IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

LYCOMING LEASING CO., Plaintiff	:	
vs.	:	**NO. 06-02,497**
BERNARD GORDON, TRUSTEE, Defendant	:	**CIVIL ACTION**

OPINION

This matter has come before the Court on a claim by Plaintiff Lycoming Leasing Co. and a counterclaim by Defendant, Bernard Gordon, each seeking return of a $50,000.00 down payment that is currently being held in escrow. The dispute arises out of a proposed sale of real estate in Hometown, Schuylkill County, PA from Defendant to Plaintiff. The parties' claims require the Court to interpret a commercial real estate purchase and sale agreement dated December 26, 2003 and marked as Plaintiff's exhibit #3 which is the contractual document around which this case revolves. Each party alleges various breaches or non-performances of this contract.

After several extensions, the closing was set for August 13, 2004. As early as February 23, 2004, however, there was evidence that a potential lending institution, M&T Bank, had concerns about possible contamination on the Hometown property. This is evidenced by an email sent from Ronald Frick to Brent Fish of Fish Realty on February 23, 2008 marked as Plaintiff's Exhibit 10. In the email, regarding potential liability from the property adjacent to the Hometown property, Mr. Frick states, "Would want something from seller indemnifying bank and I will be discussing this with counsel on what they think as well." In a follow up email, dated February 24, 2004, included in Exhibit 10, Mr. Frick, speaking to Mr. Fish, states: "Probably at least need to hear from U.S. EPA on the

potential of liability on Pfleegor's part for the waste generated by Eastern Diversified and then trucked next door… I spoke to David this morning to outline our concerns. Would also want to do a Phase II study to determine that there is no existing subsurface problems."

Although M&T bank ultimately did not become the Pfleegor's lender, there is further evidence that M&T's replacement, Susquehanna Bank, shared similar concerns regarding the Hometown property. According to Michael Caffrey, the representative of Susquehanna Bank, the closing would have taken place August 13, 2004 were it not for environmental concerns raised by the EPA on August 11. Those concerns were reduced to writing by Attorney Wiley, who was retained by Plaintiff to produce an environmental opinion. Attorney Wiley's environmental opinion letter would have cleared the way for the closing but it became invalid because EPA negated one of the assumptions upon which Mr. Wiley's letter was based. A fax to Mr. Wiley on August 11, 2004 confirmed that Mr. Cohen, on behalf of the EPA, believed there may be environmental problems and hazardous substances on the Gordon property. David Fleeger II's testimony was that such notification from EPA stopped the deal. In fact, he went on to testify that the environmental issue was the only reason for the failure to close on August 13, 2004. The Court finds this testimony credible. This testimony is buttressed by the testimony of Mr. Caffrey, the representative of the lender, Susquehanna Bank, who specifically testified that the bank would not close on August 13, 2004 because of the EPA letter. Mr. Caffrey went on to state that this was the only impediment to that closing, and the other part of the financing package not involving the Schuykill County property closed several months later.

With this background in mind, the Court finds the contract is clear on its face thereby allowing the Court to apply it to the facts. The Court must look at the financing provision of the contract, specifically paragraph 26, in order to determine the outcome of this case. That provision states as follows:

> (a) FINANCING CONTINGENCY This Agreement is also **contingent upon** Buyer receiving financing to purchase the Premises on terms and conditions satisfactory to Buyer in its sole discretion. Buyer agrees to within 30 days of the execution of this Agreement make a completed written mortgage application to responsible mortgage lending institution. In the event Buyer does not receive a written mortgage commitment within 90 days from contract execution, Buyer or Seller may terminate this Agreement, any deposit made by Buyer shall be returned to Buyer, and this Agreement shall become null and void. [Emphasis Added]

Therefore, based upon the foregoing it is clear that Lycoming Leasing, the Plaintiff, had no financing to close the agreement

. This transaction was clearly conditioned upon financing to purchase the property on terms and conditions satisfactory to buyer in its sole discretion. Here there was no financing available when it came time to close not as a result of any fault by Plaintiff or Defendant. It is well settled that if a contract contains a condition precedent, the condition precedent must occur before a duty to perform under the contract arises. Acme Markets, Inc. v. Federal Armored Express, Inc., 648 A.2d 1218, 1220, 437 Pa. Super. 41, 46 (1994); Keystone Technology Group, Inc., v. Kerr Group, Inc., 824 A.2d 1223, 1227, 2003 Pa. Super. 199 (2003). The Court finds, therefore, that the contract is null and void. This is significant because Defendant's claim rests on the fact that Plaintiff did not specifically terminate the agreement. In this Court's finding that the original contract is null and void, it is unnecessary and unwarranted to distinguish between expiration and termination of an agreement. Therefore, it is clear that in August of 2004 Plaintiff was entitled to the return of their down payment inasmuch as the financing was not available and therefore no enforceable agreement existed.

Nevertheless, the parties wished to attempt to keep the deal alive and an additional extension was signed by Mr. Gordon on August 27, 2004 and by Mr. Fleeger on September 7, 2004, which has been marked as Plaintiff's exhibit #86. Without quoting this

extension agreement that is in the record, that agreement acknowledged EPA concerns, the need for EPA testing, and clearly gave the buyers the ability to have their deposit reimbursed if additional EPA tests are not "okay". Thereafter, it was determined that the property did contain contamination and remediation ultimately became necessary. The seller Defendant, Mr. Gordon, refused extending the agreement beyond February 28, 2005. In fact, the remediation was not completed and the property was not totally cleared by EPA until April 13, 2006 (see Plaintiff's exhibit #115). By that time, the parties had differing opinions as to the value of the property and a new agreement could not be reached. Thereafter, on or about September 15, 2006, Mr. Vanderlin, on behalf of Lycoming Leasing, requested the return of the deposit in writing having confirmed a previous verbal request by Mr. Fleeger, Sr. (see Plaintiff exhibit # 131).

In short, the Court concludes:

1. The $50,000.00 deposit is the property of Plaintiff, Lycoming Leasing Co. as they breached no agreement that would have lost their entitlement to that money.
2. As a result of the financing being unavailable, the sales agreement became null and void pursuant to paragraph 26 of Plaintiff's exhibit #3 because of a lack of financing.
3. The extension agreement referenced above as Plaintiff's exhibit #86 further clarified the Plaintiff's entitlement to the return of the $50,000.00 down payment.
4. The Court concludes that based upon the contract language itself, that there is no basis to award Attorney's fees to the Plaintiff or interest, and the Court so concludes.

ORDER

AND NOW, this ___ day of September, 2008, after non-jury trial, the Court enters judgment in favor of Plaintiff, Lycoming Leasing Co. and against Defendant Bernard Gordon Trust in the amount of $50,000.00. It is ordered and directed that this sum be released from the existing escrow and returned to the Plaintiff within 30 days. Further, judgment is entered in favor of Plaintiff and against Defendant on Defendant's counter claim.

. By the Court,

Richard A. Gray, Judge

RAG/kae
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