IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

RB MONTOURSVILLE, LLC, Plaintiff	:	NO. 10 – 00,019
	:	CIVIL ACTION - LAW
vs.	:	
	:	
D. RICHARD SNYDER, Defendant	:	Cross-Motions for Summary Judgment

OPINION AND ORDER

Before the Court are cross-motions for summary judgment, filed by the parties on May 24, 2011. Argument thereon was heard June 2, 2011. Trial is currently scheduled for June 10, 13 and 14, 2011, and counsel agreed that the instant motions will resolve Plaintiff's claim, leaving only Defendant's counter-claim to be tried.

This litigation arises from an attempted land purchase by Plaintiff[1] of certain property owned by Defendant, for development as a shopping center. In May 2003, the parties entered a comprehensive Purchase Agreement which was modified various times over the course of about four years. When it became apparent that Plaintiff would not be able to obtain the necessary permits, Plaintiff elected to terminate the parties' agreement and requested a refund of the various deposit monies paid to Defendant pursuant to the agreement. Defendant took the position that the deposit monies were non-refundable and the instant litigation ensued. In their cross-motions for summary judgment the parties ask the Court to determine who is entitled to the deposit monies.

The May 23, 2003, Purchase Agreement provided, in relevant part:

> **6. Due Diligences**. For a period of 150 days from the Effective Date of this Agreement (hereinafter referred to as the "Due Diligence Period"), Buyer, at Buyer's sole cost and expense, shall have the right to conduct any studies and investigations, as Buyer deems necessary or advisable to determine the feasibility of the Property for Buyer's Intended Use. If Buyer determines, in Buyer's sole discretion, that the Property is not feasible for Buyer's Intended

[1] Although the original negotiations were between Prime Site Development LLC and Defendant, at some point during the negotiations Prime Site transferred its interest in the deal to Plaintiff and therefore, the Court will simply refer to Plaintiff even though some of the contracts may have been entered by Prime Site.

> Use, Buyer may terminate this Agreement upon written notice to Seller within three days from the expiration of the Due Diligence Period and the Deposit and all interest earned thereon shall be returned to Buyer and thereafter the parties hereto shall have no further rights, duties or obligations hereunder.

The Purchase Agreement also listed various "Conditions Precedent", including receipt of all government approvals required for construction and operation of the improvements contemplated by "Buyer's Intended Use", and provided as follows:

> **9.2 Failure of Contingencies**. If any of the above Conditions Precedent are not duly satisfied or waived as provided above, or if at any time Buyer determines, in its reasonable judgment, that any of the foregoing conditions cannot be fulfilled, in whole or in part, on or before the Closing Date, then Buyer, at its sole option, shall have the right, exercisable by written notice to Seller: (1) to waive such condition and proceed to close this transaction; (2) to terminate this Agreement, in which event the Deposit shall be returned to Buyer, and neither party shall have any further rights or obligations.

Also relevant to the claims at issue is the following language of the Agreement:

> **11. Closing Date Extensions**. In the event Buyer has not obtained all the Permits within 180 days from the Effective Date but furnishes evidence that it is diligently pursuing obtaining said approvals and permits, then Buyer shall have the right to extend the Closing Date up to two (2) times, each extension to be for a period of ninety (90) days upon payment to the Escrow Agent of an additional sum of Ten Thousand Dollars ($10,000.00) for each extension. All such payments shall be treated as Deposit and applicable to the Purchase Price.

Finally, language upon which Defendant relies:

> **17.1 Buyer's Default**. If the transaction contemplated herein is not consummated because of a default of Buyer under the terms of this Agreement, after notice and the opportunity to cure as provided for below, Seller's sole remedy shall be to retain the Deposit, as liquidated damages and in full settlement of any claims for damages, whereupon this Agreement shall become null and void and of no further force or effect. … .

The Purchase Agreement was amended by five (5) successive written, signed amendments, each of which extended the due diligence period, the second of which provided for extensions of the closing dates upon payment of additional deposits, the last three of which provided for additional monthly deposits and the last of which set a closing date for February 28, 2007. The closing date was extended twice according to the terms of the second

amendment, with the final closing date set for August 28, 2007. All of the contemplated deposits were paid: the original $15,000 was paid to the Escrow Agent,[2] and the remaining $560,000 was paid directly to Defendant. Plaintiff sent notice of termination and a request for refund of the deposit monies on May 26, 2009, nearly two years later. This two-year period becomes the focus of this dispute.

Plaintiff contends the deposit monies are refundable under the terms of the Purchase Agreement and the five subsequent amendments; Defendant contends the deposit monies are not refundable because the parties further amended the Purchase Agreement to provide for such, or, in the alternative, because Plaintiff defaulted by failing to exercise due diligence, which triggered Section 17.1 of the original Agreement. Defendant also seeks to retain part of the deposit on yet other grounds, and objects to the demand for interest.

In support of his first argument, Defendant relies on an October 15, 2007, letter from Plaintiff which lists, in twelve numbered paragraphs, proposed amendments to the Purchase Agreement, including the following:

> 9. The Deposit paid by the Buyer is non-refundable in the event Buyer is unable to obtain (i) preliminary and final land development plan and subdivision approval from the applicable governmental agencies, (ii) variances and conditional use approvals from Fairfield Township, (iii) Lycoming County Planning Commission site plan review, (iv) sanitary sewer approval from the Lycoming County Water and Sewer Authority or (v) Pennsylvania Department of Transportation acceptance of Buyer's traffic impact study. Furthermore, the deposit is non-refundable if Buyer terminates the Purchase Agreement because the project is not economically feasible for Buyer.

This letter does not constitute a modification to the original agreement, however, because in response, Defendant sent to Plaintiff a letter dated October 23, 2007, which requested "some modifications to the contract as outlined below", and then asked to delete two proposed revisions and added additional language. Plaintiff did not respond to this letter. As was stated by the Court in Rich v. G.W. Pifer Sons, 1930 Pa. Super. LEXIS 100,

> Nothing is better settled than that in order to constitute a contract there must be an offer on one side and an unconditional acceptance on the other. So long as any condition is not acceded to by both parties to the contract, the dealings are

[2] This deposit has been returned to Plaintiff by the Escrow Agent and is not at issue here.

> mere negotiations and may be terminated at any time by either party while they are pending. There must be a meeting of minds in order to constitute a contract. This doctrine is very familiar and has been recognized many times in our Courts. In *Swing v. Walker, 27 Pa. Super. 366*, we said at page 372, quoting from *Joseph v. Richardson, 2 Pa. Super. 208*: "To constitute a contract the acceptance of the offer must be absolute and identical with the terms of the offer. If one offers another to do a definite thing, and that other person accepts conditionally or introduces a new term into the acceptance, his answer is either a mere expression of willingness to treat or it is in effect a counter proposal." We then stated "To bind the parties, an acceptance must be in exact conformity with the proposal. A qualified acceptance does not constitute a contract."

Indeed, Defendant himself seems to acknowledge that no modification had been effected by the October 15 letter in communications he made to Plaintiff in July 2008 ("contract, that has expired"; "contract expired August '07"; "All this could be resolved with a contract, $4 million and retention of money in hand.") and December 2008 ("I feel I have no legal obligation to you but am willing to work with you."; "Here's what I need for compensation for the 66 acres you are requesting. … 5. Indemnify me from option money I hold …… for last 6 years of loss, pain and suffering. … .").

Defendant nevertheless argues that although there may not have been a writing signed by both parties which amended the Purchase Agreement to provide for non-refundability of the deposits, such an agreement may be inferred by the fact that the parties continued to work toward completing the sale. The Court agrees that " 'an offer may be accepted by conduct and what the parties d[o] pursuant to th[e] offer' is germane to show whether the offer is accepted." Schreiber v. Olan Mills, 627 A.2d 806 (Pa. Super. 1993), quoting Accu-Weather, Inc. v. Thomas Broadcasting Co., 625 A.2d 75 (1993) (Citations omitted). The fact that there was a functioning contract prior to the letters of October 15 and 23, 2007, undercuts Defendant's argument, however. It is just as likely that the agreement evidenced by the parties' conduct was simply to extend the closing date, and in fact, the 2008 communications referenced above are evidence that there was no agreement beyond that.

Defendant's alternative theory, that Plaintiff defaulted by failing to exercise due diligence, which triggered Section 17.1 of the original Agreement, also fails. Due diligence in obtaining permits and approvals is required by Section 11 which provides for extension of the

closing date if proof of due diligence and an additional deposit is provided to Seller. Defendant accepted the deposits which accompanied the requests for extension of the closing date, and thus implicitly accepted that Plaintiff had exercised due diligence or waived the requirement therefor. Further, Section 17.1 requires notice of default and an opportunity to cure, but Defendant never provided that notice, and once Plaintiff elected to terminate the contract, Defendant no longer had that option.

With respect to Defendant's contention that he is entitled to retain at least the extension fees paid with the letters of June 4, 2004, September 1, 2004, November 1, 2004, and February 21, 2007, at least part of this contention has merit. The letter of June 4, 2004, is what is considered to be the "Third Amendment" to the Purchase Agreement. The first amendment had extended the due diligence period, and the second amendment made numerous revisions, including extending the due diligence period and revising the closing date extension clause to provide for an increased payment, but not until the Third Amendment did the parties provide for a payment "in consideration of the extension of the due diligence period". That Amendment provides for an initial payment of $5,000 and five additional monthly payments of $5000 to cover the period of the extension. It also indicates that "[e]ach of the aforesaid payments shall be credited against the Purchase Price at Closing", but does not, unlike subsequent amendments, indicate that such payments are "additional Deposit[s]". Therefore, the Court agrees that the plain language of the amendment supports Defendant's position that the $5,000 payments during this period of time (totaling $30,000) were extension fees which he is entitled to retain.

The payment accompanying the letter of February 21, 2007, is not, however, of a similar ilk. That payment was made to extend the closing date pursuant to the Purchase Agreement, as modified by the Second Amendment, which in paragraph 9 gave to Plaintiff "the right to extend the closing date up to two (2) times, … upon payment to Seller of an additional sum of Sixty Thousand ($60,000.00) Dollars for each extension." The agreement specifically indicates that "[a]ll such payments shall be treated as Deposit payable to Seller (to be retained if Buyer fails to close pursuant to the term of the Agreement) and applicable to the Purchase Price." Since Plaintiff did not fail to close pursuant to the terms of the Agreement, and since

the Agreement provides that the Deposit is refundable under Section 9.2 of the Original Agreement, Defendant is not entitled to retain this payment.

Finally, Defendant asks the Court to determine that Plaintiff is not entitled to interest on the deposit, but this the Court cannot do. Section 3(b) of the Purchase Agreement clearly provides for the Deposit to be deposited in an interest-bearing account, and that all interest earned shall be paid to Buyer.

Accordingly, the Court will enter the following:

ORDER

AND NOW, this 7th day of June 2011, for the foregoing reasons, summary judgment on the issue of whether the Deposit is refundable is entered in favor of Plaintiff. Defendant's motion for summary judgment is GRANTED with respect to the due diligence extension fees paid from June 4, 2004, through and including November 1, 2004 ($30,000), but in all other respects is DENIED.

BY THE COURT,

Dudley N. Anderson, Judge

cc: Scott. T. Williams, Esq.
Gary T. Harris, Esq.
Gary Weber, Esq.
Hon. Dudley Anderson