

AMERICAN STANDARD APPAREL CORP.,	: IN THE COURT OF COMMON PLEAS OF
	: LYCOMING COUNTY, PENNSYLVANIA
Plaintiff	:
	:
vs.	: NO. 99-01,615
	:
AGILE BUILDING SYSTEMS, LLC,	: CIVIL ACTION
Defendant	: IN EJECTMENT

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Plaintiff	:
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vs.	: NO. 99-01,616
	:
AGILE BUILDING SYSTEMS, LLC,	:
Defendant	:
	:
vs.	: CIVIL ACTION
	:
PRO-TRACT, INC.,	:
Intervenor	: DECLARATORY JUDGMENT

**OPINION and ORDER**

The background of this dispute between the parties focuses around a commercial property on West Fourth Street in the City of Williamsport known as 3607 West Fourth Street (hereafter sometimes referred to as the “property”). Plaintiff, as owner of the property, commenced the above-captioned cases simultaneously, filing a complaint for confession of judgment in ejectment against Defendant as lessee of a portion of the property and at the same time seeking declaratory judgment relief to establish that Defendant’s purchase option rights under the lease had been terminated. By a separate Order (entered after argument of January 5, 2000) this Court determined that, to facilitate discovery and further evidentiary proceedings

and to avoid inconsistent results, the two cases should be consolidated, although maintained under separate docket numbers for purposes of potential disposition of each one.

Both actions were commenced on October 5, 1999. On December 16, 1999, this Court heard argument on the Petition of Pro-Tract, Inc. to intervene in the Declaratory Judgment action. Pro-Tract asserted it had agreed to purchase the Property from Plaintiff and its right required an expedited determination as to why the Defendant's purchase option rights were valid. The intervention was granted by this Court's Order of that date. As also evidenced in that Order, the Court and parties determined that the legal interpretation to be given to the lease should be resolved through legal argument as if each party had moved for judgment on the pleadings.

The pleadings clearly establish that a lease was executed between Plaintiff as lessor and Defendant as lessee on February 13, 1998, for approximately 30% of a commercial building that occupied a substantial part of a 14-acre tract of ground. The lease was for a three-year term, calling for base monthly rental payments of \$13,150 to be made on the first day of each month beginning January 1, 1998.<sup>1</sup> The portion of the building leased was intended to be used by Defendant for manufacturing operations. The parties by stipulation evidenced by Court Order of January 5, 2000, the pleadings were amended to establish that no rent was paid to Plaintiff by Defendant after December 2, 1998.

The pleadings also establish that in addition to the commercial lease terms, the lease provided an option to purchase should be given to Defendant. This option had two aspects. The first was an absolute option to purchase within the first 120 days of the lease

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<sup>1</sup> Once Plaintiff vacated the demised premises, the monthly payment was to increase to \$14,601.00.

period all property owned by Plaintiff of which the leased premises were a part for a price of \$1,650,000.00. The second aspect of the option, which is the center of this dispute, consists of the grant of a right of first refusal. The specific language in dispute reads as follows from the lease:

Following the expiration of the One Hundred and Twenty (120) day exclusive purchase option, the LESSOR agrees to grant the LESSEE the right of first refusal for a period of ninety (90) days under the same terms, conditions and price as any other received by LESSOR.

Plaintiff contends that this right of first refusal option is no longer valid or enforceable by Defendant. Plaintiff avers that under the right of first refusal language in the lease, Defendant had an additional 90 days after the initial 120 day absolute option expired in which to exercise its right of first refusal; this time period has also expired. Plaintiff's Complaint paragraphs 12-13. In the alternative, Plaintiff pleads that Defendant breached the lease by failing to make the required monthly payments and meet other financial commitments under the lease; therefore, Defendant has lost any right of first refusal. Plaintiff's Complaint paragraph 14. Plaintiff asks this Court to declare Defendant's right of first refusal expired as of September 13, 1998, or declare that Defendant's breach has rendered void its right of first refusal and Plaintiff has no obligation to provide Defendant with notice of purchase offers Plaintiff receives, nor extend Defendant the opportunity to match such offers.

Defendant asserts the lease cannot be terminated for non-payment of rent because of an understanding Defendant had after conversations with Plaintiff. This contention is primarily set forth in Defendant's paragraph 7 of its Answer, which acknowledges that all rents were not paid but pleads Defendant had made improvements to the leasehold in

anticipation of exercising its purchase option. Defendant also asserts the unpaid rents would be capitalized when the purchase option was exercised. Accordingly, Defendant claims it still enjoys the right of first refusal to purchase the Property. Defendant further claims that having been advised by Plaintiff that a valid purchase offer has been made for the property by the Intervenor, ProTract, Inc., Defendant is entitled to be fully apprised as to the terms of the offer and to be given the opportunity to purchase the property under the same terms and conditions as agreed upon by Plaintiff and Intervenor.

The Confession of Judgment and Ejectment was commenced at the same time as the Declaratory Judgment action by Plaintiff, with the Judgment of Ejectment entered by confession based upon Defendant's non-payment of rent. The Complaint for Confession of Judgment by Ejectment, filed October 5, 1999, in paragraph 8, asserts that a breach has occurred because Defendant has failed and neglected to pay monthly rental payments as required, with the last rental payment being made on December 2, 1998. In paragraph 10 it is also alleged that other payments required by the lease relating to taxes, insurance and utilities were not paid. The Affidavit of Default (Exhibit C) asserts that the basis for default is the Defendant's default with respect to making monthly rental payments as required by the Lease, with the last payment having been made on December 2, 1998. Defendant filed a petition to Open the Confessed Judgment in Ejectment on November 15, 1999, asserting that it had a right to purchase the property under the right of first refusal and there was a good faith dispute as to the amounts allegedly past due for payment of rent. In paragraph 14, Defendant admitted that it had not made all the required payments but asserted that, based upon discussions with and representations by the Plaintiff, any monthly rental payments would be capitalized at the time

of Agile's purchase of the property. Defendant further asserts it has an absolute right of first refusal to purchase the property and now that a valid offer has been made, it can now purchase the property and thus should not be ejected from the property.

### *Discussion*

The determining issue is whether Defendant continues to enjoy its right of first refusal.<sup>2</sup> The procedural posture of this matter had been deemed a motion for judgment on the pleadings. Judgment on the pleadings should be granted only in cases clear and free from doubt; the court must accept as true all averments of fact by the opposing party which are material and relevant, but not its inferences or conclusions of law. *West Penn Power Co. v. Piatt*, 592 A.2d 1306, 1308 (Pa.Super. 1991) (citations omitted). Further:

Judgment on the pleadings should not be entered where there are disputed issues of material fact. The court must treat the motion as if it were a preliminary objection in the form of a demurrer. In conducting this inquiry, the court should confine its consideration to the pleading and relevant documents. Since a motion for judgment on the pleadings is not a motion for summary judgment, no affidavit or depositions may be considered, nor is any matter before the court except the pleadings.

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<sup>2</sup> As a threshold issue, the parties presented their respective positions as to why the right of first refusal does or does not exist. Defendant argued that the option of first refusal was in addition to the terms and conditions of the Lease. However, at oral argument defense counsel could not cite any authority for such an interpretation. The Court finds this position untenable. The provision clearly appears within the document below the title "Business Property Lease." More importantly, if the right of first refusal is not limited by the term of the lease, then Plaintiff would, in effect, have afforded Defendant a perpetual right of first refusal. We can envision no circumstances under which Plaintiff, or any business, would agree to such an arrangement.

Plaintiff, on the other hand, urged the Court to interpret the 90 day time period clause as being sequential to the initial 120 day period, thereby expiring 7 months after the lease began. However, if we were to accept Plaintiff's position, the contract would provide no time period in which Defendant could determine whether it could or would exercise its right. Considering the amounts of money involved, it stands to reason Defendant would require a set period of time upon which it could rely in exploring the possibility of purchase.

Accordingly, we find Defendant enjoys a 90 day right of first refusal upon notification of a third party offer. However, the right is governed by the Lease Agreement and does not survive in the event of Defendant's breach.

*West Penn Power Co., supra, citing Del Quadro v. City of Philadelphia*, 437 A.2d 1262, 1263 (Pa.Super. 1981). With these standards in mind, we find Defendant has failed to plead that an agreement was reached through a meeting of the minds of the parties, such that Plaintiff acquiesced in Defendant's non-payment of rent and would not declare the lease in default, allowing Defendant to defer and capitalize rental payments until such time as Defendant purchased the property.

First, for an additional agreement to have existed in this case, there must have been a "meeting of the minds." *Schreiber v. Olan Mills*, 627 A.2d 806, 808 (Pa.Super. 1993) (citation omitted). We have carefully review the pleadings submitted by Defendant. Nowhere does Defendant plead the existence of an agreement resulting from such "meeting of the minds," which modified the written contract. Rather, Defendant avers only that, based upon discussions and representations made by Plaintiff, *Defendant* understood that monthly payments would be capitalized at the time Defendant purchased the property; based upon *Defendant's* understanding, Defendant continued to make substantial improvements to the property. Defendant's Answer to Plaintiff's Complaint, paragraph 7. Specifically, the relevant portion of the pleading reads as follows:

*Agile* understood, based upon discussions with and representations by the Plaintiff, that any monthly rental payments not made by Agile would be capitalized at the time of Agile's purchase of the property. *Based upon such understanding*, Agile has made substantial improvements to the Property in anticipation that its right of first refusal in the Lease would be honored and Agile would purchase the Property...

Defendant's Answer to Plaintiff's Complaint paragraph 7 (emphasis supplied). This speaks only to Defendant's understanding of the existence of an agreement. Nowhere in Defendant's

pleadings is there any claim that an actual agreement was made, nor meeting of the minds achieved with Plaintiff. Reading Defendant's pleading in the light most favorable to Defendant, it can only be inferred, at most, that Defendant acted in response to its own understanding of Plaintiff's representations. Defendant's unilateral *understanding* that a new contract had been created was not a meeting of the minds necessary to amend the Lease Agreement.

Second, a subsequent oral agreement must be founded on valid consideration.<sup>3</sup> Defendant has neither pled nor argued the existence of any such consideration. Defendant does plead and argue that it expended substantial amounts of money in anticipation of exercising its right to purchase the property. Detrimental reliance of a promisee can create the consideration necessary for the formation of a contract. *Travers v. Cameron County School District*, 544 A.2d 547 (Pa.Cmwlt. 1988). However, in the instant case the pleadings reveal that the monies expended by Defendant were monies Defendant contemplated expending when entering into the lease originally. We agree with Plaintiff that this cannot constitute new consideration.

With respect to whether Defendant breached the Lease Agreement, it is clear to this Court that such a breach occurred. We adopt and incorporate by reference Plaintiff's Brief in Support of Complaint for Declaratory Judgment and Ejectment pp. 8-11. No subsequent contract was formed, and the practical effect is that the subject property has been "tied up" for over a year without payment while being encumbered by liens for work brought about by Defendant. *Id.* at p. 9.

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<sup>3</sup> The parties agree that a contract may be modified by subsequent oral agreement. *See* Plaintiff's Brief p. 12.

Further, it is hornbook law that a contract cannot be based on a promise to do a thing to which a party is already bound; the doing of an act which one is under obligation by law to perform does not constitute a sufficient consideration to support a promise. In the instant case, Defendant's promise to pay the capitalized rental payments it was obligated to pay cannot be deemed new consideration.

Therefore, we must find that Defendant breached the terms of the Lease Agreement by its failure to make monthly rental payments or honor its other financial commitments under the Lease Agreement. By breaching the terms of the Lease Agreement, Defendant lost its right of first refusal. Motion for Judgment on the Pleadings must be granted in favor of Plaintiff. The relief sought in Plaintiff's Declaratory Judgment complaint, filed to docket #99-01,616, will be granted.

We have found Defendant to be in breach of the Lease Agreement. Further, no new oral agreement existed to modify the Lease Agreement, such that the breach was excused. As this is the sole issue before the Court in Defendant's Petition to Open a Confessed Judgment in Ejectment, the Petition is denied. The judgment remains. Defendant's Petition to Open Judgment, filed to docket #99-01,615 December 6, 1999, must be denied.

**ORDER**

**AND NOW**, this 11<sup>th</sup> day of January 2000, for the reasons set forth in the foregoing Opinion, Plaintiff's Motion for Judgment on the Pleadings is GRANTED. Defendant's Motion for Judgment on the Pleadings is DENIED. The Court hereby grants Plaintiff's request for declaratory relief, contained in Plaintiff's Complaint filed to docket #99-01,616 as follows:



1. Defendant's breach of the property lease agreement voids and extinguishes Defendant's 90-day right of first refusal as set forth under the terms of the lease.

2. Plaintiff has no obligation to provide Defendant with notice of pending or future offers to purchase the subject property.

3. Plaintiff has no obligation to extend to Defendant a 90-day period of time to match any offers to purchase the subject property.

Defendant's Petition to Open Judgment, filed to docket #99-01,615, is DENIED.

BY THE COURT:

William S. Kieser, Judge

cc: Court Administrator  
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