

AMG

10-18-83

Memo in opposition to D<sub>s</sub> motion  
to dismiss timber's complaint  
-w/Cert.

pgs. 14

Pi # 3272

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SUPERIOR COURT OF NEW JERSEY  
 LAW DIVISION : SOMERSET COUNTY  
 DOCKET NO. L-23277-80 P.W.  
 L-67820-80 P.W.

AMG REALTY COMPANY, et als, :

Plaintiff, :

- vs - :

Civil Action

THE TOWNSHIP OF WARREN, :

Defendant. :

MEMORANDUM IN OPPOSITION  
 TO DEFENDANT'S MOTION TO  
 DISMISS THE COMPLAINT OF  
 TIMBER PROPERTIES

CONSOLIDATED WITH: :

TIMBER PROPERTIES, etc. :

Plaintiff, :

- vs - :

THE TOWNSHIP OF WARREN, et als:

Defendants. :

#### STATEMENT OF FACTS

The facts are fully set forth in the certification filed with this Court on the prior motion of Warren Township to dismiss the complaint of Timber Properties. A further statement of facts

is contained in the certification submitted by Mr. David M. Weinberg in opposition to the Township's motion. No useful purpose would be served by repeating those facts in this memorandum. It is sufficient to point out that the only issue before the Court is whether the Township of Warren can legally challenge the standing of the plaintiff Timber Properties based on a bare affidavit submitted by William Peek who at one time represented both Mr. Reis and Mr. Evans, the sellers of the property.

#### ARGUMENT OF LAW

The brief submitted in support of the Township's motion is the same brief submitted in support of the first motion brought by the Township. In that respect a substantial portion of the brief is not relevant to the argument on this motion. The Court has already ruled with respect to the issues of exhaustion of administrative remedies and on the motion for consolidation. The only remaining issue is whether the plaintiff Timber Property has "standing" to maintain the suit.

The assertion made by the Township is that the plaintiff Timber Properties no longer has a valid contract with respect to the purchase of the property in question. The Township goes on to argue that since there is no valid contract relationship, there is no standing to test the zoning on the property in question. No certification of the property owners has been filed in support of this contention. Instead, there is attached to the Township's motion a certification prepared by the attorney who represented the sellers of the property and who opines in an affidavit that

the contract has been breached. It is based on the opinion of that attorney with respect to the status of the contract that the Township seeks to oust Timber Properties not only from this litigation but from its rights with respect to the property. It is submitted that this Court is without jurisdiction to enter such a ruling since neither of the sellers is a party to this action and no suit has been brought to test the validity of the contract. Messrs. Reis and Evans, through their attorney, have unilaterally asserted a position with respect to the contract which is not binding upon Timber Properties and Timber Properties has, likewise, asserted its rights as a contract purchaser and will, upon satisfaction of the conditions of the contract seek specific performance of the contract. The issues generated by the motion brought by the Township cannot be tried and resolved in context of a Mount Laurel II zoning dispute and on the basis of a single affidavit setting forth the opinion of an attorney with respect to the validity of the contract. Timber Properties asserts its rights as a contract purchaser both on a de jure and a de facto basis. In fact, it has a contract and, in fact, it continues to operate under the terms of that contract.

Defendant Township cites absolutely no law or authority for its argument that the plaintiff Timber Properties has no standing in this suit. The only case cited by the defendant Township is Sente v. Mayor and Municipal Council of the City of Clifton, et als., 66 N.J. 204 (1974). The Sente case stands for the proposition that a plaintiff who moves from a municipality and no longer

has any interest in property in the municipality no longer has any standing to contest zoning in that municipality. That holding is subject to some question based on later holdings of our Supreme Court with respect to the right of non-residents to attack the zoning of other municipalities on exclusionary grounds. Clearly in both Mount Laurel I and Mount Laurel II the Court did permit parties to litigate issues even those parties did not own real estate within the town. Indeed, one of the issues was whether the proper parties were persons who asserted that they could not afford to purchase property in the municipality.


The defendant Township also asserts that the public interest is being protected in the existing AMG case and that there is no reason for the Court to decide the Timber Properties case. This argument clearly makes no sense. Timber Properties claims that the Township of Warren acted illegally and unconstitutionally in a number of respects as it affects the land which Timber Properties has contracted to purchase. The claims made by Timber Properties are not claims brought solely in the public interest but are claims which are brought to assert the rights of Timber Properties. AMG clearly does not intend to argue the case to be made out by Timber Properties. Indeed, AMG has asserted "builder's rights" under the principles of Mount Laurel II and argues that said rights may very well be to the exclusion of other property owners.

CONCLUSION

For the reasons stated it is respectfully submitted that the motion brought by the Township of Warren must again be denied.

Respectfully submitted,

RAYMOND R. & ANN W. TROMBADORE  
A Professional Corporation  
Attorneys for Timber Properties

By:   
RAYMOND R. TROMBADORE  
A Member of the Firm

Dated: October 18, 1983

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SUPERIOR COURT  
OF NEW JERSEY

OCT 20 1983

JUDGE SERPENTELLI'S CHAMBERS

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L.R. OLSON, CLERK

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CERTIFICATION IN OPPOSITION  
TO MOTION TO DISMISS COMPLAINT  
OF TIMBER PROPERTIES

CONSOLIDATED WITH: :

TIMBER PROPERTIES, etc. :

Plaintiff, :

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Defendants. :

*Judge Serpentelli*

DAVID M. WEINBERG certifies as follows:

1. I am an Attorney at Law of the State of New Jersey and I am Vice-President of Timber Properties, a New Jersey Corporation and one of the plaintiffs herein.

2. I have read the motion for dismissal of the complaint of Timber Properties against the Township of Warren and other defendants and I have also read the brief and certification submitted in support of said motion.

3. The brief submitted in support of the motion is the same brief which was submitted by the Township of Warren in support of its earlier motion to dismiss the complaint of Timber Properties. The only additional item submitted to the Court for consideration at this time is an affidavit executed by William D. Peek who asserts that he represented the sellers of the property, Waldo Reis and Henry Evans. In his affidavit Mr. Peek makes a brief for the conclusion that he terminated the contract of sale which existed between Messrs. Reis and Evans and Timber Properties. The conclusions drawn by Mr. Peek from the facts which he sets forth are his own conclusions and are not accepted by Timber Properties. Timber Properties continues to rely upon its contract of sale dated July 10, 1980. A copy of that contract has been submitted to the Court as an exhibit and can be found attached to the moving papers submitted on behalf of Warren Township. Paragraph 5(k), found on pages 8 and 9 of the contract, clearly spells out the provisions regulating the time within which the Purchaser was permitted to prosecute its application for zoning approvals which were conditions to the contract. The position urged by the Township of Warren is that since the contract did not close by January 2, 1983 and since Mr. Peek sent a letter asserting that the contract was voided as of that date, no contract exists and



therefore Timber Properties has no standing to contest zoning in Warren Township. The argument is specious. The same provision of the contract clearly states that Timber Properties would have the option to appeal any adverse decision with an appropriate court or courts. The contract then goes on to state: "Seller hereby agrees to extend the time for performance by the Purchaser until such time as the appeal process has been exhausted or abandoned by Purchaser." (emphasis added). The following subparagraph clearly does not apply in the situation in which an appeal was taken from an adverse decision. The facts in this case are that Timber Properties' appealed from the failure of Warren Township to rezone the property as requested. That appeal is still pending and the instant case is the culmination of that appeal. Timber Properties has never had an opportunity to test the validity of the decision of Warren Township in refusing to undertake the action requested in terms of rezoning. The ultimate action of Warren Township in rezoning the land in question did not satisfy the condition of the contract because the ordinance by which the land was rezoned was not given effect. Instead, the ordinance was conditioned upon approval of the rezoning by the trial court in Somerset County.

4. I previously submitted a certification to this Court under date of June 29, 1983. I reaffirm the facts as stated therein. In further support of those facts, I attach a memorandum of the negotiations between Timber Properties and Messrs. Evans and Reis. The memorandum is dated April 23, 1980 and is addressed to Messrs. Evans and Reis by Mr. Peek. A careful

reading of the memorandum will clearly indicate that there was never any proposal between the parties which would have limited the right of Timber Properties to prosecute its appeals from adverse decisions of the Township. Indeed, the last paragraph on the first page of the memorandum clearly indicates that the purchaser wanted an option to appeal an adverse decision through the courts. That memorandum also indicates that the purchaser does not want to pay real estate taxes after 18 months. The ultimate agreement which was drafted did call upon the purchaser to pay real estate taxes after the extension periods. In return, Messrs. Evans and Reis granted the necessary right to appeal any adverse decisions. That right was not limited as to time. The sentence inserted by Mr. Peek and now relied upon by the Township of Warren was an after-thought which was designed to limit the time within which to prosecute applications for zoning approval and was never intended to limit the purchasers in the prosecution of appeals to the courts. If there is any ambiguity between these two provisions, that ambiguity must be resolved in favor of the purchaser since the law clearly does not favor forfeitures of contract rights. The sellers of the property under the guise of a motion brought by the Township of Warren now seek to litigate a contract difference with Timber Properties and seek a forfeiture of the substantial monies invested by Timber Properties in the prosecution of their application and in the prosecution of this zoning suit. (The memorandum which is attached hereto was voluntarily furnished to me by Mr. Henry W. Evans, one of the sellers of the property.)

5. Mr. Peek states in Paragraph 2 of his affidavit that the provision of the contract giving the seller the right to terminate the contract was specifically written to provide the purchaser with an opportunity to close title during the ten-day notice period. He goes on to argue that it was not subject to the earlier indefinite extension provision because the sellers did not want to have the property tied-up for whatever period the purchaser might choose to take to litigate this zoning. This contention on the part of Mr. Peek totally ignores the essential ingredient of the negotiation which was that the purchaser would have an unlimited period of time in which to complete any litigation which might be required against the Township of Warren. Any contrary arrangement would have made no sense whatsoever. The purchaser was required to expend substantial sums of money and did expend substantial sums of money. Architects were hired who designed specific forms of housing for the land. Engineers prepared site plans for the land. Preliminary site studies were performed and reports were submitted to the Planning Board by a licensed planner, a licensed traffic consultant, a licensed architect and licensed civil engineers and professional engineers. In addition, counsel was retained to prosecute the applications for rezoning of the property and when the Township failed to take prompt action in response to the request suit was instituted against Warren Township. That suit has been diligently prosecuted from the time it was filed. If the contention of Mr. Peek is accepted, then Timber Properties would have risked all of its

investment based on its inability to complete the litigation, a matter which was entirely out of its control. This was never intended by Timber Properties and I personally participated in these negotiations and assert to the Court that it was not the understanding of the parties with respect the right of Timber Properties to continue in its contractual relationship with Messrs. Reis and Evans pending the completion of the litigation.

6. Following the execution of the contract, Mr. Peek on behalf of his clients took the position that the contract in fact provided for a finite period of time for performance. Mr. Berlant and I attempted on numerous occasions to clarify this contract provision and in a good faith effort to satisfy the demands of Mr. Peek, met on numerous occasions with Mr. Peek and his clients and discussed various forms of contract amendment which were designed to satisfy Mr. Peek and to insure that Timber Properties would have adequate time to prosecute its applications in Warren Township. These various meetings were never fruitful because of a basic disagreement between the parties concerning the language of the original contract. Mr. Peek argues in his affidavit that the good faith efforts on the part of Mr. Berlant and myself and the attorneys retained by us to reach subsequent agreement evidence a meeting of the minds with respect to the intention of the parties as to the first agreement. That is not true. We did entertain the prospect of new contract arrangements with Reis and Evans both in 1981 and again in 1983. Those negotiations never represented a repudiation or a waiver of our

original contract rights. Throughout this entire period we insisted that we had a valid contract with Reis and Evans. The opinion stated by Mr. Peek in Paragraph 9 of his affidavit ("In my opinion, as attorney for Evans and Reis, and as set forth in this affidavit, Timber Properties breached the contract in July, 1981 by its failure to pay the sewer charges required to protect sewer availability. In addition, the buyer has failed to make required tax payment.") is a subjective evaluation on the part of Mr. Peek and we take issue with the opinion expressed by him. Indeed, that opinion is emphatically rejected by Timber Properties which will, if necessary, litigate in a court at law its right to specific performance of the contract.

7. During the same period of time that Mr. Peek was sending us letters indicating that our contract was terminated, we continued to prosecute our appeals and requests for rezoning. We appeared before the Township Committee in Warren Township and before the Planning Board in Warren Township on numerous occasions and following the institution of our lawsuit we appeared again before the Planning Board and the Township Committee in connection with the proposed rezoning of the property. On those occasions Mr. Evans, one of the sellers involved in this matter, was present and we had continuing conversations with him concerning our efforts to obtain rezoning on the land. At no time did Mr. Evans ever assert to the Planning Board or the Township Committee that we were not authorized to proceed on his behalf and in our own right to seek the rezoning of his property. Indeed, he stood

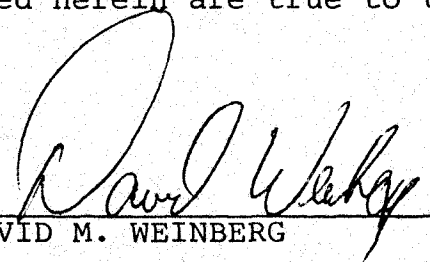
by and welcomed the result of our efforts which finally did produce a rezoning of the property which would have permitted the development of the property as required by the contract of sale. It was only because of the litigation brought by AMG Realty Company that that rezoning was not given immediate effect. Mr. Evans accepted the benefits of our efforts and we relied upon his continued encouragement even though the attorney representing Mr. Reis and Mr. Evans took the technical position that we were in breach. We denied the breach and continued our efforts in full reliance upon the expressed interest of Mr. Evans in obtaining the rezoning which we sought. During the same period of time a disagreement erupted between Mr. Reis and Mr. Evans and Mr. Evans obtained separate counsel, John Lynch, Esq. of Martinsville, New Jersey, to represent his interests. Mr. Peek makes no mention of the fact that Mr. Evans was separately represented during that period of time.

8. If this Court grants the motion of Warren Township, this Court will, in effect, be granting summary judgment in a contract dispute without the benefit of a plenary hearing and in the face of serious factual issues. In addition, the Township of Warren, is asking this Court to ignore serious issues of collateral estoppel and detrimental reliance which could be resolved only after a plenary hearing on the contract issues.

CERTIFICATION

I am aware of the penalties for a false certification.  
I certify that the facts contained herein are true to the best  
of my knowledge and belief.

Dated: October 18, 1983

  
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DAVID M. WEINBERG