

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA**

JAMES W. BOWER, JR., :  
Plaintiff :  
 :  
v. : No. 00-20,831  
 :  
TERESA H. BOWER, :  
Defendant :

*Opinion issued February 13, 2001*

**OPINION and ORDER**

In this case the court is asked to determine the fate of the Montour County Dunkin Donut store and the goodies therein. James and Teresa Bower, who jointly operated the store during their marriage, are currently haggling over who should own their donut dukedom now that they are divorced.

The couple's marital settlement agreement gave Mr. Bower the choice of either handing the store over to Mrs. Bower or paying her \$400,000. Mr. Bower chose to pay the money and keep the store, but did not give Mrs. Bower the money until months after the deadline for payment had passed. Mrs. Bower refused to accept the money at that time, claiming that because the check was late, Mr. Bower had lost the right to keep the store. But like the donuts in that store, there is a hole in the center of Mrs. Bower's argument: she has confused the two basic contractual principles of acceptance and performance.

**Factual History**

There is little dispute over the essential facts. The Bowers' Marital Separation Agreement states that Mr. Bower will convey to Mrs. Bower the title to the Danville donut

shop real estate and the shares of the company owning that store. However, it also states that in lieu of conveying those items, Mr. Bower “may elect to pay wife \$400,000.00 in cash.” (Paragraph 6.04.) The agreement also states:

Within 30 days from the date of this Agreement, the parties will sign, seal, acknowledge, and deliver to one another such documents (including but not limited to agreements, assignments, bills of sale, checks, deeds, stock powers, and vehicle titles) as may be necessary for the full performance of every provision of this Agreement.

(Paragraph 11.05.)

Mrs. Bower signed the agreement on August 23, 2000. Mr. Bower signed it on September 5, 2000 and on that same date his attorney wrote Mrs. Bower’s attorney a letter stating, “Mr. Bower will be electing to pay your client the sum of \$400,000 in lieu of items 3 and 4 on the agreement.” For various reasons, however, Mr. Bower did not send Mrs. Bower a check until November 29, 2000. In the meantime, the Bowers and their attorneys became embroiled in a fierce fight over the tax consequences of the agreement. Finally, despite having agreed to accept the \$400,000 as late as November 2, 2000, Mrs. Bower rejected the money on November 30, 2000. Mr. Bower then filed this petition to enforce the agreement.

### **DISCUSSION**

We first note that Mrs. Bower contends this court does not or should not decide this issue because she has filed a separate civil action on the Agreement.<sup>1</sup> We reject her argument because we can find no impediment to enforcement in this court. On the

---

<sup>1</sup> Mrs. Bower filed a complaint in Equity, Docket # 00-01,770, asking the court to, among other things, compel Mr. Bower to convey the donut store.

contrary, the following statutory sections clearly give this court jurisdiction to enforce a marital settlement agreement: 23 Pa. C.S.A. § 3105 and 23 Pa. C.S.A. §3502. The additional matters raised in the civil action, apart from the tendering and acceptance of the \$400,000, are not before this court and will not be addressed here. We are simply asked to rule on the contractual provision at issue, and we will do so because it will promptly clear up one issue in this rather messy divorce and help the parties get on with their lives.

Our task here is to interpret the Marital Settlement Agreement. Specifically, we must determine whether Mr. Bower made his choice to pay cash for the store before it was too late.

It would be nice if the agreement specifically stated when Mr. Bower had to make that choice, because it would give the parties one less thing to fight about. Unfortunately, it does not. However, the meaning of the provision at issue is clear to this court.

The Marital Settlement Agreement is a bilateral contract; the parties exchanged promises to do specified things. The responsibilities Mr. Bower committed himself to depended upon his choice between conveying the store to Mrs. Bower or paying her \$400,000. The contract did not give a deadline for communicating his decision; however, he clearly did so in time, for he specified his choice in a letter written the very day he signed the agreement.

Mrs. Bower contends, however, that Mr. Bower lost his right to choose to pay rather than convey when he did not *deliver* the \$400,000 on time. She herself, however, has changed her mind on what the payment deadline was. We hardly blame her for waffling on this issue, for neither theory makes much sense.

First, Mrs. Bower argued in her Answer to the Petition to Enforce, which she filed on 10 January 2001, that “the option expired on September 5, 2000, when Petitioner executed the Agreement without paying the \$400,000 or even excising the language of paragraph 6.04 subparagraphs (3) and (4).” That interpretation, however, contradicts the language of the contract itself, which states that checks must be delivered “[w]ithin 30 days from the date of this Agreement.” (Paragraph 11.05.). Moreover, Mrs. Bower herself apparently did not hold this opinion at the time, for she accepted the signed contract without demanding immediate payment of the \$400,000.

Mrs. Bower now contends Mr. Bower lost the right to pay the \$400,000 because he failed to deliver the money by the 30-day deadline. There is no support for this position in the language of the contract. The Agreement explicitly separates the opportunity to choose to pay cash from the payment deadline. It says Mr. Bower “may elect” to pay the money rather than convey the store, and it also says all documents, including checks, must be delivered within the 30 days.

As discussed above, there is no question Mr. Bower made and communicated his choice on time. When he did this, he committed himself to paying the \$400,000. He now not only has *the right* to pay the \$400,000, he has *the responsibility* to pay it. The fact that he did not pay on time is merely evidence of his breach of the agreement. It does not relieve him of the obligation to pay the money, but it may provide a basis for Mrs. Bower to secure damages for his failure to perform on time, which she is free to pursue in her civil action.

In short, Mrs. Bower gets the dough, but not the donuts.

**ORDER**

AND NOW, this \_\_\_\_\_ day of February, 2001, for the reasons stated in the foregoing opinion, the Petition to Enforce, filed on 22 December 2000, is granted and it is ordered that Teresa H. Bower accept the \$400,000 tendered by James W. Bower, Jr., in satisfaction of his obligation under Sections 6.04(3) and (4) of the parties' Marital Separation Agreement. This order is entered without prejudice to Mrs. Bower to assert her claim for interest on that money or any other claims asserted in Lycoming County Civil Action No. 00-01,770. Mr. Bower's request for attorneys' fees is denied.

BY THE COURT,

Clinton W. Smith, P.J.

cc: William Carlucci, Esq.  
J. David Smith, Esq.