IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

JOSEPH. M. COURY, III	)	**CASE NO. CV 13 803327**
	)	
Plaintiff,	)	**JUDGE JOHN P. O'DONNELL**
	)	
vs	)	**JUDGMENT ENTRY AFTER A BENCH TRIAL**
	)	
ELIAS J. COURY, *et al.*	)	
	)	
Defendants.	)	

John P. O'Donnell, J.:

This lawsuit is a contract dispute between two brothers.

The complaint

Plaintiff Joseph M. Coury, III filed a complaint that includes causes of action for breach of contract, an accounting, conversion, fraud and a declaratory judgment. The essence of the complaint is that defendant Elias J. Coury breached an agreement to give Joe[1] mortgage liens on several properties to secure a $500,000 promissory note. Eli filed a counterclaim including claims that Joe breached the contract's duty of good faith and fair dealing and for a declaratory judgment that the contract cannot be performed due to impossibility or mutual mistake.[2] The case proceeded to a bench trial and this judgment follows.

[1] Because the case involves several Courys I will refer to them by their first names to avoid confusion. No disrespect is intended.

[2] The complaint included a claim for declaratory judgment. That count was aimed at Eli's wife, Donna Coury, and mother-in-law, Marilyn Gould. But the claim against those defendants was voluntarily dismissed before trial, as were the counterclaims of those defendants.

The facts

Joe and Eli are brothers who both worked in businesses started by their father, including nursing homes, a medical supply company and an institutional pharmacy. In 2003 they both became owners of the three businesses and Joe proposed in 2004 that Eli buy out Joe's interests. Eventually the three entities redeemed Joe's stock in exchange for a $1.2 million lump sum payment and a $3.6 million promissory note secured by Joe's shares.

As time passed there were payments made on the note but by 2011 Eli wished to refinance all of the companies' debt. The refinancing proved difficult because Joe would not agree to subordinate the money he was still owed – approximately $2.43 million – to the new lender. Eli was eventually able, however, to secure refinancing from Oxford Finance and agreed to use $1.75 million of the loaned funds to pay a lump sum to Joe, and Joe accepted a note for another $500,000.

The terms of the brothers' agreement were set out in a "Master Agreement" dated December 30, 2011. The contract provided that the lump sum payment of $1.75 million would satisfy the $2,432,705.98 still owed on the original promissory note and that Eli would execute a new cognovit promissory note in favor of Joe for $500,000, to be paid beginning January 20, 2019 in fifty equal monthly payments. As security for the new cognovit note, the master agreement provided that Eli's note "shall be secured by a first mortgage lien on the properties identified on Exhibit E-1 and a second mortgage lien on the properties identified on Exhibit E-2."

Exhibit E-1 listed five properties in Cuyahoga County including two houses, a condominium and two vacant lots. Exhibit E-2 listed two properties: a house and lot at 5708 Mackenzie Road in North Olmsted and an apartment building on Giel Avenue in Lakewood.

The record evidence on the state of title to all the properties as of the date of the master agreement shows that Eli was not the sole owner of all seven properties. Instead, he individually owned only four of them, as shown here:

Exhibit	Address	Ownership
E-1	2940 S. Bay Drive, Westlake	Elias J. and Donna Coury Living Trust
E-1	4315 West 150, Cleveland	Elias J. and Donna Coury Living Trust
E-1	4379 West 150, Cleveland	Elias J. Coury
E-1	4409 West 150, Cleveland	Elias J. Coury
E-1	14800 Puritas Avenue, Cleveland	Elias J. Coury
E-2	5708 Mackenzie Rd., N. Olmsted	Elias J. Coury
E-2	1384 Giel Ave., Lakewood	Tamory Corp.

Additionally, all of the properties owned by Eli were subject to the dower rights of his wife Donna, and Marilyn Gould (Donna's mother) held a life estate on the Westlake condominium.

The agreement not only required Eli to give Joe mortgages on the seven properties but also obligated him to "[p]romptly . . . list said properties for sale and use commercially reasonable efforts to sell such properties." Upon the sale of a property the contract called for Eli to pay "all net proceeds" to Joe, and those payments would be credited to the balance due on the note.

As of the trial, Eli had not given Joe mortgages on any of the properties and only one of them – the Mackenzie Road property – had been listed for sale. The Mackenzie Road property was sold about five months after the execution of the master agreement and Eli realized net proceeds of $34,088.43, but he did not pay that money to Joe.

Eli acknowledged at trial that he cannot articulate any breach by Joe of Joe's obligations under the master agreement.[3]

LAW AND ANALYSIS

Breach of contract

A plaintiff claiming a breach of contract must demonstrate by a preponderance of the evidence (1) that a contract existed, (2) that the plaintiff fulfilled his obligations, (3) that the defendant failed to fulfill his obligations, and (4) that damages resulted from this failure. *Telxon Corp. v. Smart Media of Del., Inc.*, 9th Dist Summit Nos. 22098 & 22099, 2005-Ohio-4931, ¶53.

The evidence demonstrates – and the parties agree[4] - that a contract exists, so the first element is satisfied.

But despite his trial testimony Eli claims that Joe cannot enforce the contract because Joe has not fulfilled his own obligations. In particular, Eli argues that Joe breached paragraph 13 of the master agreement, which requires each party to sign documents and do things the other party reasonably requests "that may be necessary or desirable in order to effect fully the purposes" of the contract. Eli claims as breaches of this obligation: 1) Joe's insistence that Donna sign all of the mortgages; and 2) Joe's proposal to give Eli only a $30,000 prepayment credit – at the end of the note term – on the note if Eli would pay him $90,000 upon the sale of the Mackenzie Road property with the condition that the credit would be forfeited if Eli otherwise breached the master agreement.

These demands by Joe arose in postcontract negotiations that took place only because Eli had declined to deliver the mortgages by then. The December 30, 2011 master agreement – the contract at issue in this case – does not prohibit Joe from demanding Donna's waiver of dower

[3] See transcript, pages 82-83 and Trial Exhibit 41.
[4] See the defendant's written closing argument, p. 14.

rights nor does it specify a particular credit for early payments on the note, so Joe could not have breached the contract by making such requests in the context of efforts to cure Eli's breaches. Accordingly, the plaintiff has demonstrated by a preponderance of the evidence that he fulfilled his obligations under the contract, and thus the second element of a breach of contract claim has been satisfied.

The plaintiff has also demonstrated the defendant's breach of the contract. There is no question that Eli did not provide mortgages on the seven properties, that he did not promptly list all of them for sale, and that he did not pay the net proceeds from the Mackenzie Road sale to Joe. Yet the defendant argues that his failure to perform should be excused on the grounds that performance is impossible because it requires Donna to sign the mortgages to release her dower interests in all the real estate and Marilyn Gould to sign to release her life estate in the Westlake condominium.

Impossibility of performance is an affirmative defense to a breach of contract claim. *Hiatt v. Giles*, 2d Dist. Darke No. 1662, 2005-Ohio-6536, ¶34. Impossibility occurs where after a contract is entered into, an unforeseen event arises, rendering performance by one or more of the contracting parties impossible. *Truetried Sew. Co. v. Hager*, 118 Ohio App.3d 78, 87 (8th Dist. 1997). A contracting party's nonperformance, however, will not be excused merely because performance would have been difficult, dangerous or burdensome. *Id.* Performance must be truly not possible – i.e. unable to be done – and not just onerous or unpleasant. There is a distinction between objective impossibility, which amounts to saying, "The thing cannot be done," and subjective impossibility -- "I cannot do it." *Christy v. Pilkinton*, 224 Ark. 407, 407 (Ark. 1954).

Accepting as true Eli's testimony that his wife refused to sign the mortgages, that only rendered his performance difficult or burdensome but not impossible. Donna's refusal to waive her dower rights was a possible eventuality that Eli was aware of when he agreed to the mortgages in the first place and it would be inequitable to allow him to use it as an escape hatch from his obligations.

Another reason that the defense of impossibility does not apply here is that his claim that he could not have delivered mortgages is just not true. The master agreement provides that the note "shall be secured by" mortgage liens on the seven properties. It does not specify that all of the mortgages come from Eli individually. As it happens, he is the titled owner of four parcels on which he could have granted mortgages without his wife's signature. A fifth property – the Lakewood apartment – is owned by a company of which he is the sole owner: he surely had the ability and authority to cause Tamory Corporation to grant a mortgage for the apartment building. The last two are owned by a trust of which he is a trustee, and he could have given mortgages in that role, even if that would have exposed him to a claim from the trust that he breached a fiduciary duty to it.

Delivering the mortgages is required by the contract and delivering the mortgages is what Eli failed to do, thereby breaching the contract. There is thus no need to consider whether the mortgages Eli could have granted are not what was bargained for in the contract because Donna's dower rights and Marilyn Gould's life estate impaired their value as security. The breach is the failure to give the security interests at all as opposed to giving a security interest less valuable than what was promised.

Another breach alleged by Joe is the defendant's failure to promptly list and sell the properties through commercially reasonable efforts, then pay the net proceeds to the plaintiff.

Except for Mackenzie Road there is no question that the properties were not listed and no effort, commercially reasonable or otherwise, was made to sell them and the defendant breached this promise in the contract.

Finally, the defendant also breached his obligation to pay the net proceeds from the sale of the Mackenzie Road property. The master agreement requires that "[a]ll net proceeds from the sales of such properties . . . shall be paid to [Joe] *and shall reduce the principal balance due under the EJC note.*" (Emphasis in italics added.) The defendant claims he didn't pay the proceeds because, in essence, the parties never negotiated a credit to account for the present value of the proceeds paid for money owed in the future on the note. As Eli articulated it in a post-agreement letter to Joe's lawyer:

> This provision does not stipulate the methodology to be utilized to determine the January 2019 future value of amounts paid prior to that date in order to determine the correct principal reduction.[5]

And the defendant is right: the master agreement does not set out how the present value of a dollar owed in the future will be calculated. But the absence of such an express provision does not mean, as Eli asserts, that they must agree to a present value reduction. It means only that there is no such reduction. The intent of the parties to a contract is presumed to reside in the language they chose to employ in the agreement. *Kelly v. Medical Life Ins. Co.*, 31 Ohio St. 3d 130 (1987), syllabus 1. Intent may also be inferred from the omission of certain terms from a contract. Here, the contract has no language at all pertaining to a present value discount on the proceeds, suggesting that such a calculation is not necessary and the parties understood that the reduction in principal value would be dollar for dollar. This conclusion is supported by the language of the separate promissory note, which provides that the balance may be prepaid in full

[5] Trial Exhibit 19, February 14, 2012 letter from the plaintiff to T. David Mitchell, Esq.

or in part at any time without penalty or premium.[6] The parties explicitly agreed in the note to have no present value discount for early payments and there is no reason to believe they intended anything different for the proceeds of real estate sales due under the master agreement.

Ultimately, the plaintiff proved by a preponderance of the evidence that the defendant breached the master agreement by 1) not mortgaging the seven properties, 2) failing to promptly list six of the properties for sale, and 3) not paying the net proceeds of the one property that was listed and sold.

Remedies for these breaches will be addressed in the contract remedies section of this decision.

Conversion and an accounting

The plaintiff's second and third causes of action are related and are best considered together.

For the conversion claim the plaintiff alleges that the failure to pay the net proceeds of the Mackenzie Road property sale amounts to an unlawful conversion of that money. In particular, at paragraph 19 of the complaint, Joe alleges that Eli "had a legal duty to deliver the closing funds" from the Mackenzie Road sale. Assuming that is true, the legal duty in question could only have arisen from the defendant's promise in the master agreement to pay the proceeds to the plaintiff. In other words, the refusal to deliver the money was a *contractual* breach. But the evidence supporting Eli's retention of the money as a breach of contract may also support a claim for the tort of conversion.

Conversion is a wrongful exercise of dominion over property in exclusion of the right of the owner, or withholding it from his possession under a claim inconsistent with his rights. *Zacchini v. Scripps-Howard Broad. Co.*, 47 Ohio St. 2d 224, 226 (1976). The elements of a

[6] Trial Exhibit 15, cognovit promissory note.

conversion claim are (1) the plaintiff's ownership or right to possession of the property at the time of the conversion; (2) defendant's conversion by a wrongful act or disposition of plaintiff's property rights; and (3) damages. *KeyBank Nat'l Assoc. v. Guarnieri & Secrest, P.L.L.*, 7th Dist. Columbiana No. 07 CO 46, 2008-Ohio-6362, ¶15. As a tort, conversion typically involves a claim that specifically identifiable property has been converted. In Ohio an action for conversion of money will only lie if identification is possible and there is an obligation to deliver the specific money in question. *Haul Transp. v. Morgan*, 2d Dist. Montgomery No. CA 14859, 1995 Ohio App. LEXIS 2240, *9 (June 2, 1995).

The contract in this case required that "all net proceeds" from a sale "shall be paid" to the plaintiff. The defendant was aware of this obligation well before the actual amount of net proceeds on the sale was even calculated, and he was still aware of it once the amount was set at $34,088.43. Additionally, the source of the funds due to the plaintiff was identifiable by definition: Joe was entitled only to the proceeds from a sale; he was not entitled to an equivalent amount from any other asset in Eli's possession. There is thus no question that the plaintiff had a right to the proceeds and no question that Eli's personal use of the proceeds violated that right. Because of that, the plaintiff incurred damages in the amount of net proceeds that were not paid - namely $34,088.43 – and the usual elements of conversion were proved by the plaintiff.

Finally, the defendant did have a legal right, under his contract with the property buyer, to initial possession of the proceeds of the sale. In order to prove conversion of property that came into the rightful control of the defendant a plaintiff must demonstrate that he demanded the property from the defendant and the defendant refused to deliver the property to its rightful owner. *Kitchen v. Welsh Ohio, L.L.C.*, 10th Dist. Franklin No. 00AP-1256, 2001 Ohio App. LEXIS 2588, *17-18 (June 12, 2001). Trial Exhibit 27 includes the plaintiff's demand, through

counsel, for the sale proceeds and this requirement of the conversion claim has also been satisfied, thus the plaintiff is entitled to a judgment in his favor on the conversion claim.

As for the claim for an accounting, that is a remedy, not a cause of action. Moreover, the plaintiff has gotten an accounting in the form of the settlement statement, Trial Exhibit 47. As a result, even though the plaintiff proved his right to the proceeds of sale he is not entitled to a separate judgment on the accounting claim.

Fraud

The plaintiff's fourth cause of action is for fraud. The elements of fraud are: (1) a representation (2) that is material to the transaction at hand, (3) made falsely, with knowledge of its falsity or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, and (4) with intent to mislead another into relying upon it, (5) justifiable reliance, and (6) resulting injury proximately caused by the reliance. *Volbers-Klarich v. Middletown Mgmt.*, 125 Ohio St. 3d 494, 2010-Ohio-2057, ¶27.

According to the plaintiff, the defendant's fraud was "misrepresenting that he could deliver first and second mortgages"[7] on the seven properties. The misrepresentation was contained in the master agreement since the clear implication of agreeing to provide first and second mortgages was that Eli had the authority to give them. But the evidence does not support that this was a knowing misrepresentation, much less a misrepresentation at all.

First, the defendant is either the titled owner of all of the properties or a trustee or corporate officer with the authority to encumber the properties. Second, he testified that his wife had agreed to waive dower rights for certain transactions in the past and he had no reason to think she wouldn't do the same here, given the stakes: a threatened January 1 foreclosure on all of his assets by his primary lender. Third, Donna's dower rights and, for the Westlake

[7] Plaintiff's written closing argument, p. 9.

condominium, Marilyn Gould's life estate do not defeat the defendant's ability to mortgage the property. A mortgage given subject to dower interests or a life estate is still a mortgage in that it is a pledge of the grantor's interest in the property as collateral for an underlying debt and there is no debate that Eli had an interest in all of the properties. Fourth, although dower and a life estate are real rights that must be accounted for when transferring ownership, they are not *security* interests and thus do not qualify as prior *mortgages* even if they might have priority over a mortgage in the event of a foreclosure lawsuit. Of course unreleased dower rights and a life estate impair the marketability of a parcel of real estate but they don't render worthless a mortgage on such a piece of real estate and the plaintiff would still receive a security interest from a mortgage made in the face of dower rights and a life estate. For all of these reasons, the defendant never misrepresented his ability to deliver first and second mortgages on the seven properties described in Exhibits E-1 and E-2 to the master agreement.

Because there was no misrepresentation the other elements of fraud need not be addressed.

Declaratory judgment

The last cause of action in the complaint is captioned as one for declaratory judgment. For this claim the plaintiff asks that Donna and Marilyn Gould be ordered to "cooperate and participate in the execution, delivery and filing of the mortgage liens on the subject real estate per the master agreement."[8] In other words, the plaintiff wanted a court order requiring the two women to give up their interests in the seven properties. But this claim morphed between the filing of the complaint and trial, presumably because of the May 28, 2014 dismissal of the claims against and by Donna and Marilyn Gould, and in his closing argument the plaintiff requested an order requiring Eli to immediately file mortgages on the property in favor of Joe and remove any

[8] Complaint, ¶35.

encumbrances on any of the properties since December 30, 2011.[9] As the last part of his proposed declaratory relief, the plaintiff asks for an order allowing him to list and sell the properties.

Section 2721.03 of the Ohio Revised Code allows any person interested under a written contract to obtain a declaration of his rights, status or other legal relations under it. The plaintiff's purported cause of action seeks none of these things and is not a claim for declaratory judgment. Instead it seeks to force the defendant to do what he agreed to do and is effectively a request for the remedy of specific performance. As a result, the cause of action for a declaratory judgment is decided in the defendant's favor but the implied request for specific performance will be addressed below.

Contract remedies

Since the defendant breached the master agreement by not giving the plaintiff the agreed security in the seven properties and by converting the net proceeds of sale from the Mackenzie Road property, the plaintiff's requests for the remedies of damages and specific performance must be decided.

The purpose of compensatory money damages is to make a plaintiff whole by putting him in the same position he would have been if the contract had been performed or the tort not committed. In this case, making the plaintiff whole requires a calculation of the value of the security interests at the time they should have been granted. For the failure to mortgage the Mackenzie Road property that calculation is easy. Had Joe been given the second mortgage on that property at the time the master agreement was executed he would have received, upon the sale not long after the master agreement was made, net proceeds of $34,088.43. That is also the amount of Joe's damages on the conversion claim.

[9] Plaintiff's closing argument, p. 12.

For the six properties that were not sold the calculation is not as obvious. In fact, it is impossible.

Generally, the value of a true first mortgage – where dower rights and any life estate do not exist – is the fair market value of the property up to the amount of the underlying debt, and the value of a second mortgage without dower rights and a life estate is the fair market value less the amount owed to the prior secured creditor. Here there is no record evidence of the market value of the six other properties as of the December 30, 2011 contract date, nor is there evidence of the amount owed secured by the contractually permissible first mortgage on the Giel Avenue apartment building. Accordingly, damages for failing to provide the mortgages cannot be ascertained. The plaintiff tacitly acknowledged this obstacle to damages by not mentioning compensatory damages in his opening statement and closing argument despite praying in the complaint for compensatory damages.

The plaintiff has, however, asked for an award of specific performance. In his misnamed complaint for declaratory judgment he sought an order requiring Eli to deliver the mortgages and repeated that request in his closing argument. Specific performance is an equitable remedy. *Oglebay Norton Co. v. Armco, Inc.*, 52 Ohio St. 3d 232, 237 (1990). An equitable remedy is typically not available when there is an adequate remedy at law, i.e. for money damages. *State v. McCliment*, 7th Dist. Mahoning No. 14 MA 68, 2015-Ohio-1119, ¶9. That rule would ordinarily apply here to decide the breach of contract claim in the defendant's favor since the plaintiff produced no evidence of damages. But a contract for the conveyance of an interest in real estate is an exception to that usual rule since every piece of real estate is unique. *Gleason v. Gleason*, 64 Ohio App. 3d 667, 672 (4th Dist. 1991). And that principle applies to all interests in real

estate, not just contracts for the conveyance of real property. *Sholiton Indus. v. Wright State Univ.*, 2d Dist. Greene No. 95-CA-101, 1996 Ohio App. LEXIS 4044, *13 (Sept. 20, 1996).

Still, equitable relief is only available to a plaintiff who has "clean hands" and is not guilty of reprehensible conduct with respect to the subject matter of his suit. *Marinaro v. Major Indoor Soccer League*, 81 Ohio App. 3d 42, 45 (9th Dist. 1991). The defendant argues that the master agreement itself was "the product of a process corrupted by bad faith on the part of the plaintiff"[10] because Joe took advantage of the "absolute leverage"[11] he had because of Eli's urgent need to refinance or be foreclosed on by his lender. Or, as Eli put it, "there was no good faith on [the plaintiff's] part . . . when he was shoving it up my throat"[12] to get the mortgages as part of the agreement. But taking advantage of a superior negotiating position is not the same as "reprehensible conduct" that disqualifies someone from obtaining an equitable remedy. Joe had leverage and he used it, just as Eli would have used any leverage he had if the circumstances were different. It's also worth remembering that Joe accepted $2.25 million to satisfy a note on which $2.43 million was still owed. Admittedly this included a lump sum initial payment of $1.75 million that Joe would not have gotten under the original note, but the figures are still close enough that they don't support the contention that Joe demonstrated bad faith in abusing his position of strength in the negotiations. For that reason, the doctrine of "unclean hands" does not operate here to bar an equitable remedy in favor of the plaintiff and Joe is entitled to receive mortgages from Eli on the six remaining properties described in Exhibit E-1 and Exhibit E-2 of the master agreement.

That leaves the question of whether Joe is entitled to specific performance of Eli's contract obligation to "promptly" sell the properties using "commercially reasonable efforts."

[10] Defendant's closing argument, p. 8.
[11] *Id.*
[12] Trial transcript, p. 89, line 24 to p. 90, line 2.

This promise is not enforceable in equity. First, although the contract does not define the meaning of promptly, surely it does not extend to more than 15 months after signing the contract – i.e., when this lawsuit was filed in March 2013 – so the opportunity to specifically enforce a requirement to promptly sell the properties had long passed by the time litigation commenced. Second, what amounts to a forced judicial sale can hardly be considered "commercially reasonable." Any buyer who knows Eli is under judicial compulsion to sell a property has a negotiating advantage not typically available in an otherwise commercially reasonable sale.

The combined remedy ordered here - $34,088.43 in damages plus an order requiring only Eli to pledge to Joe his interest in the remaining six properties – does not leave the plaintiff exactly where he would have been if the entire contract had been performed as agreed and the properties promptly sold and the net proceeds paid to Joe. But without the sales, and in the absence of evidence demonstrating what the net proceeds would have been in the event the properties had been sold, it is the closest thing to put the parties back in the position they bargained for. And that is true even if the mortgages ordered by this judgment are subject to Donna's dower rights and Marilyn Gould's life estate because they still constitute valuable security for the note.

The plaintiff's final demand is for an assessment of punitive damages. Punitive damages may be recovered in a conversion action when the conversion involves elements of fraud, malice or insult. *Parrish v. Machlan*, 131 Ohio App. 3d 291, 296-297 (1st Dist. 1997). At the same time, punitive damages are generally not recoverable for a breach of contract, no matter how willful the breach. *Lucarell v. Nationwide Mut. Ins. Co.*, 7th Dist. Mahoning No. 13 MA 74, 2015-Ohio-5286, ¶177. But punitive damages may be available if the breach of contract is accompanied by a connected, but independent tort involving fraud, malice, or oppression. *Id.*

An independent tort – the conversion claim – has been proved in this case, but the malice necessary to justify the imposition of punitive damages for either the conversion or contract causes of action has not. "Actual malice" has been defined as (1) that state of mind under which a person's conduct is characterized by hatred, ill will or a spirit of revenge, or (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm. *Calmes v. Goodyear Tire & Rubber Co.*, 61 Ohio St. 3d 470, 473 (1991). The evidence here shows that Eli didn't expect a problem giving the mortgages with Donna's refusal to release her dower rights when he signed the contract. Once that obstacle arose he was left with two choices, both of which would not have satisfied Joe. First, he could have granted the mortgages without a release of dower. In that event, commercially reasonable sales could not have occurred. Second, he could have not given any mortgages and tried to reach a compromise. That's the course he took and the existence of this lawsuit shows how acceptable that was to Joe. But despite the obvious frictions between the brothers I can't say, from the record evidence, that Eli acted out of hatred, ill will or a spirit of revenge. Nor, until such time after January 2019 as Eli may default on the note, can I find that his conduct, albeit conscious, has a great probability of causing substantial harm since he very well may comply to the letter with the terms of the note, and even if he doesn't, it's far from clear that a judgment on the note will not be satisfied.

The defendant's counterclaim

The defendant's remaining counterclaim is for a declaration that he is not liable on the contract due to the impossibility of performance, the plaintiff's own breach and a mistake of fact. These claims have been implicitly rejected in the preceding sections of this judgment entry and are explicitly rejected here. The declaration sought is not warranted by the evidence and the request for it is denied.

CONCLUSION

Consistent with this entry, judgment is hereby entered: in favor of plaintiff Joseph M. Coury, III and against defendant Elias J. Coury on the complaint's causes of action for breach of contract and conversion; in favor of defendant Elias J. Coury and against plaintiff Joseph M. Coury III on the complaint's causes of action for fraud and declaratory judgment; and in favor of plaintiff Joseph M. Coury III and against defendant Elias J. Coury on the counterclaim for declaratory judgment.

To the extent the complaint's claim for an accounting is a cause of action and not just a request for a remedy, it is decided in the defendant's favor.

On the contract and conversion claims, a single monetary judgment is hereby made in favor of the plaintiff and against the defendant in the amount of $34,088.43 plus interest at the statutory rate beginning June 25, 2012[13] and court costs.

On the contract claim, the remedy of specific performance is granted and Elias J. Coury, individually or as corporate president or as trustee, as the case may be, is ordered to forthwith convey to Joseph M. Coury, III a mortgage on Eli's own interest or the interest that he controls, as the case may be, in each of the six properties listed on the master agreements Exhibits E-1 and E-2 except the Mackenzie Road property.

IT IS SO ORDERED:

Judge John P. O'Donnell

May 16, 2017
Date

[13] The date the Mackenzie Road proceeds were deposited by the defendant into his account. See Trial Exhibit 47.

SERVICE

A copy of this judgment entry was sent by email on May 16, 2017 to the following:

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Judge John P. O'Donnell

5/16/2017