

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
ABINGDON DIVISION**

<b>OLIN WOOTEN,</b>	)	
	)	
Plaintiff,	)	Civil Action No. 1:07cv00052
	)	
<b>v.</b>	)	<b><u>REPORT AND</u></b>
	)	<b><u>RECOMMENDATION</u></b>
<b>ROBERT C. LIGHTBURN,</b>	)	
	)	
Defendant.	)	By: PAMELA MEADE SARGENT
	)	UNITED STATES MAGISTRATE JUDGE

This case is currently before the court on the defendant’s Motion for Summary Judgment on Plaintiff’s Second Amended Complaint, (Docket Item No. 52), (“Lightburn’s Motion”), which was filed on January 25, 2008, and the plaintiff’s Motion for Summary Judgment, (Docket Item No. 58), (“Wooten’s Motion”), which was filed on February 11, 2008. Jurisdiction is conferred upon this court pursuant to 28 U.S.C. § 1332. These motions are before the undersigned magistrate judge by referral, pursuant to 28 U.S.C. § 636(b)(1)(B). As directed by the order of referral, the undersigned now submits the following Report And Recommendation.

On January 25, 2008, the undersigned entered a Report And Recommendation, (Docket Item No. 49), (“Report”), as to the defendant’s first Motion for Summary Judgment, (Docket Item No. 19), which addressed Count I of the Plaintiff’s Second Amended Complaint, (Docket Item No. 47), (“Second Amended Complaint”). On March 6, 2008, the Honorable Glen M. Williams, Senior United States District Judge, entered an order accepting the undersigned’s Report, and thus, granted the defendant’s

Motion for Summary Judgment as to Count I of the plaintiff's Second Amended Complaint. (Docket Item No. 61), ("Order Accepting Report"). This opinion will address Lightburn's Motion as to the remaining counts set forth in the plaintiff's Second Amended Complaint, as well as Wooten's Motion. The facts, as stated in the previous Report, will be adopted for the purposes of this Report And Recommendation.

### *I. Analysis*

The standard of review for a motion for summary judgment is well-settled. A moving party is entitled to summary judgment "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c); *see also Charbonnages de France v. Smith*, 597 F.2d 406, 414 (4th Cir. 1979). A genuine issue exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

In considering a motion for summary judgment, the court must view the facts, and the reasonable inferences to be drawn from those facts, in the light most favorable to the party opposing the motion. *See Anderson*, 477 U.S. at 255; *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986); *Nguyen v. CNA Corp.*, 44 F.3d 234, 237 (4th Cir. 1995); *Miltier v. Beorn*, 896 F.2d 848, 852 (4th Cir. 1990); *Ross v. Commc'ns Satellite Corp.*, 759 F.2d 355, 364 (4th Cir. 1985); *Cole v. Cole*, 633 F.2d 1083, 1092 (4th Cir. 1980). The nonmoving party is entitled to have

the credibility of all its evidence presumed. *See Miller v. Leathers*, 913 F.2d 1085, 1087 (4th Cir. 1990). The party seeking summary judgment has the initial burden to show absence of evidence to support the nonmoving party's case. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The opposing party must demonstrate that a triable issue of fact exists; he may not rest upon mere allegations or denials. *See Anderson*, 477 U.S. at 248. A mere scintilla of evidence supporting the case is insufficient. *See Anderson*, 477 U.S. at 248.

When this court's jurisdiction is based upon diversity, as it is in this case, the court must apply the substantive law of the forum state, including the forum state's choice of law rules. *See Klaxon Co. v. Stentor Elec. Mfg. Co., Inc.*, 313 U.S. 487, 496-97 (1941); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938); *see also Ferens v. John Deere Co.*, 494 U.S. 516, 519, 531 (1990); *Nguyen*, 44 F.3d at 237; *Merlo v. United Way of Am.*, 43 F.3d 96, 102 (4th Cir. 1994). This court sits in Virginia. In Virginia, the making of a contract is governed by the place where the contract is made. *See Occidental Fire & Cas. Co. of N.C. v. Bankers & Shippers Ins. Co. of N.Y.*, 564 F. Supp. 1501, 1503 (W.D. Va. 1983) (citing *Woodson v. Celina Mutual Ins. Co.*, 177 S.E.2d 610, 613 (Va. 1970)). Because Wooten is alleging that Lightburn failed to honor a modification of the contract, the nature, validity and interpretation of the contract are at issue. While the facts before the court are not clear as to the location of the parties when the modification was allegedly agreed upon, the parties assert that Virginia law is controlling, and the court has no evidence before it to suggest to the contrary.

The Second Amended Complaint contains four counts, including claims for

breach of contract, breach of warranty, specific performance and quasi-contract or unjust enrichment. Through each of these claims, pled in the alternative, the plaintiff, Olin Wooten, seeks the same remedy – abatement of the price paid to the defendant, Robert C. Lightburn, for the purchase of unimproved property located in Washington County, Virginia. Wooten claims that he is entitled to an abatement of the purchase price based upon a 182-acre deficiency in the quantity of land conveyed. In particular, Wooten claims that Lightburn represented that the property conveyed contained approximately 1,977.13 acres, when a later survey revealed that the property contained only 1,795.235 acres. Lightburn argues that the contract for purchase of the property, (Docket Item No. 47, Exhibit A) (“Contract”), made provision for a study period to allow Wooten to arrange for a survey of the property prior to closing. Lightburn argues that Wooten waived his right to conduct a survey and seek an abatement for any deficiency in the quantity of land conveyed when he did not conduct the survey within the time limits and in the manner required by the Contract. As stated above, the court has entered summary judgment in Lightburn’s favor on Wooten’s breach of contract claim contained in Count I of his Second Amended Complaint. The matter now before the court on cross motions, the undersigned must decide whether either party is entitled to summary judgment as to the remaining claims.

*A. Breach of Warranty Claim*

In Count II of the Second Amended Complaint, Wooten argues that, by general warranty deed with English covenants of title dated November 27, 2006, Lightburn purported to convey certain real property amounting to “1,967 acres more or less[.]”

(Second Amended Complaint at 3, Exhibit D.) Wooten contends that the actual amount of acreage conveyed totaled only 1,795.235 acres, and, thus, the deficiency in the amount of property conveyed was a defect of title and a breach of warranty of title. (Second Amended Complaint at 3.) In Lightburn's Motion, he contends that a general warranty deed with English covenants of title does not warrant the acreage cited in the deed. (Docket Item No. 53), (Brief in Support of Motion for Summary Judgment on Plaintiff's Second Amended Complaint), ("Lightburn's Brief"), at 2.) I agree.

In this case, the deed stated, in relevant part, that "for and in consideration of the sum of **FOUR MILLION TWO HUNDRED FIFTY THOUSAND DOLLARS (\$4,250,000.00)** cash in hand paid, receipt of which is hereby acknowledged, the Grantor does hereby GRANT, BARGAIN, SELL, and CONVEY with GENERAL WARRANTY and ENGLISH COVENANTS OF TITLE unto the Grantee[.]" (Docket Item No. 50, Attachment 1 at 1.) The Virginia Code has defined the words "with general warranty" and "with English covenants of title." VA. CODE ANN. § 55-70 (2003 Repl. Vol.). When the words "with general warranty" are present in the granting part of any deed, they "shall be deemed to be a covenant by the grantor 'that he will warrant specially the property hereby conveyed.'" VA. CODE ANN. § 55-70 (2003 Repl. Vol.). Additionally, when the words "with English covenants of title" are used in the granting part of any deed, it "shall be deemed to be an expression by the grantor of those covenants set out in §§ 55-71 through 55-74, inclusive, and in addition thereto the covenant that he is seized in fee simple of the property conveyed." VA. CODE ANN. § 55-70 (2003 Repl. Vol.). The covenants set forth in the previously mentioned sections include the covenant of the right to convey, the right to quiet

possession, the right to be free from encumbrances, the right for further assurances and the covenant that the grantor has done no act to encumber the said lands. *See* VA. CODE ANN. § 55-71 - § 55-74 (2003 Repl. Vol.).

As a general consideration, under Virginia law, to recover for any breach of warranty, the plaintiff must demonstrate (1) the existence of a warranty and (2) a breach of that warranty. *See Hitachi Credit Am. Corp. v. Signet Bank*, 166 F.3d 614, 624 (4th Cir. 1999) (citing *Collier v. Rice*, 356 S.E.2d 845, 847 (Va. 1987)). Here, Wooten argues that due to the alleged deficiency in acreage, Lightburn breached the warranties contained in the deed, and thus, conveyed defective title. However, an examination of the language set forth in the deed reveals no warranty or covenant dealing with the quantity of the land to be conveyed. Moreover, the Virginia Code has specifically outlined what a deed with the words “with general warranty” and “with English covenants of title” means. None of the relevant code sections contain any language that warrants anything with respect to the acreage to be conveyed. *See* VA. CODE ANN. § 55-71 - § 55-74 (2003 Repl. Vol.).

The court recognizes the general rule, under Virginia Law, that a plaintiff is entitled to an abatement of the purchase price in situations where there is a deficiency in the quantity of property when the property in question was sold by the acre. *See Chesapeake Builders, Inc. v. Lee*, 492 S.E.2d 141, 145 (Va. 1997); *Triplett v. Allen*, 67 Va. (26 Gratt.) 721 (1875); *Neal v. Logan*, 42 Va. (1 Gratt.) 14 (1844). However, considering the language of the deed at issue, as well as the relevant statutes and case law, it does not appear that a claim of breach of warranty of title is the proper manner by which to seek an abatement in purchase price. Instead, under the relevant case law,

it appears that this right of abatement is an equitable remedy more akin to specific performance. As such, this remedy will be dealt with in greater detail below.

Accordingly, the undersigned is of the opinion that, as a matter of law, there is no dispute in fact as to whether Lightburn warranted the amount of acreage to be conveyed. The deed unequivocally identified the specific warranties and covenants contained therein; none of which pertained to the quantity of land to be sold. Therefore, I recommend that the court grant Lightburn's Motion and deny Wooten's Motion as to Count II of the Second Amended Complaint.

#### *B. Specific Performance Claim*

In Count III of the Second Amended Complaint, Wooten asserts that he is entitled to specific performance of the agreement and an abatement of the purchase price reflecting a reduction equal to the difference between the acreage amount as stated in the deed and the amount of acres actually conveyed. (Second Amended Complaint at 4.) In Lightburn's Motion, he argues that Wooten's specific performance claim fails for lack of an enforceable contract. (Lightburn's Brief at 2.)

The Supreme Court of Virginia has indicated that specific performance is not a remedy of right. *See Robertson v. Gilbert*, 249 S.E.2d 787, 789 (Va. 1978); *see also Fisher v. Bauer*, 436 S.E.2d 602, 604 (Va. 1993). Moreover, the court has explained that, in order to invoke this "extraordinary equitable remedy," the plaintiff "must first prove a contract enforceable at law." *See Robertson*, 249 S.E.2d at 789; *Fisher*, 436 S.E.2d at 604; *see also Beazer Homes Corp. v. VMIF/Anden Southbridge Venture*, 235

F. Supp. 2d 485, 493 (E.D. Va. 2002). Here, Wooten is attempting to specifically enforce the price per acre term, as stated in the Contract. Thus, the court must determine whether the Contract entered into by the parties was an enforceable contract. An examination of the Contract demonstrates that the essential elements to an enforceable contract appear to be present. Also, no party contends that the Contract is not an enforceable contract. Furthermore, no party contends that the actual conveyance of the property in question by deed is not an enforceable contract. That being the case, I find that the undisputed evidence shows that an enforceable contract existed.

In his Answer to the Second Amended Complaint, Lightburn asserts that the terms of the Contract merged into the deed, which made no mention of a per acre price. The Supreme Court of Virginia has ruled that, “[u]nder the doctrine of merger, provisions in a contract for sale are extinguished and merged into the deed, an instrument of higher dignity. However, provisions which are collateral to the passage of title and not covered by the deed are not merged into the deed and survive its execution.” *Beck v. Smith*, 538 S.E.2d 312, 314 (Va. 2000) (citing *Empire Mgmt. & Dev. Co. v. Greenville Assocs.*, 496 S.E.2d 440, 443 (Va. 1998); *Davis v. Tazewell Place Assocs.*, 492 S.E.2d 162, 165 (Va. 1997); *Miller v. Reynolds*, 223 S.E.2d 883, 885 (Va. 1976); *Woodson v. Smith*, 104 S.E. 794, 795 (Va. 1920)). In previous discussions involving the merger doctrine, the court explained that a deed “is a mere transfer of title[,]” *Beck*, 538 S.E.2d at 314 (quoting *Miller*, 223 S.E.2d at 885), and that it is the “final expression of the agreements between the parties as to ‘every subject which it undertakes to deal with,’ and any conflicts between the terms of prior agreements and the terms of the deed are resolved by the deed.” *Beck*, 538 S.E.2d at

314-15) (quoting *Woodson*, 104 S.E. at 795).

Nonetheless, Virginia jurisprudence has recognized that not every agreement between the parties regarding the purchase and sale of property are included within the deed. *See Beck*, 538 S.E.2d at 315 (citing *Woodson*, 104 S.E. at 795.) Agreements not referenced in the deed are considered collateral to the sale of property if: (1) the agreements are distinct agreements made in connection with the sale of the property; (2) the agreements do not affect the title to the property; (3) the agreements are not addressed in the deed; and (4) the agreements do not conflict with the deed. *See Beck*, 538 S.E.2d at 315. Here, Wooten seeks to specifically enforce the price per acre term of the Contract. This particular term was clearly a distinct agreement set forth in the Contract. In addition, this agreement was not addressed within the deed, and the price per acre agreement does not conflict with the terms of the deed. In determining whether or not the price per acre term impacted title to the property, I refer back to the earlier discussion regarding breach of warranty of title. As discussed above, the warranties and covenants as set forth in the deed did not reference the quantity of the land to be conveyed. *See VA. CODE ANN. § 55-70 - § 55-74* (2003 Repl. Vol.). Thus, I am of the opinion that the price per acre term was a collateral agreement that did not merge into the Contract. Instead, the price per acre term survived the execution of the deed.

Even if the price per acre term had merged into, and been extinguished by, the deed, Virginia law recognizes an equitable right of abatement of the purchase price in situations where there is a deficiency in quantity when the property in question was sold by the acre or by “estimation,” where the quantity was material in assessing the

price. *See Green v. Taylor*, 10 F.Cas. 1120, 1123 (E.D. Va. 1879), for detailed explanation of three classes of sales of land and application of doctrine of abatement for deficiency in quantity in each. There appears to be no dispute that the contract of sale and conveyance in this case were by acres, or at the very least, by estimation, where the quantity was material in assessing the price, and were not by a contract for hazard or sale of gross. *See Green*, 10 F.Cas. at 1123. Thus, whether the price per acre term merged into the deed is immaterial as to the application of this remedy.

Furthermore, an examination of the relevant case law shows that this right of abatement is an equitable remedy generally enforced by a request for specific performance. *See Chesapeake Builders, Inc.*, 492 S.E.2d at 145. Unlike with other equitable remedies, a purchaser may seek abatement for deficiency even if he has a complete and full remedy at law for breach of contract. *See Austin v. Sanders*, 95 S.E. 273 (Va. 1918). As with all equitable remedies, however, abatement of the purchase price should be imposed only when it is equitable to do so under the facts and circumstances of each particular case. *See Millman v. Swan*, 127 S.E. 166, 168-69 (Va. 1925).

...“He who seeks equity must do equity. The doctrine, thus applied, means that the party asking the aid of the court must stand in conscientious relations towards his adversary; that the transaction from which his claim arises must be fair and just, and that the relief itself must not be harsh and oppressive upon the defendant.”

*Millman*, 127 S.E. at 168 (quoting 1 POMEROY’S EQUITY JURISPRUDENCE § 400).

That being the case, I find that there are disputes in fact, which, depending on

the facts eventually found, could affect whether the plaintiff would be entitled to equitable relief. In particular, the evidence demonstrates a dispute in fact as to whether the plaintiff agreed to accept the risk of deficiency by not complying with the terms of the Contract. Where the evidence shows that the parties expressly agreed that the purchaser should bear the risk of a deficiency no equitable relief should be granted. *See Blessing's Adm'rs. v. Beatty*, 40 Va. 287 (1842). The Contract contained a study period provision which gave Wooten 30 days from the date of execution of the Contract to enter upon the property to determine whether his plan of development was practical, and to allow him to examine the property, title and deeds to determine if another survey would be necessary. (Contract at 1.) In addition, in order to take advantage of this provision, Wooten was required to contract for such studies within five days from the date of execution and provide the seller with copies of the letters ordering the studies. (Contract at 1.) If, within the 30-day period, Wooten found that his plan was not practical, or that there was an issue with the deed, title or survey, he had the option to declare the entire Contract null and void and receive a full refund of his deposit. (Contract at 1.) Conversely, if timely notice was not provided, the Contract would remain in full force and effect. (Contract at 1.) Further, the Contract provided for an extension of the study period, allowing Wooten an additional two weeks, until September 7, 2006, to conduct any studies as to the property, provided Wooten did not withdraw from the Contract within the first 30 days. (Contract at 4-5.) If Wooten found the property to be objectionable during the two-week extension, he could declare the Contract null and void by delivering written notice to Lightburn on or before September 7, 2006; if notice was not provided, the Contract would remain in full force and effect. (Contract at 4.)

As provided by the Contract, the parties agreed to several settlement extensions, with the final settlement date set at November 30, 2006. (Docket Item No. 24), (Exhibit 5 at 36-38.) It is clear from the evidence before the court that, prior to closing, a dispute arose regarding the actual acreage being conveyed. (Docket Item No. 24), (Exhibit 5 at 39-55.) After much discussion regarding closing and the acreage issue, Lightburn's counsel indicated that "I do not think we would accept a survey to adjust the price after November 30, 2006." (Docket Item No. 24), (Exhibit 5 at 43.) In response, Wooten's counsel informed Lightburn's counsel that he was awaiting a letter from a surveyor in which the property in question was measured at fewer acres than bargained for in the Contract. (Docket Item No. 24), (Exhibit 5 at 43.) As such, Wooten's counsel sent an e-mail to Lightburn's counsel on November 29, 2006, and attached a copy of a survey plat that had been completed by Holbrook Surveyors. (Docket Item No. 24), (Exhibit 5 at 53.) The survey plat reflected a discrepancy in the acreage total, which, in turn, impacted the purchase price. (Docket Item No. 24), (Exhibit 5 at 53.)

Lightburn eventually rejected the survey plat because it was not a field survey, despite the fact that it was provided prior to the November 30, 2006, apparent deadline he had previously mentioned during the parties' discussions. (Docket Item No. 24), (Exhibit 3 at 8.) Wooten's counsel pointed out that the Contract did not specifically require a field survey and stressed that the property in question did not total the acreage as originally represented by Lightburn. (Docket Item No. 24), (Exhibit 5 at 53.) Based upon the evidence before the court, there is a dispute in fact as to whether Wooten properly exercised his right to conduct a survey. It appears that Lightburn agreed to allow a survey up until November 30, 2006. The record shows that Wooten

did provide a survey plat on November 29, 2006, which indicated an acreage deficiency.

Furthermore, Wooten asserts that he and Lightburn entered into a separate oral agreement allowing him to seek an abatement for any deficiency after closing. Wooten alleges that he and Lightburn spoke several times about extending the closing date and that Lightburn agreed to honor “the up and down nature of paragraph 2” of the Contract that made the purchase price totally dependent upon the actual acreage conveyed. (Docket Item No. 24), (Exhibit 3 at 9.) Specifically, Wooten asserts that the parties agreed to keep the language of Paragraph 2 open for a field survey, even if the potential survey would not be completed for several months. (Docket Item No. 24), (Exhibit 3 at 9.) Based upon this alleged agreement, Wooten agreed to proceed with closing, which occurred on November 30, 2006. (Docket Item No 24), (Exhibit 3 at 9.)

Accordingly, based on these disputes in fact, I recommend that the court deny both Lightburn’s Motion and Wooten’s Motion as to Count III of the Second Amended Complaint.

*C. Quasi-Contract / Unjust Enrichment*

Wooten also argues that, under the theory of quasi-contract, he is entitled to recovery because a benefit was conferred upon Lightburn, in which Lightburn possessed full appreciation or knowledge of the benefit conferred, and that a retention of that benefit would result in unjust enrichment. (Second Amended Complaint at 4.)

In Lightburn's Motion, he claims that Wooten's ability to proceed under this cause of action is barred by the existence of a contract that is based upon the same subject matter. (Lightburn's Brief at 2-3.) I disagree.

In general, a quasi-contract arises from the equitable principle that one person may not enrich himself unjustly at the expense of another. *See Kern v. Freed Co., Inc.*, 299 S.E.2d 363, 365 (Va. 1983). In fact, a quasi-contract is actually not a contract at all; instead, it is "an equitable remedy thrust upon the recipient of a benefit under conditions where that receipt amounts to unjust enrichment." *Nossen v. Hoy*, 750 F. Supp. 740, 744 (E.D. Va. 1990) (citing *Marine Dev. Corp. v. Rodak*, 300 S.E.2d 763, 766 (Va. 1983)); *see also Commonwealth Group-Winchester Partners, L.P. v. Winchester Warehousing, Inc.*, 2007 U.S. Dist. LEXIS 64652 (W.D. Va. Aug. 31, 2007); *Atl. Credit & Finance Special Finance Unit, LLC v. MBNA Am. Bank*, 2001 U.S. Dist. LEXIS 10957 (W.D. Va. June 4, 2001). In *Nossen*, the court explained that quasi-contract is a plaintiff's remedy at law when the facts and circumstances of the case demonstrate that a defendant has been "unjustly enriched at the expense of the plaintiff, but where the facts fail to establish that the parties established any form of agreement." 750 F. Supp. at 744. The court set forth three elements that must be shown by the plaintiff in order to properly establish a quasi- contract, including

- (1) [a] benefit conferred on the defendant by the plaintiff;
- (2) [k]nowledge on the part of the defendant of the conferring of the benefit;
- and (3) [a]cceptance or retention of the benefit by the defendant in circumstances that render it inequitable for the defendant to retain the benefit without paying for its value.

*Nossen*, 750 F. Supp. at 744-45 (citing *Corbin on Contracts*, § 19 at 50).

The court further explained that “the modern trend is to recognize actions for quasi-contract based on a ‘reasonable expectation theory.’” *Nossen*, 750 F. Supp. at 745. Under the reasonable expectation theory, in order to successfully recover based on quasi-contract, one of three things must be true: “(1) [t]he plaintiff had a reasonable expectation of payment; (2) [t]he defendant should reasonably have expected to pay; or (3) [s]ociety’s reasonable expectations of security of person and property would be defeated by nonpayment.” *Nossen*, 750 F. Supp. at 745 (citing *Provident Life & Accident Ins. Co. v. Waller*, 906 F.2d 985, 993 (4th Cir. 1990); *Corbin on Contracts*, § 19A at 59).

The facts show that a benefit was undoubtedly conferred upon Lightburn when Wooten paid the purchase price for the real estate located in Washington County, Virginia. Moreover, there is no dispute that Lightburn was aware of this benefit, as he received the payments, which were deposited by his attorneys. However, there does seem to be a dispute as to whether Lightburn’s acceptance and retention of the purchase price occurred under circumstances that render it inequitable for Lightburn to retain the benefit of the entire purchase price. According to Wooten, the parties allegedly agreed to allow the acreage issue to survive closing and remain open pending the completion of a field survey and to keep the purchase price in escrow until the survey was completed. Wooten contends that the survey eventually revealed a deficiency in the actual amount of acreage conveyed. Based upon Wooten’s evidence, the fact that Lightburn received the full purchase price for the real estate at issue and, in turn, failed to honor his alleged agreement to adjust the purchase price if the survey showed an acreage deficiency, could show that Lightburn was unjustly enriched.

In addition, when examining the quasi-contract claim under the reasonable expectation theory, disputes in fact exists which would affect whether Wooten had a reasonable expectation of payment, whether Lightburn should reasonably have expected to reimburse Wooten due to the acreage shortage and whether “society’s reasonable expectations of security of person and property” would be served if Lightburn was permitted to retain the entire purchase price. *Nossen*, 750 F. Supp. at 745; *see also Provident Life*, 906 F.2d at 933.

Accordingly, for the reasons stated above, I recommend that the court deny both Lightburn’s Motion and Wooten’s Motion as to Wooten’s quasi-contract claim.

## *II. Proposed Findings of Fact and Conclusions of Law*

As supplemented by the above summary and analysis, the undersigned now submits the following formal findings, conclusions and recommendations:

1. The evidence presented reveals that the warranties and covenants, as set forth in the deed at issue, did not pertain to the quantity of the land to be conveyed; thus, because a warranty or covenant was not proven to exist as to the acreage to be conveyed, Wooten’s breach of warranty claim fails as a matter of law;
2. Genuine issues of material fact exists which prevent the entry of summary judgment in either party’s favor as to Wooten’s claim for specific performance; and
3. Genuine issues of material fact exists which prevent the entry of summary judgment in either party’s favor as to Wooten’s claim for quasi-contract or unjust enrichment.

### *III. Recommended Disposition*

Based upon the above-stated reasons, I recommend that the court grant Lightburn's Motion as to Count II of the Second Amended Complaint and enter summary judgment in Lightburn's favor on this claim. I also recommend that the court deny Lightburn's Motion as to Counts III and IV. Furthermore, I recommend that the court deny Wooten's Motion in its entirety.

### *IV. Notice To Parties*

Notice is hereby given to the parties of the provisions of 28 U.S.C. § 636 (b)(1)(C):

Within ten days after being served with a copy [of this Report and Recommendation], any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed finding or recommendation to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence to recommit the matter to the magistrate judge with instructions.

Failure to file written objections to these proposed findings and recommendations within 10 days could waive appellate review. At the conclusion of the 10-day period, the Clerk is directed to transmit the record in the matter to the Honorable Glen M. Williams, Senior United States District Judge.

The clerk is directed to send copies of this Report and Recommendation to all counsel of record.

**DATED:** This 28<sup>th</sup> day of March 2008.

*/s/ Pamela Meade Sargent*

UNITED STATES MAGISTRATE JUDGE