IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

MAYNARD STREET PROPERTIES, LLC and GRIMESVILLE PROPERTIES, LLC,	:	No. 21-0086
Plaintiffs	:	CIVIL ACTION – LAW
vs.	:	
	:	
DRUCK PARTNERS, LP,	:	
Defendant	:	

OPINION AND ORDER

AND NOW, after argument held on December 16, 2021 on Plaintiffs' Preliminary Objections to Defendant's New Matter and Counterclaim, the Court hereby issues the following OPINION and ORDER.

BACKGROUND

Plaintiffs commenced this matter by filing a Complaint on January 27, 2021. Plaintiffs' Complaint alleges that in December of 2017 each Plaintiff entered into an agreement (the "Agreements") with Defendant to purchase real property, with Plaintiff Grimesville Properties, LLC ("Grimesville") agreeing to purchase real estate at 200 High Pines Road in Old Lycoming Township and Plaintiff Maynard Street Properties, LLC ("Maynard") agreeing to purchase real estate at 1 Maynard Street in Williamsport. Both Plaintiffs contend that their full agreements consist of three parts: an Agreement for Sale of Real Estate and an Addendum, both dated December 13, 2017, and "December 27 and 28, 2017 emails between the attorneys for the parties."

The Agreements of Sale, attached as exhibits to the Complaint, are identical in all relevant ways. Each required the Plaintiff to deposit $10,000 in earnest money (the "Earnest Money") with an escrow agent "[u]pon the execution of this Agreement." The Agreements specified that each sale was contingent upon the closing of the

other sale, as well as "final approval during the Due Diligence period of all necessary codes and funding approval, as well as Lease Agreements, PennDot permits, building permits, etc. that are necessary in order to develop the Subject Premises." The "Due Diligence Period" was defined as "one hundred fifty (150) days from the date of final execution of this Agreement," and the Agreements provided that each Plaintiff could, "[p]rior to the conclusion of the Due Diligence Period… cancel this Agreement, subject to the requirements set forth in Section 18," at which time the Earnest Money would be refunded to that Plaintiff. The Agreements further provided that "[i]n the event that BUYER does not cancel this Agreement during the Due Diligence Period or following the Due Diligence Period BUYER fails to carry out and perform the terms of this Agreement as a result of no fault of the SELLER, the Earnest Money shall be forfeited to SELLER as liquidated damages at the option of SELLER, provided SELLER agrees to the cancellation of this Agreement."

Plaintiffs allege that the "necessary codes and funding approvals, as well as lease agreements, PennDOT permits and building permits were not obtained during the due diligence period" for either property. This prompted Jennifer Doane, on behalf of Plaintiffs, to communicate to Mark Lundberg, a general partner of Defendant, on May 11, 2018, indicating that Maynard "had not yet secured a lease with a potential tenant and thank[ing] Mr. Lundberg for offering 'to be gracious and in the event that we do need an extension, we will not have to put additional money up because of the other money we are using to develop the site.'"[1] Plaintiffs contend that Ms. Doane again communicated with Mr. Lundberg on May 25, 2018, indicating

[1] Complaint, ¶ 23-24.

that if he did not agree to extend the sales agreements to June 4, 2019, the Plaintiffs were exercising their option to cancel the Agreements and demanding the return of the Earnest Money in accordance with the Agreements.

Each Plaintiff filed a count for Breach of Contract. The crux of Plaintiffs' causes is their contention that, although the Sales Agreements were dated December 13, 2017, the "final execution of the Agreement[s]" did not occur until December 28, 2017, when the parties agreed via email "to the change to the draft of the wording of the leases…." Plaintiffs contend that the Due Diligence Period began on December 28, 2017 and ended 150 days later on May 27, 2018; therefore, because they exercised their right to cancel the Agreements on May 25, 2018, they did so within the Due Diligence Period and are entitled to a return of the Earnest Money.

On September 2, 2021, Defendant filed an Answer to the Complaint, denying that Plaintiffs are entitled to a return of the Earnest Money. Specifically, Defendant contends the "Agreements [were] entered into and executed on December 13, 2017," meaning the Due Diligence Period concluded on May 12, 2018. Thus, Defendant argues, Plaintiffs' attempts to cancel the Agreement occurred after the expiration of the Due Diligence Period, and Defendant is therefore entitled to retain the Earnest Money as liquidated damages.

Defendant also filed a New Matter and Counterclaim. The New Matter contends that the December 27 and 28, 2017 email exchange did not reflect communication between Plaintiffs and *Defendant*, but rather negotiations between Plaintiffs and non-party Webb Communications, Inc., "a current tenant of [Defendant]

at the time of the real estate sale transactions" at issue.[2] Thus, Defendants aver, because they were not a party to the December 27 and 28, 2017 email exchange, those communications could not have altered the December 13, 2017 Agreements between Plaintiffs and Defendants. The New Matter additionally contains various affirmative defenses, pled in paragraphs 79 through 84.

Defendant's Counterclaim raises six counts, three against each Plaintiff. Counts I and IV are for Breach of Contract, alleging the Plaintiffs failed to cancel the Agreements during the Due Diligence Period. These counts seek a court order directing the escrow agent to release the Earnest Money to Defendant and "grant[ing] any other relief [or] award as the Court deems appropriate." Counts II and V are for Specific Performance, seeking payment of the monies owed, and requesting identical relief as Counts I and IV. Counts III and VI are for Declaratory Judgment, and seek judgment declaring that Defendant is, and Plaintiffs are not, entitled to the release of the Earnest Money currently held in escrow.

PRELIMINARY OBJECTIONS

On September 22, 2021, Plaintiff filed Preliminary Objections to Defendant's New Matter and Counterclaims. Plaintiffs' first preliminary objection is in the nature of a demurrer,[3] and seeks the dismissal of all counterclaims. Plaintiffs argue that Defendant "fails to allege that all conditions precedent in the [Agreements] were satisfied," and therefore their claims fail to state a cause of action. Specifically, Plaintiffs argue that in order to state claims for breach of contract, specific

[2] Answer and New Matter, ¶ 63-64.
[3] Rule of Civil Procedure 1028(a)(4) permits preliminary objections for "legal insufficiency of a pleading (demurrer)."

performance, or declaratory judgment, Defendant needed to plead each of the conditions precedent as stated in the Agreements, which Plaintiffs contend are:

- For each sale, the closing of the other sale;
- Obtaining all necessary lease agreements; and
- Obtaining funding approval, PennDOT permits, building permits, "or anything else which was a condition precedent for each of the Plaintiffs' obligation to go through with the purchase."

Plaintiffs argue that, because Defendant has not pled – and cannot plead – any of these facts, their claims must fail as a matter of law. In support of their claims, Plaintiffs cite Rule of Civil Procedure 1019(c)[4] and multiple cases addressing the need to plead conditions precedent.[5]

Plaintiffs' second preliminary objection is a motion to strike for lack of specificity.[6] Plaintiffs criticize paragraphs 79 through 84 of Defendant's New Matter as merely presenting boilerplate affirmative defenses without any factual allegations that would indicate they are applicable to this case. Thus, Plaintiffs argue, these defenses do not satisfy Pennsylvania's fact-pleading standard. Plaintiffs attach this Court's October 18, 2002 decision in *Klay v. Hilliker*, in which Hon. William S. Kieser

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[4] Rule of Civil Procedure 1019(c) states "[i]n pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of such performance or occurrence shall be made specifically and with particularity."

[5] Plaintiffs cite *Brown v. Gloeckner*, 118 A.2d 449 (Pa. 1955); *Foxlea Enterprises, Inc. v. Powell*, 3 Pa. D. & C.3d 506 (Cumberland C.C.P. 1977); and *Jennison v. Aacher*, 193 A.2d 769 (Pa. Super. 1963). These cases establish that a plaintiff may plead "the performance or occurrence of conditions precedent generally," as in *Jennison*, but when a contract requires certain events to occur before it becomes operative, a party who fails to plead the occurrence of those events either generally or specifically has not pled a cause of action (as in *Foxlea* and *Brown*).

[6] Rule of Civil Procedure 1028(a)(3) permits preliminary objections for "insufficient specificity in a pleading."

struck affirmative defenses for "[f]ailure to set forth the material facts" supporting them.

In response to Plaintiff's first preliminary objection, Defendant first notes that a court should grant a demurrer only when it is free and clear from doubt.[7] Defendant argues that it is irrelevant whether it has pled all conditions precedent to the completion of the transaction contemplated by the Agreements – that is, the sales – because it is not asking this Court to "force [Plaintiffs] to take possession and title of the properties nor… to relinquish the remainder of the purchase price specified in the respective [A]greements."[8] Rather, Defendant contends its causes of action are appropriate because it has plead each of the conditions precedent to *the forfeiture of the Earnest Money* as laid out in the Agreements – that is, that Plaintiffs terminated the Agreements outside of the Due Diligence Period and that the sales did not occur. Defendant cites a number of cases in which the courts have approved liquidated damages in a sale contract for a "purchaser['s] repudiat[ion] [of] an agreement for the sale of real property."[9]

In response to Plaintiffs' second preliminary objection, Defendant argues that the New Matter as a whole, particularly the twenty-seven paragraphs prior to the five Plaintiffs object to, puts Plaintiffs on notice of the claims it will have to defend against, which Defendant contends is sufficient under Pennsylvania law.

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[7] Defendant cites *Cafazzo v. Central Medical Health Servs.*, 635 A.2d 151, 152 (Pa. Super. 1993).
[8] Defendant's Brief, p. 4.
[9] *Id*. at 4-5.

ANALYSIS

A. <u>Plaintiffs' First Preliminary Objection</u>

To plead a cause of action for breach of contract, a party must adequately plead three elements: "(1) the existence of a contract, including its essential terms; (2) a breach of the contract; and, (3) resultant damages."[10] Here, the parties agree that a contract exists, as they have each attached the Agreements they contend constitute the relevant contract. It is clear too that Defendant has adequately pled "resultant damages," inasmuch as the Agreements explicitly contemplate liquidated damages for a certain type of breach. Thus, with respect to Counts I and IV, the remaining question is whether Defendant has adequately alleged a breach of the contract.

Each Agreement identically states, in relevant part:

> "1. **<u>PURCHASE PRICE</u>. …** Upon the execution of this Agreement, a deposit in the amount of Ten Thousand and 00/100 Dollars ($10,000.00) (the "Earnest Money") shall be paid to SELLER….
>
> SELLER and BUYER hereby direct that… [the escrow agent] hold the Earnest Money in trust until this agreement has been accepted and signed by all parties, at which time the Earnest Money will be promptly deposited in the escrow account of the Escrow Agent. Prior to the conclusion of the Due Diligence Period, as defined herein, BUYER may cancel this Agreement, subject to the requirements set forth in Section 18, and shall be refunded the Escrow Deposit. In the event that BUYER does not cancel this Agreement during the Due Diligence Period or following the Due Diligence Period BUYER fails to carry out and perform the terms of this Agreement as a result of no fault of the SELLER, the Earnest Money shall be forfeited to SELLER as liquidated damages at the option of SELLER, provided SELLER agrees to the cancellation of this Agreement."

[10] *Kelly v. Carman Corporation*, 229 A.3d 634, 653 (Pa. Super. 2020).

This passage is by its own terms a liquidated damages provision. Liquidated damages are "a term of art originally derived from contract law, [denoting] the sum a party to a contract agrees to pay if he breaks some promise, and which, having been arrived at by a good faith effort to estimate in advance the actual damage that will probably ensue from the breach, is legally recoverable… if the breach occurs."[11]

Plaintiffs contend that Defendant has not pled a breach of the Agreements because the sales they described were subject to a number of contingencies: the sale of each other property as well as the attainment of leases, permits, and PennDOT approval. Although these are conditions precedent to the closing of the sale on each property, the Agreements are very clear on what events are conditions precedent to the forfeiture of the Earnest Money to Defendant: if the buyer either does not cancel the Agreement during the Due Diligence period, or the buyer fails to fulfill the Agreement through no fault of the seller, then the seller has the option to take the Earnest Money as liquidated damages, provided the seller agrees to cancel the sale. There is no limiting language in the liquidated damages provision that specifies its application only to cancellations that occur on the eve of closing, after all preconditions to closing have been met.

Almost by definition, a party seeking to exercise a liquidated damages clause in a contract need not necessarily plead every condition precedent to the ultimate agreement contemplated by the contract. This is because when a contract

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[11] *Pantuso Motors, Inc. v. Corestates Bank, N.A.*, 798 A.2d 1277, 1282 (Pa. 2002). This provision was included in both agreements, and there has been no suggestion from either party that these liquidated damages are of an inappropriate amount or were not agreed to by the parties in good faith. Rather, the sole question is whether Defendant has appropriately pled that the liquidated damages provision has been triggered.

contemplates a future agreement with multiple steps required to reach that outcome, a breach can occur at any stage of the contractual relationship. Rather, the controlling language will be the liquidated damages clause itself, and the operative issue will be whether the conditions precedent t*o the award of liquidated damages* have been pled.

Here, there is a factual question as to whether Plaintiffs' cancellation occurred during the Due Diligence Period; more directly, Defendant has pled that the cancellation did not occur during that period. Both parties agree, however, that the sales did not close, and Defendant is not insisting on going through with the agreement. Therefore, Defendant has pled the conditions precedent to an invocation of the liquidated damages clause. Although Counts I and IV do not explicitly state that Plaintiffs' canceling of the Agreements after the Due Diligence Period constituted a breach, it is clear from the New Matter and Counterclaims taken in their entirety with reference to the Agreements that Defendant contends this cancellation is the "breach," inasmuch as the Agreements provide "liquidated damages" for it. The Court finds that Defendant has appropriately pled Counterclaim Counts I and IV.

Plaintiffs did not argue Counts II and V, specific performance, and Counts III and VI, declaratory judgment, separately from Counts I and IV – rather, Plaintiffs' demurrer was premised solely on the conditions precedent issue. For the reasons given above, the Court concludes that the issues raised by Plaintiffs similarly do not render Counts II, III, V and VI insufficient as a matter of law. Thus, the Court will OVERRULE Plaintiffs' first preliminary objection.

B. Plaintiffs' Second Preliminary Objection

The question of what facts, if any, must be averred to appropriately plead affirmative defenses under Pennsylvania's fact-pleading standard is a recurring one. This Court discussed this issue in detail in its October 22, 2020 Order in *Barnes v. Williamsport Petroleum, Inc. et al.*, explaining that the Lycoming County Court of Common Pleas has long required parties to plead specific facts to support affirmative defenses. As stated in that Order:

> "In Allen v. Lipson, Judge Clinton W. Smith, writing the majority Opinion joined by Judge Kenneth D. Brown, ruled that just as the Pennsylvania Supreme Court's decision in *Connor v. Allegheny General Hospital* effectively required that general averments within a complaint be stricken upon objection for lack of specificity, affirmative defenses pled within new matter unsupported by material facts should also be stricken upon objection. The Court reasoned that a party asserting an allegation should bear the onus of supporting that allegation and maintained that allowing a defendant to assert factually unsupported defenses in new matter could subject the plaintiff to unfair surprise at time of trial. The Court held that Pa.R.C.P. 1030, which required all affirmative defenses be pled in new matter or be subject to waiver, was not inconsistent with the mandates of Pa.R.C.P. 1019(a), which required the pleading of material facts forming the basis of a cause of action or defense. In response to defense counsel's argument that defendants could not reasonably determine the factual basis for all affirmative defenses within the statutory timeframe for filing an answer and new matter, the Court provided that fairness could be assured by providing defendants a reasonable time to amend their new matter. The Court noted that absent such a ruling, 'there is no doubt that boilerplate affirmative defenses could become commonplace and this would greatly increase the plaintiffs' burden in discovery and the possibility of plaintiffs having to defend a surprise claim at the time of trial.'
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> Judge Brown, in his concurring Opinion, noted that, '[t]o allow a party in defense to engage in non-factual pleading by simply asserting a defense does not help define the real issues of a case or put the opposing party on notice of the claims (defenses) which will actually be litigated.' In his dissenting Opinion, President Judge Thomas C. Raup asserted that the Connor decision should not be interpreted as applying to pleadings within new matter as with a complaint, noting that while a plaintiff has years to prepare a complaint, a defendant has only twenty days to file a response or risk suffering a default judgment. However,

he acknowledged that the majority opinion would provide certainty for litigants as to the manner in which the Lycoming County Court would henceforward address this issue.

At the time Allen v. Lipson was decided, Rule 1030 provided:

> All affirmative defenses including but not limited to the defenses of accord and satisfaction, arbitration and award, assumption of risk, consent, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fair comment, fraud, illegality, immunity from suit, impossibility of performance, justification, laches, license, payment, privilege, release, res judicata, statute of frauds, statute of limitations, truth and waiver shall be pleaded in a responsive pleading under the heading 'New Matter'. A party may set forth as new matter any other material facts which are not merely denials of the averments of the preceding pleading.

Following the 1994 revisions, this language was amended into subdivision (a) of Rule 1030, with a subdivision (b) added that provides, '[t]he affirmative defenses of assumption of the risk, comparative negligence and contributory negligence need not be pleaded.' The explanatory note to Rule 1030 states that if assumption of the risk, comparative negligence, or contributory negligence are pled in new matter, those defenses are presumed denied and do not require a response. Further, if assumption of the risk, comparative negligence, or contributory negligence are not pled within new matter, those defenses will not be deemed waived.

… Allen v. Lipson remains binding authority within this County even after the 1994 revision to Rule 1030. The doctrine of stare decisis applies; while the Court will not continue to adhere to precedent clearly in error, the reasoning provided in support of the majority opinion within Allen v. Lipson remains sound. The Court agrees it is inequitable to 'put the onus on plaintiffs to conduct extensive discovery to disprove a factually unsupported allegation rather than requiring the defendants who asserted the allegation to marshal the facts to support it.' The only alteration that the revised Rule 1030 presents to this calculus is that defendants are no longer required to plead assumption of the risk, comparative negligence, or contributory negligence within new matter to preserve those claims, which only lessens the pleading burden upon the defendants."

Here, a fair reading of Defendant's Answer and New Matter does not disclose facts supporting the affirmative defenses of waiver, accord and satisfaction, release

and satisfaction, "superseding or intervening causes, events, factors, occurrences or conditions," fraud, or laches as contained in paragraphs 79 through 84. As such, the Court will SUSTAIN Plaintiffs' second preliminary objection, and provide Defendant twenty (20) days from the date of this Order to file an Amended New Matter either striking paragraphs 79 through 84 or pleading specific factual bases for the affirmative defenses contained in those paragraphs.

The Court stresses that *Allen v. Lipson* should not be read as requiring a defendant to irreversibly waive any affirmative defense that it has not yet discovered at the pleading stage. Should discovery yield previously unknown information supporting an affirmative defense that a defendant did not possess prior to the close of pleadings, that defendant is always permitted to seek the Court's permission to amend their pleadings.

ORDER

AND NOW, for the foregoing reasons, Plaintiffs' first preliminary objection to Defendant's New Matter and Counterclaim is OVERRULED. Plaintiffs' second preliminary objection to Defendant's New Matter and Counterclaim is SUSTAINED. Defendant shall have twenty (20) days from the date of this Order to file an Amended New Matter and Counterclaim either removing paragraphs 79 through 84 or pleading specific factual bases for the affirmative defenses contained in those paragraphs.

IT IS SO ORDERED this 31st day of March 2022.

By the Court,

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Eric R. Linhardt, Judge

ERL/jcr
cc: Marc Drier, Esq.
Thomas Marshall, Esq. and Brandon Griest, Esq.
Gary Weber, Esq. (Lycoming Reporter)