchanged, or, if there have been material changes, a statement specifying such changes." In sum, Plaintiffs note that neither section "links any request for an assurance that the disclosure packet remains unchanged and the option to cancel the sales contract." Opp. at 3.

Plaintiffs note that a purchaser is now no longer limited to requesting assurances, but can now, themselves, request a disclosure packet update pursuant to Virginia Code §55-509.4(C). Plaintiffs also assert that by including the request for an updated disclosure packet within § 55-509.4(C), which discusses the option of the purchaser to cancel the sales contract, it is clear that the same deadlines for providing an updated disclosure packet apply as with the original disclosure packet. Opp. at 4.

¹ That list itself is not attached to the Complaint.

Plaintiffs interpret the statutory scheme to allow a property purchaser to have the opportunity to review all the available information about a homeowners' association before committing to purchasing property in that association. Plaintiffs believe that when the full disclosure packet is not delivered, the purchaser has the right to cancel the contract any time before settlement. Plaintiffs reason that since Virginia Code § 55-509.5 is a consumer protection statute, it should be construed liberally to further its purpose. *Bd. of Supervisors of Richmond Cty. v. Rhoads*, 294 Va. 43, 51 (2017). Plaintiffs rationalize that it would be nonsensical to permit cancellation of a contract at any time before settlement if no information is provided, but to prohibit cancellation after three days when the only information provided is outdated and inaccurate.

III. Analysis.

Purchasers rely on disclosure packets to confirm or reassess a purchasing decision. An undercapitalized homeowners' association ("HOA"), for example, may result in a purchaser assuming a large unanticipated assessment.

Virginia Code § 55-509.4(A)(iii) permits a real estate purchaser to cancel a contract within three days after receiving a POAA disclosure packet, or upon notice that a packet will not be available. That same section also permits a purchaser who has received a packet to request an update. Virginia Code § 55-509.4(A)(iv).² However, a plain reading of the statute shows that the purchaser has no direct right under this clause to rescind the contract based on requested updates.

Virginia Code § 55-509.4(C) mandates that the information in the disclosure packet be current as of the date specified on the packet. It permits update requests.³ Like Virginia Code § 55-509.4(A), it permits a purchaser to cancel a contract within three days of receiving a disclosure packet. This section starts with a preamble stating that the disclosure packet shall be current, restating the right to request updates. It then lists the four ways that a purchaser can cancel the contract. They are: (1) three days after the date of the contract (if the purchaser receives the disclosure packet prior to that date); (2) three days after the purchaser receives a

² It references Virginia Code §§ 55-509.6(H) and 55-509.7(C) for the process of requesting updates, neither of which is relevant for this analysis. Neither one expressly gives a purchaser the right to rescind a contract if the disclosure statement update is not provided by the statutory deadline.

Virginia Code § 55-509.6(H) says that a settlement agent may request a financial update and it sets forth the request requirements and a three-day response deadline.

Virginia Code § 55-509.7(C) says that when a disclosure statement is issued for a property within the preceding 12-month period, either the seller or the buyer may request an update. It sets a 10-day response deadline.

³ It references Virginia Code §§ 55-509.6 (G) and 55-509.7(C). Neither statute is relevant for this analysis. Virginia Code § 55-509.6(G) mirrors § 55-509.7(C) which was explained above in footnote 2. Neither one expressly gives a purchaser the right to rescind a contract if the disclosure statement update is not provided by the statutory deadline.

disclosure packet electronically or by overnight delivery; (3) six days after the disclosure packet's mailing postmark, if mailed conventionally through the United States Postal Service; or (4) any time prior to settlement if the disclosure statement is not delivered to the purchaser.⁴

Nowhere does the statute give a purchaser the right to rescind a purchase contract if he requests an *update* to a disclosure packet and the seller or HOA fails to timely provide the update, or if the packet is incomplete.

What happens if a purchaser can't look at a disclosure packet because it is not provided to him, and he was never told that it would not be available? He can cancel the contract for any reason at any time prior to settlement.⁵ What happens if he gets the disclosure packet and finds it undesirable, or is notified that one won't be available? He can cancel for any reason within three days of the date he gets it or is told of its unavailability.⁶

Plaintiffs raise the question: what happens if the purchaser gets an incomplete disclosure packet? In this case, Plaintiffs allege that the original disclosure packet "was woefully incomplete, as it lacked almost all the necessary financial information." Opp. at 6.⁷ Unfortunately for them, the statute is silent as to any right of rescission in this instance. The purchaser knows within three days of receipt if packet information is *incomplete* because the Virginia Code §55-509.5 sets forth its mandated contents. The purchaser can see within three days of receipt if packet information is *outdated* by looking at the dates of the financial materials. So, what can the purchaser do? Within three days of receiving an outdated or incomplete disclosure packet, the purchaser has the information necessary to cancel the contract, negotiate a longer study period to pursue rights under Virginia Code § 55-509.4(C), or forgo any rescission remedy.

Plaintiffs wish for this Court to read into the update statute that "since this new, updated information would potentially have a bearing on the purchaser's desire to buy into the association, the purchaser again has three days from the delivery of the updated disclosure packet to cancel the sales contract." Opp. at 5. Given that this is a consumer protection statute that should be construed liberally to further its purpose, there is some merit to their argument. See *Rhoads*, 294 Va. at 51. As written, a buyer could receive a disclosure packet, request an update

⁴ The statute also permits a purchaser to cancel a contract within these deadlines from the date the purchaser is notified that a disclosure packet will not be available.

⁵ See the last sentence of Virginia Code § 55-509.4(C).

⁶ Virginia Code § 55-509.4 (C)(i).

⁷ Exhibit 5 to the Complaint contains an "Acknowledgment of Receipt of Association Disclosure Packet" that Plaintiffs signed on September 29, 2017 ("Acknowledgement"). That Acknowledgment states that all documents "SHOULD BE REVIEWED CAREFULLY PRIOR TO YOUR PURCHASE OF THE PROPERTY. A LIST OF THOSE DOCUMENTS YOU ARE ENTITLED TO RECEIVE IN ACCORDANCE WITH THE PROPERTY OWNERS' ASSOCIATION ACT IS INCLUDED."

within three days, and then theoretically lose the chance to cancel the contract after the three days has elapsed, but potentially before receiving the updated disclosure packet. For this reason, a purchaser pursuing an update would be wise to negotiate a longer study period, or to cancel the contract within three days.

Factually, this is not the scenario that played out in the instant case. As Plaintiffs admit in their Complaint, they did not request an updated disclosure packet until November 29, 2017, more than three days after they were given the disclosure packet. But, in any event, the legislature has not extended the unilateral rescission period beyond three days from the date the purchaser receives the disclosure packet.

Plaintiffs misread the statute to argue that it would be nonsensical to permit a purchaser to rescind a contract at any time prior to settlement if no disclosure packet is provided, but are stuck with a three day rescission deadline after being given an incomplete packet. They are relying on the last sentence of Virginia Code § 55-509.4(C), which allows the purchaser to “cancel the contract at any time prior to settlement if the purchaser has not been notified that the association disclosure packet will not be available and the association disclosure packet is not delivered to the purchaser.” This sentence predicates a rescission right on (1) a lack of “notification” of unavailability *and* (2) non-deliverability. It applies to those cases where a purchaser gets nothing from the seller. In this case, the seller never gave notification of unavailability. It actually delivered a packet, albeit one that Plaintiffs claim was outdated or incomplete. Therefore, this sentence of the statute doesn’t help them.

The persuasive case law of *Davis v. Horton* remains squarely on point:

Even if [Defendants’] disclosure packet were deficient in March 2001, ... [Plaintiff’s] remedy was to cancel the Sales Agreement within three days of their receipt of the incomplete disclosure packet. The Owner’s Association Disclosure and Agreement fully apprised the [Defendants] of what disclosures they were entitled by law to receive. If they thought the disclosure packet was deficient, they could cancel the Sales Agreement within three days of their receipt of the packet.

63 Va. Cir. at 626. Plaintiffs attempt to refute the persuasive value of *Horton* by noting that the relevant statutes have changed since 2002. Specifically, Plaintiffs argue that as a result of the amended statutes, “a purchaser is no longer limited to ‘assurances’ that the original disclosure packet is still valid, but rather may request an updated disclosure packet.” Opp. at 4. Plaintiffs also argue that “by including the request for an updated disclosure packet within § 55-509.4(C), which discusses the option of the purchaser to cancel the sales contract, it is clear that the same deadlines for providing an updated disclosure packet apply as to the original disclosure packet.” Opp. at 4.

However, the statute simply references the means in which “a disclosure packet update or financial update may be requested.” The rest of § 55-509.4(C) lists out the means by which a

purchaser may cancel the contract, none of which relate to a request for an *updated* packet. The fact that the legislature provides a mechanism for requesting a disclosure packet does not act to create a new contractual rescission period unless the legislature expressly says so by its statute. In this case, the legislature has not provided rescission as a remedy when a purchaser receives an outdated or incomplete disclosure package.

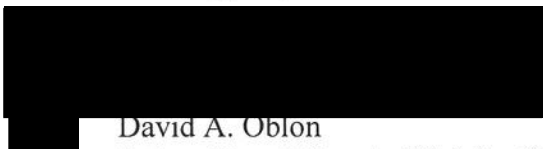
There is no doubt that the statute as worded favors sellers in these instances instead of buyers, which is peculiar given that the statute is ostensibly for the protection of the buyer. Indeed, a buyer without counsel may not be aware of the consequences of letting three days lapse after receiving the disclosure packet. But, if the legislature wished to “reset” the clock on a buyer’s right to cancel a contract after requesting an updated disclosure packet, it could have done so within the plain wording of the statute. But given the current plain reading of the statute, Judge Roush’s persuasive holding in *Horton* is dispositive.

As it relates to this Demurrer, Plaintiffs missed the deadline for unilaterally canceling their purchase contract. Thus, as to the Count I claim for declaratory relief for their right to cancel the contract, the Court sustains the Demurrer and declares that Plaintiffs had no right to cancel the contract. Since Plaintiffs have no right to cancel the contract, the Court sustains the Demurrer to Counts II (rescission) and III (breach of contract). Count IV concerns attorney’s fees to the prevailing party, pursuant to Virginia Code § 55-515. As Plaintiffs are not the prevailing party, the Court sustains the Demurrer to Count IV as well.⁸

As to Count III (breach of contract), Plaintiffs have leave to amend. While rescission is not a statutory remedy related to incomplete or outdated disclosure documents, the failure of a seller or HOA to comply with the update requirements of Virginia Code § 55-509.6(G) or § 55-509.7(C) may result in damages. However, the Plaintiff in their Complaint in this matter did not plead such claim or pray for relief with sufficient specificity.

An Order sustaining the Demurrer is attached.

Kind regards,


David A. Oblon
Judge, Circuit Court of Fairfax County
19th Judicial Circuit

⁸ Defendant did not seek attorney fees.

