

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

RUSSELL W. TWIGG,	:	NO. 07 – 00,013
Plaintiff	:	
	:	CIVIL ACTION - LAW
vs.	:	
	:	
CHILITECH INTERNET SOLUTIONS, INC.,	:	
ANDREW D. SAUERS and JEFFREY R. JOHNS,	:	
Defendants	:	Non-jury Trial

**OPINION AND VERDICT**

Before the Court is Plaintiffs’ demand for immediate payment of an outstanding loan balance allegedly due him from the Defendants, as contained in his Complaint filed January 3, 2007, and his Amended Complaint filed March 19, 2007. A non-jury trial was scheduled for July 2, 2008, at which time counsel requested the Court to allow submission of proposed findings of undisputed fact and briefs, and to enter a decision based on those findings and briefs. This request was granted and counsel were given until July 16, 2008, to submit such findings and briefs. All Defendants filed findings and briefs on July 16, 2008. Plaintiff’s findings, accompanied by a cover letter rather than a brief, were filed July 18, 2008. The matter is thus now ripe for decision and the Court enters the following:

**FINDINGS OF FACT**

1. Defendant Chilitech Internet Solutions, Inc. (hereinafter “Chilitech”) is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania.
2. Defendant Andrew D. Sauers (hereinafter “Sauers”) is and has been the President, Chief Executive Officer and majority shareholder in Chilitech since October 15, 2004.
3. As of October 15, 2004, Defendant Jeffrey R. Johns (hereinafter “Johns”) was an employee of Chilitech. His employment there terminated in 2006. Johns has no financial interest in Chilitech.

4. Plaintiff, Russell W. Twigg (hereinafter “Twigg”) was, prior to October 15, 2004, a shareholder and director of Chilitech and was also the treasurer.
5. On October 15, 2004, Twigg sold all his shares in Chilitech back to Chilitech. As part of the redemption of shares, Chilitech, Sauers and Johns provided as consideration a promissory note in favor of Twigg in the amount of \$467,313.00. The terms of the note included annual interest at the rate of 8%, amortized over a period of fifteen (15) years, with a final, balloon payment due after five years, on October 15, 2009.
6. The note provides that “[a]ll indebtedness provided for in this Note shall become due and payable immediately, without demand or notice, on the occurrence of any of the following: ... (3) The insolvency of Maker; ... (8) Maker’s failure to pay, withhold, collect or remit any tax or tax deficiency when assessed or due; ... .”
7. At some time between October 15, 2004 and January 3, 2007, Chilitech failed to pay a Williamsport business privilege tax when due. As of January 3, 2007 (the date the Complaint was filed), however, there were no unpaid taxes outstanding.
8. Chilitech paid business privilege taxes after the deadline for such in 2003 and 2004; at that time, Twigg was the treasurer of Chilitech.
9. The amount of any outstanding business privilege tax never constituted more than four-tenths of one percent (.4%) of Chilitech’s total liabilities.
10. Chilitech’s balance sheet indicates that liabilities currently exceed assets.
11. At the time the note was executed, Chilitech’s liabilities exceeded its assets.
12. All payments due Twigg under the terms of the note have been paid in a timely fashion.

## **DISCUSSION**

Twigg seeks to call this loan on the grounds that Chilitech is insolvent, offering as proof of that the fact that Chilitech failed to pay a business privilege tax when due, and quoting in support of his claim Black’s Law Dictionary, which defines insolvency as “the condition of being unable to pay debts as they fall due or in the usual course of business.” *See* Amended Complaint, filed March 19, 2007, at paragraphs 7, 8 and 9. As the facts indicate that paying the

tax late was in Chilitech's "usual course of business", however, the Court cannot find Chilitech insolvent on that basis. Twigg also argues<sup>1</sup> that Chilitech is insolvent as its liabilities exceed its assets, but inasmuch as that was also true at the time the parties executed the note, the Court believes the parties intended in making the note to give "insolvency" the meaning it has been attributed by Twigg in his Complaint, that of "the condition of being unable to pay debts as they fall due or in the usual course of business." As Twigg has not shown that Chilitech is unable to pay its debts in the usual course of business, his demand for immediate payment of the amounts due under the note on this basis will be denied.

Twigg also claims that the failure to make the business privilege tax payment when due is, in itself, grounds for calling the loan under paragraph 8 of the list of those circumstances under which the indebtedness would become immediately due and payable. In addressing this claim, the Court looks to the explanation of "material breach" such as would "entitle[] the non-breaching party to suspend performance" of the contract, given in Widmer Engineering, Inc. v. Dufalla, 837 A.2d 459, 467-68 (Pa. Super. 2003)(some citations omitted):

"When performance of a duty under a contract is due, any nonperformance is a breach." Restatement (Second) of Contracts § 235(2) (1981). ... If a breach constitutes a material failure of performance, then the non-breaching party is discharged from all liability under the contract. ... If, however, the breach is an immaterial failure of performance, and the contract was substantially performed, the contract remains effective. ... In other words, the non-breaching party does not have a right to suspend performance [if the breach is not material]. "Whether a breach is so substantial as to justify an injured party's regarding the whole transaction as at an end 'is a question of degree; and it must be answered by weighing the consequences in the actual custom of men in the performance of contracts similar to the one that is involved in the specific case.'" Gray v. Gray, 448 Pa.Super. 456, 468, 671 A.2d 1166, 1172 (1996) (citing 2401 Pennsylvania Ave Corp. v. Federation of Jewish Agencies, 319 Pa.Super. 228, 242-43, 466 A.2d 132, 139 (1983) (citations omitted)). In determining materiality for purposes of breaching a contract, we consider the following factors:

a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;

b) the extent to which the injured party can be adequately compensated for that part of the benefit of which he will be deprived;

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<sup>1</sup> While this basis for a finding of insolvency was not supported by factual allegations in the Complaint, the Court will nevertheless consider such as none of the Defendants has objected thereto on that ground.

c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;

d) the likelihood that the party failing to perform or offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;

e) the extent to which the behavior of the party failing to perform or offer to perform comports with standards of good faith and fair dealing.

Restatement (Second) of Contracts § 241 (1981). Accord Jennings v. League of Civic Organizations of Erie County, 180 Pa.Super. 398, 119 A.2d 608 (1956).

Upon consideration of these factors under the circumstances of the instant case, the Court finds Chilitech's failure to remit a business privilege tax when due immaterial, and further, that the contract has been substantially performed. Twigg has been deprived of no benefit whatsoever and the late tax payment has been made and thus the "failure" has been "cured". Moreover, the Court has no trouble finding that the failure to pay the tax when due nevertheless "comports with standards of good faith and fair dealing" inasmuch as it was in keeping with the past practice of the business.

Accordingly, the Court draws the following:

### **CONCLUSIONS OF LAW**

1. There has been no material breach of the note.
2. Twigg is not entitled to immediate payment of the outstanding principal balance.

**VERDICT**

AND NOW, this 11<sup>th</sup> day of August 2008, for the foregoing reasons, the Court finds in favor of Defendants and against Plaintiff.

BY THE COURT,

Dudley N. Anderson, Judge

cc: Joseph F. Orso, III, Esquire  
J. David Smith, Esquire  
Benjamin E. Landon, Esquire  
Gary Weber, Esq.  
Hon. Dudley Anderson