SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

P.O. Box 746
COURTHOUSE
GEORGETOWN, DE 19947

September 20, 2004

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RE: Allen v. The Pictsweet Company f/k/a/ United Foods, Inc and Smith O'Donnell Procino and Berl, LLP.
C.A. No. 03C-07-026 ESB

Date Submitted: August 19, 2004

Dear Counsel:

This is my decision on the Motion for Summary Judgment filed by plaintiffs Howard W. Allen and Marjorie M. Allen ("Plaintiffs") against defendant The Pictsweet Company ("Defendant") in this breach of contract case. The Plaintiffs' motion is granted for the reasons stated herein.

STATEMENT OF THE CASE

Defendant entered into a Contract of Purchase and Sale ("Contract") for approximately 165 acres of real property from the Plaintiffs. At the time the Contract was signed, the Defendant placed an initial deposit of $25,000 into an escrow account with the law firm of Smith O'Donnell Procino and Berl, LLP. Several contingencies were placed into the Contract that required the performance

of Plaintiffs and Defendant. One of the contingencies specifically required that the property be rezoned for industrial use. The Sussex County Council approved the rezoning application for the property on July 30, 2002. Once the property had been rezoned, the Contract called for a second deposit of $25,000 to be placed into the escrow account. The Defendant never paid the second deposit as required by the Contract. Defendant met some of the other contingencies in the Contract prior to the rezoning of the property, such as the environmental study and an absorption rate analysis, while other contingencies in the Contract were never met. Defendant never raised an issue as to any of the contingencies that were the Plaintiffs' responsibility.

After approximately nine (9) months of inaction on the Contract, Plaintiffs sent a letter, dated April 27, 2003, to the Defendant declaring the Contract null and void. Plaintiffs seek damages in the amount of $50,000, plus accrued interest. More specifically, Plaintiffs want the initial deposit of $25,000 and the second $25,000 deposit that was supposed to be paid into escrow after the property was rezoned, plus pre-judgment and post-judgment interest. Defendant contends that its letter, dated May 20, 2003, terminated the Contract and it seeks the return of the initial $25,000 deposit.

STANDARD OF REVIEW

Summary Judgment may be granted only when no material issues of fact exist, and the moving party bears the burden of establishing the non-existence of material issues of fact.[1] Once the moving party meets its burden, then the burden shifts to the non-moving party to establish the existence of material issues of fact.[2] Where the moving party produces an affidavit or other evidence

[1] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

[2] *Id.* At 681.

sufficient under Superior Court Civil Rule 56 in support of its motion and the burden shifts, then the non-moving party may not rest on its own pleadings, but must provide evidence showing a genuine issue of material fact for trial.[3] If, after discovery, the non-moving party cannot make a sufficient showing of the existence of an essential element of her case, then summary judgment must be granted.[4] If, however, material issues of fact exist or if the Court determines that it does not have sufficient facts to enable it to apply the law to the facts before it, then summary judgment is inappropriate.[5]

DISCUSSION

I. The Defendant did not act in good faith in performing under the Contract.

A duty to act in good faith exists in every contract.[6] The duty to act in good faith also extends to contingencies or conditions in the contract.[7] The Defendant was responsible for performing the majority of the contingencies in the Contract. Some of the contingencies were performed by the Defendant, such as the environmental study and absorption rate analysis. However, Defendant did not make a formal application for permits to the Delaware Department of Natural Resources and Environmental Control or the Delaware Department of Transportation, nor did Defendant object to any of the contingencies that were the responsibility of the Plaintiffs. Once the

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[3] Super. Ct. Civ. R. 56(3); *Celotex Corp. V. Catrett*, 477 U.S. 317, 322-23 (1986).

[4] *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991), *cert. den.*, 112 S.Ct. 1946 (1992); *Celotex Corp.*, 477 U.S. 317 (1986).

[5] *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

[6] *Restatement (Second) Contracts. §* 205 (1981).

[7] *Rehoboth Resort Realty, Inc. v. Brittingham Enterprises, Inc.*, 1992 WL 207262 (Del.Super) (quoting *Gilbert v. El Paso Co.,* 490 A.2d 1050, 1055 (Del.Ch. 1984).

property was rezoned, Defendant stopped performing and breached the Contract by not paying the second $25,000 deposit. Defendant's inaction on the Contract lasted for approximately nine (9) months, and it wasn't until Plaintiffs sent Defendant a letter declaring the contract null and void that Defendant responded and stated it was terminating the Contract.[8] Defendant's nine (9) months of inaction on the Contract violates the duty to act in good faith that is imposed in every contract. The Plaintiffs have carried the burden of demonstrating to the Court that the Defendant did not act in good faith in pursuing the satisfaction of the contingencies in the Contract after the property was rezoned. Furthermore, the Defendant has not provided this Court with any information demonstrating that issues of material fact exist.

II. The Contract was not automatically terminated by the Defendant due to the contingencies being "not satisfied or waived."

A clause in the Contract existed that permitted the Defendant to terminate the Contract "if all contingencies have not been satisfied or waived by Purchaser within six (6) months after the agreement has been executed by both Purchaser and Seller..."[9] The Contract was signed on March 5, 2002. According to Paragraph 5 in the Contract, Defendant had until September 5, 2002 to terminate the Contract. At no time up to or through September 5, 2002 did Defendant attempt to terminate the Contract due to the contingencies not being satisfied. It was not until after Plaintiffs sent Defendant a letter, dated April 27, 2003, that Defendant stated its desire to terminate the

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[8] The Court is using the July 30, 2002, date as the date of rezoning. The Court recognizes Defendant's argument that the property rezoning did not become final until the sixty (60) day appeal period concluded. However, for the purpose of this Motion for Summary Judgment, there is no evidence that Defendant made any objections during the appeal period that would convince the Court that the Defendant was still acting in good faith under the Contract.

[9] Paragraph 5 on the Buyer/Seller agreement.

Contract.

The question this Court must decide is whether or not inaction by the Defendant can justify the "not been satisfied" clause or is there still a duty to continue to act on the Contract. Rehoboth Resort Realty suggests that the Defendant had a duty after signing the Contract to continue to operate in good faith.[10] Nine (9) months of inaction does not constitute good faith and should not be able to justify the "not been satisfied" language of the Contract. In order to justify the "not been satisfied" clause, a good faith attempt should have been made. Paragraph 21(e) of the Contract suggests this argument. It states that, "[n]o failure or delay by any party hereto in exercising any right, power or privilege hereunder (and no course of dealing between or among the parties) shall operate as a waiver of any such right, power or privilege." For Defendant to successfully argue that the contingencies have "not been satisfied or waived" within the meaning of the Contract, it would have to show that the failure of the contingencies was not attributable to its failure or delay in pursuing the Contract. Defendant has not presented the Court with any information that would indicate the failure of the contingencies was based on anything other than its delay.

III. The damages are limited to $25,000, plus accrued interest.

The Plaintiffs contend that the Defendant forfeited both the initial deposit of $25,000, and the second deposit of $25,000 that was supposed to be paid upon completion of the property rezoning for a total of $50,000. In contrast, the Defendant argues that it was the one who terminated the Contract and is entitled to a refund of the initial $25,000 deposit.

Since Defendant breached the Contract, the proper classification of the unpaid second deposit becomes an issue. If the money is determined to be part of the deposit, it will be included as part of

[10] 1992 WL 207262.

the liquidated damages award. If it is not part of the deposit, it will be excluded from the liquidated damages award. Paragraph 8 of the Contract provides for liquidated damages in case of breach by the Purchaser. The provision specifically states that Plaintiffs may declare the Contract null and void and retain "any deposit money as liquidated damages" if Purchaser fails to make any payments. Black's Law Dictionary defines a deposit as "[t]he act of giving money or other property to another who promises to preserve it or to use it and return it in kind; esp., the act of placing money in a bank for safety and convenience. 2. The money or property so given. 3. Money placed with a person as earnest money or security for the performance of a contract."[11] Applying this definition to the facts suggests that Plaintiffs have a right to the initial deposit, but not the second deposit, since the second $25,000 was never actually placed into the escrow account. If Plaintiffs want to reach the second $25,000, then they should have proceeded under a different theory of damages.

IV. Conclusion

When entering into an agreement or a contract the parties are free to bargain for the terms and clauses they desire. If there is not a time period in the contract, the Court will infer a reasonable time for performance.[12] After reviewing the arguments, it is the Court's opinion that Defendant breached the Contract by not only failing to pay the second $25,000 deposit, but also through its inaction. Defendant did not diligently pursue the Contract after the property was rezoned. Defendant sat idle for nine (9) months without pursuing the Contract or attempting to satisfy the contingencies. Under the current facts, nine (9) months of inaction on the Contract by the Defendant constitutes an unreasonable delay in performance. The Defendant attempts to shift the blame to

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[11]Black's Law Dictionary 450 (7th ed. 1999).

[12] *Martin v. Star Publishing*, 126 A.2d 238 (Del. 1956).

Plaintiffs by implying that the Contract failed because Plaintiffs declined to sign an amendment to the Contract that would have extended the closing date and the date for satisfaction of the contingencies. Plaintiffs were not under a duty to sign an extension, so this argument is without merit. Even after examining the facts in the light most favorable to the Defendant, the Defendant still has not demonstrated a good faith effort in pursuing the contingencies in the Contract.

Plaintiffs' are pursuing the Contract under a liquidated damages theory. The Contract specifies that the liquidated damages will be limited to the amount of deposit money. Defendant only deposited $25,000. The second deposit that became due after the rezoning was never deposited, so under terms of the Contract, the second required deposit is excluded from the liquidated damages. The initial deposit of $25,000, plus all accrued interest is forfeited by the Defendant as a result of its breach.

For the foregoing reasons, Plaintiffs' Motion for Summary Judgment is granted with the damages set at $25,000, plus accrued interest at the applicable rate.

IT IS SO ORDERED.

Very truly yours,

E. Scott Bradley

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cc: Prothonotary's Office