

Trial Report

Case	<u>Thibodeau v. Venne</u> , Southern Berkshire District Court (Tried in Pittsfield before Jury of Six), 07-150.
Verdict	For Plaintiffs, \$22,570 (approximately \$27,000 with interest and costs)
Judge	Hon. Frederic Rutberg
Counsel	John B. Stewart, Springfield, MA for plaintiffs William A. Murray, III, Westfield, MA for defendants
Nature of Case	Breach of Contract
Date of Verdict	November 14, 2008
Case Summary	<p>In January 2004, the plaintiffs made an offer to purchase a property in Otis, MA from the defendants, their offer stated "Seller to provide a Title 5 Compliant Septic System and Title 5 Certificate." The offer was accepted and this provision was handwritten into the February 2004 P&S Agreement. The septic system was inspected in March 2004 and no failure criteria were found, but because the property was unoccupied (no one had lived there since September 2003), it was given a "conditional pass" subject to re-inspection 90 days after occupancy. The parties closed on the property in late-April, 2004. At the request of the mortgage lender, an estimate (later determined to be a "guess") was obtained for a potential septic repair, and \$8,750 was held in escrow. An escrow agreement provided that money was being placed aside "to ensure Seller complies with Title 5" by having a re-inspection 90 days after occupancy.</p> <p>The plaintiffs moved into the property after their children finished school in June 2004. In late-June the septic inspector came out in response to the plaintiff's complaint and found the septic system in failure. A re-inspection occurred in late-September and all parties were notified it was in failure. The work which was to go forward the next spring did not due to personal hardships.</p> <p>The following year engineering work to design the new septic system and permits were paid out of the escrow, and then the remainder of the escrow funds was inadvertently released to the sellers. An estimate of \$22,570 was obtained to build the new septic per the engineer's design specifications.</p> <p>Suit was filed in 2007 when it became clear the defendants were refusing to remit the inadvertently released escrow funds and to acknowledge responsibility to pay for the septic system upgrade. The seller hired defense counsel to answer the suit, and the seller then restored funds to the escrow agent but refused to release the funds without a full release. The seller's answer claimed the passing of the deed extinguished any previous promise to provide a Title 5 compliant</p>

<p>Case Summary (Cont'd)</p>	<p>septic system.</p> <p>At trial there was significant emphasis placed on a “survival” clause in the Berkshire Board of Realtors P&S form, which provided that all covenants and conditions in the P&S which, by their nature, could not be performed by the time the deed was passed, or if it could not be determined if they were fully performed, would survive the closing. There was other evidence and argument that a clause like “merger” provision in the P&S, which made clear the earlier offer to purchase was swallowed up and extinguished, was notably absent from the Escrow Agreement, and therefore the P&S survived and was not superseded by the Escrow Agreement.</p> <p>As framed to the jury, the question was whether the Escrow Agreement signed at closing was a novation and extinguished the sellers obligation to provide a compliant septic system, or if it was a side-agreement regarding money put aside to satisfy the mortgage lender. The jury was charged on the merger by deed doctrine, and its exception if the parties intended certain agreements to survive the passing of the deed, and on the doctrine of waiver.</p> <p>The jury deliberated approximately 45 minutes before returning a verdict for the plaintiffs in the full amount of the 2006 septic repair estimate. The court denied the defendants’ motion for a new trial.</p>
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