

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

RAYMOND and BRENDA SECREST,	:	
Plaintiffs	:	DOCKET NO. 12-00,168
	:	CIVIL ACTION – LAW
vs.	:	
	:	
MICHELLE R. BOOB and ROBERT B. BOOB, JR.,	:	
Defendants	:	

**OPINION AND ORDER**

This matter comes before the Court on Defendants’ Motion for Summary Judgment. This matter arises out of a real estate dispute for a property located in Cogan Station, Lycoming County, Pennsylvania. After review of the pleadings, the Court DENIES Defendant’s motion.

A brief factual background of the case is as follows. The parties entered into a property sales agreement on February 15, 2009; Plaintiffs paid a deposit at the time of signing. Settlement of the agreement was to occur on May 1, 2011, with closing to occur on or before May 31, 2011. The closing on the property never occurred. Plaintiffs vacated the property in September 2011, after the flooding that occurred throughout the County. Plaintiffs filed suit to get a refund of the deposits that they made on the property under the property sales agreement. Plaintiffs allege that they are due these amounts because the property was destroyed in the flood. Defendants argue that the property sales agreement was not in place at the time of the September flooding because Plaintiffs failed to close on the property on or before May 31, 2011. Additionally, Defendants argue that the property was not destroyed in the flood.

Pa. R.C.P. 1035.2 provides that summary judgment may be granted at the close of the relevant proceedings if there is no genuine issue of material fact. *See Keystone Freight Corp. v. Stricker*, 31 A.3d 967, 971 (Pa. Super. Ct. 2011). Defendants assert that the numerous admissions made by Plaintiffs support their motion for summary judgment. In this matter,

Plaintiffs admit that they did not close on the property by May 31, 2011, because they were unable to obtain financing; additionally, Plaintiffs admit that they did not enter into any oral modifications of the property agreement. However, Plaintiff also admits that there were no agreements to terminate the agreement. *See* Dfs. Brief, Ex. A-B. After review, the Court cannot agree that summary judgment is appropriate in this matter.

Despite Plaintiffs' admissions, the Court believes an issue of fact exists. In this matter, Plaintiffs' main contention is that the parties extended their property sales agreement through actions taken after the May 31 closing date. Our Supreme and Superior Courts have held that, in property sales agreements, parties may waive "time of the essence" clauses, specifically as they pertain to proposed closing dates, by their conduct subsequent to a closing date, if the parties failed to meet the closing date. *Davis v. Northridge Development Associates*, 622 A.2d 381, 386 (Pa. Super. Ct. 1993) (citing *Warner Co. v. MacMullen*, 112 A.2d at 74, 78 (Pa. 1955)). Thus, in deciding this issue, the Court will need to consider conflicting testimony regarding the parties' actions taken after the proposed closing date. In hearing each party's version of events, the Court will need to decide his or her credibility. These findings cannot be undertaken on a summary judgment motion. *See Accu-Weather, Inc. v. Prospect Communications, Inc.*, 644 A.2d 1251, 1255 (Pa. Super. Ct. 1994) (providing that contract modification/termination through conduct is an issue of fact that cannot be properly determined on a summary judgment motion).

Additionally, the Court notes that a potential trial issue raised by the parties is whether the property was destroyed in the September 2011 flooding, and how this alleged destruction affects the parties' claims.

The Court enters the following Order.

**ORDER**

AND NOW, this 20<sup>th</sup> day of December, 2012, after oral argument on Defendants' Motion for Summary Judgment and for the reasons stated above, it is hereby ORDERED and DIRECTED that Defendants' motion is DENIED. This matter shall be listed for arbitration on or after **January 28, 2013**.

BY THE COURT,

\_\_\_\_\_  
Date

\_\_\_\_\_  
Richard A. Gray, J.

cc: Andrew Smalley, Esq.  
Christian Frey, Esq.  
Betty Buckle  
Gary L. Weber, Esq.