

In The  
**Court of Special Appeals  
of Maryland**

No. 916

September Term, 2006

JOHN M ZUPANCIC, *et al.*,

*Appellants.*

v.

PAUL ABBOTT, *et al.*,

*Appellees.*

v.

CATHERINE BARTOS,

*Appellant.*

*On Appeal from the Circuit Court of St. Mary's County, Maryland,  
(Hon. Karen H. Abrams, Judge)*

**BRIEF FOR APPELLANT CATHERINE BARTOS**

CHRISTOPHER T. LONGMORE  
DUGAN, MCKISSICK, WOOD & LONGMORE, L.L.C.  
*Attorneys for Appellant Catherine Bartos*  
22738 Maple Road, Suite 101  
Lexington Park, Maryland 20653  
(301) 862-3764

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**STATEMENT OF CASE**

Appellees Paul Abbott and Elaine Barker filed a civil action against Appellant Catherine Bartos claiming that said Appellant breached a contract of sale for that real property known as 13945 Cornfield Harbor Drive, Scotland, Maryland. Their Complaint, as amended, sought only equitable relief as all claims for monetary damages had been voluntarily dismissed by the Appellees prior to trial. The Circuit Court of St. Mary's

County, Maryland, the Honorable Karen H. Abrams presiding, held a trial on this matter on May 15, 23 & 24, 2006 and July 12, 2006.

On July 12, 2006, the Circuit Court entered an Order granting the Appellees Complaint for Specific Performance and denying all other Declaratory Judgment counts raised by Appellees. Appellant Catherine Bartos appeals the Circuit Court's Order granting Appellees' request for the remedy of specific performance.

### QUESTIONS PRESENTED

1. **DID THE CIRCUIT COURT ERR WHEN IT FOUND THAT A THREATENED LAWSUIT AGAINST A PURCHASER OF REAL PROPERTY RELATING TO THEIR FUTURE DEVELOPMENT PLANS FOR THE PROPERTY CONSTITUTUED A LIS PENDENS OR THREATENED LIS PENDENS?**
2. **DID THE CIRCUIT COURT ERR WHEN IT FOUND THAT A PARTY TO A CONTRACT FOR THE PURCHASE OF REAL PROPERTY CAN UNILATERALLY IMPOSE TERMS THAT ARE NOT CONTAINED WITHIN THE WRITTEN CONTRACT BETWEEN THE PARTIES?**
3. **DID THE CIRCUIT COURT ERR WHEN IT FOUND THAT SPECIFIC PERFORMANCE WAS AN APPROPRIATE REMEDY DESPITE THE FACTS THAT (A) THE CONTRACT AT ISSUE CONTAINED AMBIGUOUS TERMS, (B) THE PURCHASERS WERE NOT READY, DESIROUS, PROMPT AND EAGER TO PERFORM THE CONTRACT; AND (C) THE PURCHASERS WERE ATTEMPTING TO UNILATERALLY IMPOSE TERMS THAT WERE NOT CONTAINED WITHIN THE WRITTEN CONTACT BETWEEN THE PARTIES?**

## STATEMENT OF FACTS

This case centers on an April 24, 2004 Sales Contract between Appellant Catherine Bartos, as Seller, and Appellees Paul Abbott and Elaine Barker, as Purchasers, for that real property known as and with an address of 13945 Cornfield Harbor Drive, Scotland, Maryland 20687 (hereinafter referred to as the "Property"). See E. 0684.<sup>1</sup> The Appellees Abbott and Barker first approached Appellant Bartos in or about the summer of 2003 to inquire as to whether she would sell them the Property. E. 0030. Appellees Abbott and Barker engaged in communication with Appellant Bartos during this timeframe and provided Appellant Bartos with an offer to purchase the Property. E. 0031. During the time period they were engaging in these communications, Hurricane Isabel hit the area where the Property is located and rendered the cottage on the property as uninhabitable. E. 0032 – 0033. After this event, the parties continued to communicate with each other about the possibility of Appellees Abbott and Barker purchasing the property despite the fact that the previous cottage was no longer inhabitable. *Id.*

On April 24, 2004, Appellees Abbott and Barker and Appellant Bartos met at a restaurant to sign a Contract on the Sale of the Property. E. 0040 – 0042; E. 0430 – 0433. Appellees Abbott and Barker brought a form contract with them and had filled in certain terms in the blanks of that Contract. *Id.* The parties had a conversation on that day about additional terms and/or changes to the terms in the draft contract, and ultimately signed the "Sales Contract" at the restaurant that day (hereinafter referred to as the "Primary

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<sup>1</sup> All references to the Extract are made to the Record Extract as prepared and filed by Co-Appellants Cheryl Gordon and John Zupancic.

Contract"). See E. 0684. Included in the terms of the Primary Contract were that the Property was being sold "as is" and that settlement was to occur within 120 days of the date of acceptance of the Primary Contract by Appellant Bartos. *Id.* The Primary Contract also provided that Appellees Barker and Abbott were going to attempt to obtain a building permit to rebuild a similarly-sized house on the Property as the one that was destroyed in Hurricane Isabel. *Id.*

Appellees Abbott and Barker and Appellant Bartos subsequently entered into an addendum to the Primary Contract on or about June 24, 2004 (hereinafter referred to as "Primary Contract Addendum"), whereby the settlement date was extended as follows "[t]he settlement date will be 7 months from the date of the signed agreement or as soon as the Purchasers are able to obtain a building permit, which they shall diligently pursue."

E. 0629. Appellee Barker drafted the Primary Contract Addendum. E. 0279. In between the signing of the Primary Contract Addendum and the expiration of the seven month deadline contained therein, Appellant Bartos entered into a backup contract with Appellants Cheryl Gordon and John Zupancic on or about October 22, 2004 (hereinafter referred to as the "Backup Contract"). E. 0632 - 0635. This Backup Contract provided that Appellant Bartos would sell the Property to Appellants Gordon and Zupancic should the Primary Contract expire without going to settlement. *Id.*

Appellees Abbott and Barker made certain efforts during this timeframe to obtain a building permit but they did not obtain one. Appellees Abbott and Barker scheduled a settlement to close on the Primary Contract with Appellant Bartos on January 20, 2005 at 4:00 p.m. at the Law Offices of Harris & Capristo located in California, Maryland

(hereinafter referred to as the "Settlement Office"). E. 0243. This was confirmed in the letter that the Appellees sent to Appellant Bartos on or about January 13, 2005. See E. 0672. Appellant Bartos agreed to attend the settlement on that date.

On Thursday morning, January 20, 2005, the Settlement Office received a copy of a letter by facsimile. E. 0227. This letter was on letterhead entitled "friends of cornfield harbor, llc, scotland, maryland" and contained a typed signature line of "c/o Jerry P. Blackburn President." E. 0645 – 0646. This letter was addressed to the Settlement Office and indicated that a "lis pendens" have been filed against the *purchasers*, Appellees Abbott and Barker, relating to their development plans for the Property. *Id.* The letter did not mention any other claims relating to what it labeled a "lis pendens" other than the claim regarding the "nefarious nature" of the development plans – there were no claims in the letter relating in any way to the title of the Property. *Id.* The letter also indicated that Appellees Abbott and Barker were aware of this action. *Id.* No one contacted Appellant Bartos to inform her of this letter prior to the scheduled settlement time and date, despite the fact that the Settlement Office received it more than 24 hours prior to the scheduled time and date. Appellees Abbott and Barker were informed of the letter prior to the scheduled settlement time. E. 0250.

Appellant Bartos traveled to the Settlement Office in California, Maryland from her home in Silver Spring, Maryland on the scheduled settlement date of January 20, 2005 and was there prior to the scheduled settlement time. E. 0447. Appellant Bartos was instructed to remain in the entrance/reception area of the Settlement Office. E. 0448. While she has been informed subsequently that Appellees Abbott and Barker were

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present in the office when she arrived, she never saw them on that date. *Id.* Appellant Bartos spoke with F. Michael Harris, the settlement attorney, while she was in the reception area. E. 0448 – 0457. Mr. Harris provided her with a copy of the HUD-1 settlement statement that his office had prepared. *Id.* This settlement statement was dated February 21, 2005 – a month into the future and had not yet been signed by the Appellees Abbott and Barker.<sup>2</sup> *Id.*; E. 0650 – 0651. Mr. Harris also informed Appellant Bartos that he would not be disbursing any funds to her, despite the fact she had come for settlement, because of the Friends of Cornfield Harbor Letter. *Id.* Instead, Mr. Harris requested that Mrs. Bartos fully perform the Primary Contract, including the signing and delivery of the deed, and that he would not disburse any proceeds to her until the deed had been recorded and he had further verified that no “lis pendens” action had been filed in the Circuit Court for St. Mary’s County. *Id.* Mr. Harris provided Appellant Bartos with a handwritten statement to this effect which she signed. *Id.*; E. 0647. Appellant Bartos did not agree to these conditions being imposed and did not settle on January 21, 2005.

Appellee Barker testified at trial that she and Appellee Abbott did sign several settlement documents at the Settlement Office after Appellant left the office on January 21, 2005. E. 0112. These included a settlement statement (e. 0648 – 0649), an Owner’s Policy Election Form for Title Insurance (E. 0673), and a Certification of Non-Foreign Status (E. 0674). All of these documents were incorrectly dated for one month into the

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<sup>2</sup> Apparently, Appellees Abbott and Barker did later sign a copy of the HUD-1, as shown on E. 0648 – 0649.

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future and none of these signed documents were presented to Appellant Bartos at settlement. In addition, Mr. Harris of the Settlement Company testified that a Deed had been prepared for Appellant Bartos's signature, but this deed was likewise misdated and was never presented to Appellant Bartos for signature. E. 0101 - 0102; 0107.

The next communication Appellant Bartos received regarding the Property was a call from an employee of the Settlement Office on the morning of Monday, January 24, 2005. E. 0219. The employee asked Appellant Bartos to again travel from her home in Silver Spring but this time to go to the Circuit Courthouse in Leonardtown, Maryland, to meet a "runner girl" from the Settlement Office at the Courthouse, and to sign the deed to the Property there. *Id.* At no time did any settlement attorney or agent offer to attend the requested signing. Appellant Bartos did not agree to do this.

On the afternoon of that same Monday, January 24, 2005, the civil lawsuit that gave rise to this appeal was filed in the Circuit Court for St. Mary's County. The plaintiffs in that lawsuit were Appellees Abbott and Barker and it was filed by an attorney that worked at the Settlement Office. *See* Letter from Settlement Office, dated January 24, 2005, E. 0696. There was not, nor has there been, any *lis pendens* on the property except for the litigation initiated by the Appellees that gave rise to this appeal. E. 0381.

At the trial of this matter, Appellee Barker acknowledged that the Appellees were not willing to allow the proceeds to be disbursed to Appellant Bartos on January 20, 2005 and that the sole reason they would not do so is because of the Friends of Cornfield Harbor Letter. E. 0308 - 0309.

## ARGUMENT

**THE CIRCUIT COURT ERRED BECAUSE THERE WAS NO *LIS PENDENS*, OR CREDIBLE THREAT OF A *LIS PENDENS* ON THE PROPERTY AND BECAUSE THE MR. ABBOTT AND MS. BARKER'S SOLE BASIS FOR FAILING TO SETTLE WAS THEIR ERRONEOUS CLAIM THAT THERE WAS A *LIS PENDENS* ON THE PROPERTY.**

Appellees Abbott and Barker claim that there is one, and only one, reason why they did not settle – because they thought there was a claimed *lis pendens* on the property at issue. E. 0308 – 0309. Their belief stemmed from the Friends of Cornfield Harbor Letter.

Appellees Abbott and Barker claim that the threat of an alleged *lis pendens* justified them not providing proceeds from the purchase of the property to be distributed until after it was verified that the threat was not true and that the deed to the property was recorded.

However, even if Appellees Abbott and Barker believed the claims in the Friends of Cornfield Harbor Letter to be true, the letter or the alleged lawsuit therein could not have been a *lis pendens* under Maryland's *lis pendens* decisions.

The doctrine of *lis pendens* is well-settled and thoroughly discussed in the case of *DeShields v. Jack's Liquors, Inc.*, 338 Md. 422 (1995). "Under the doctrine, an interest in property acquired while litigation affecting title to that property is pending is taken subject to the results of that pending litigation. Thus, [u]nder the common-law doctrine of *lis pendens*, if property was the subject of litigation, the defendant-owner could transfer all or part of his or her interest in the property during the course of litigation, but not to the detriment of the rights of the Plaintiff." *Id.* at 433. "*Lis pendens* has no applicability, therefore, except to proceedings directly relating to the title to the property transferred or in which the ultimate interest and object is to subject the property in question to the disposal of

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a decree of the court. . . . Consequently, *lis pendens* proceedings do not technically prevent alienation; they place a cloud on the title to the property and '[create] a priority in favor of the Plaintiff, which, if the Plaintiff succeeds on the merits of the claim, relates back to the date of the filing of the complaint.' *Id.* 435.

Even if the Cornfield Harbor Letter was accepted as true, it at most alleged a zoning violation relating to the Appellees' future plans to develop the Property. Maryland law is clear that zoning violations or similar claims regarding the use of property do not constitute a breach of warranty or an encumbrance on property. "The weight of authority indicates that zoning and other ordinances and statutes concerned with the use of the land involved do not constitute an encumbrance on the land and their lawful impact upon that use does not result in a breach of the covenant against encumbrances." *Marathon Builders, Inc. v. Polinger*, 263 Md. 410, 418 (1971). Accordingly, any claimed defect relating to a claim against any proposed development on the property is not a title defect or *lis pendens* and is therefore irrelevant to the rights of the parties vis-à-vis the contract that is at issue in this case.

In addition, even if the letter was correct and a lawsuit had been filed, this in no way would have affected the ability of Mrs. Bartos to transfer her title to the property. As set forth in the *DeShields* Opinion, Mrs. Bartos "could transfer all or part of his or her interest in the property during the course of litigation." *DeShields*, 338 Md. at 433. This is certainly true because the letter does not even suggest that Mrs. Bartos has done anything impermissible relating to the title or even the development of the property – instead, it

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claimed that *Appellees Abbott and Barker*, the *BUYERS* of the property at issue, had inappropriate plans to develop the property.

At trial, the Appellees called John Weiner, Esq. as an expert witness in the field of residential real estate settlements in St. Mary's County, Maryland. He confirmed that in his expert opinion, based on conducting approximately five thousand real estate settlements, that zoning violations or alleged zoning violations do not constitute a *lis pendens*. E. 0382, Tr. P. 149 of 304. In addition, Mr. Weiner stated that in conducting his five thousand settlements, he could not recall any settlements which involved a claim against a *buyer* of property that constituted a *lis pendens*. E. 0382 – 0383, Tr. P. 149 – 150 of 304. When asked if he could imagine a situation where a claim against a buyer could constitute a *lis pendens*, he said the only such situation would involve a direct dispute between a buyer and seller over a contract for the sale of property. E. 0383, Tr. P. 150 of 304. The representations in the Friends of Cornfield Harbor Letter did not constitute such a dispute. As such, by the testimony of their own expert at trial, there is no conceivable way that, even if the allegations in the Friends of Cornfield Harbor Letter were true, that they would in any way constitute a *lis pendens* on the Property.

There is also a policy reason why this Honorable Court should not allow the Friends of Cornfield Harbor to thwart the settlement process. To so hold would allow anyone, for any reason, who did not want a property to be sold to hold up a settlement on a piece of property simply by sending a letter to the attorney or settlement company performing the settlement. It is easy to imagine how this could be abused. If this Honorable Court upholds a settlement being cancelled because of such a letter, it will be empowering anyone – a

disgruntled neighbor, an ex-girlfriend or boyfriend or a jealous colleague, just to name a few – with the ability to delay anyone's settlement on their property. This simply is bad policy and the Maryland Courts should not uphold or endorse such a policy that encourages third parties to directly interfere with the contractual rights of other citizens. This is particularly true when, as are the facts in this case, the letter makes allegations against only the buyers which in no way could possibly affect title to the property.

**2. THE CIRCUIT COURT ERRED WHEN IT FOUND THAT IT WAS PERMISSIBLE FOR APPELLEES ABBOTT AND BARKER TO UNILATERALLY IMPOSE TERMS AND REQUIREMENTS ON APPELLANT BARTOS THAT WERE NOT PART OF THE CONTRACT**

It is undisputed that Appellees Abbott and Barker imposed conditions on Bartos in order for her to receive the purchase price the Appellees had agreed to pay her: they required that the deed to the property be recorded and that a further title search be conducted before they would provide Mrs. Bartos with the purchase price listed in the Contract. The Circuit Court enforced this condition when it entered its judgment in favor of Abbot and Barker. However, this condition is found no where in the contract between the parties. See E. 0684. Mrs. Bartos was asked to go to the Circuit Courthouse, meet a staff person from the settlement firm at the Office of Land Records, sign a deed there and trust that she would receive a check at that time – despite the fact that neither an attorney nor the buyers would be present at that time. E. 0219. While it is conceivable that reasonable minds may differ on whether this was or was not a reasonable request, one thing is clear – Mrs. Bartos had no contractual obligation to do this. Instead, Mrs. Bartos was under the contractual obligation to sign a deed to Appellees Abbott and Barker if they provided her with the settlement