IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

DELAWARE FINANCIAL MANAGEMENT CORPORATION,	:	C. A. No. 99-03-090
Plaintiff Below/Appellant	:	
v.	:	
JEFF LYNCH and **CHERYL LYNCH**	:	
Defendant Below/Appellee.	:	

Brian D. Shirey, Esquire, attorney for Plaintiff/Appellant
Dean Campbell, Esquire, attorney for Defendant/Appellee

DECISION AFTER TRIAL

Submitted Friday, March 7, 2003
Decided April 7, 2003

In the present action, Plaintiff-Appellant Delaware Financial Management Corporation (hereinafter "DFMC") has appealed the March 11, 1999 Order of Judgment rendered by the Justice of the Peace Court, holding that Defendants-Appellees Jeffrey and Cheryl Lynch (hereinafter "Lynches") did not breach their contract with DFMC by failing to pay the one percent financial consulting fee. In dismissing DFMC's case, the lower court held that DFMC did not obtain a loan commitment from American

Farm Mortgage within the term of the contract and therefore did not earn its fee. DFMC appealed the J. P. Court Order to this Court pursuant to 10 *Del. C.* §9571, and a trial *de novo* was held. This is the Court's decision after a trial on the merits.

FACTS

The Lynches, of Frankford, Delaware, own and operate a poultry farm, upon which their personal residence is located. Due to financial circumstances, the Lynches' sought to improve their cash flow in order to cover their operating expenses. To this end, they engaged the services of DFMC, a Delaware corporation, that operates as a commercial loan broker and also provides business advisory services. On or about October 9, 1995, DFMC and the Lynches entered into an Exclusive Agency Agreement (hereinafter "Agreement"). See Plaintiff's Exhibit 1. The parties were bound by the Agreement for a period of ninety days. The Agreement provided that if either DFMC was in good faith negotiations with a lender or an application was in progress for the Lynches at the expiration of the ninety day period, the term would extend to the completion of negotiations or the application. As an Exclusive Agency Agreement, the contract further provided;

> "EXCLUSIVE AGENCY: THIS IS AN EXCLUSIVE AGENCY AGREEMENT. Should CLIENT or an affiliate obtain financing, as herein provided, from any source or their affiliates during the term of this Agreement, or any extension thereof, or

> should the CLIENT or any affiliate obtain financing within three years from the expiration to this Agreement from any Lender or their affiliates with whom DFMC or CLIENT negotiated or was identified by DFMC during the term of this Agreement or any extension thereof, the DFMC fee, as provided in this Agreement, shall be immediately due and payable.

The terms of the Agreement provided, *inter alia*, that in exchange for DFMC's efforts to obtain financing for the Lynches, the Lynches would pay a non-refundable fee of five-hundred dollars, plus a financial consulting fee of one percent "of the gross amount of any monies loaned or committed to be loaned to the client by any lender during the term of [the Agreement]…".This fee was to be earned by DFMC regardless of whether the Lynches arranged or obtained financing through the efforts of DFMC or not. Through DFMC's efforts, the Lynches were notified by letter dated October 31, 1995, from American Farm Mortgage Company (hereinafter "American Farm") that their request for a $345,000.00 loan had been approved. Sometime in early November 1995, the Lynches contacted Richard Bennett, the president and owner of DFMC, and told him that his services were no longer necessary. On or about November 16, 1995, the Lynches received a similar letter from Wilmington Trust Company approving a loan for $340,000.00. The Lynches then paid their five hundred dollar fee to DFMC on December 21, 1995.

The Lynches and Wilmington Trust settled on a loan in the amount of $340,000.00 on January 18, 1996, which was after the expiration of the ninety-day period. The Lynches failed to pay DFMC the one percent consulting fee as provided in the Agreement for either the American Farm or the Wilmington Trust financing. DFMC renewed its claim for the American Farm fee before this Court and further plead in its complaint on appeal entitlement to the fee for the Wilmington Trust loan as well. The Lynches brought a counterclaim under the Credit Services Organizations Act, *6 Del. C.* § 2401, *et seq.*.

DISCUSSION

The American Farm Letter

The first issue before this Court is whether the Lynches breached their obligation under the Agreement by failing to pay DFMC the one percent financial consulting fee. Under the terms of the Agreement, the Lynches agreed to pay Appellant a "non-refundable fee of five-hundred dollars and a financial consulting fee of one percent of the gross amount of *any monies loaned or committed to be loaned* to the client by any Lender during the term of this Agreement…." (emphasis added). Appellant argues that it is entitled to receive its fee based on Appellees' receipt of the October 31

"commitment letter" from American Farm. Appellees argue that the American Farm letter was not a "commitment" and, therefore, Appellant is not entitled to collect its fee. Thus, this Court must examine the contents of the October 31 letter from American Farm in order to determine whether it is a "commitment" within the meaning of the Agreement.

There exists a dearth of authority in Delaware as to exactly what constitutes a "commitment letter." It is therefore instructive to turn to other jurisdictions as well as general principals of law to determine whether the October 31 American Farm letter is in fact a "commitment". While American Farm itself refers to that correspondence as a "commitment", "[l]abels such as 'letter of intent' or 'commitment 'letter' are not necessarily controlling, although they may be helpful indicators of the parties' intentions." Burbach Broadcasting Co. of Delaware v. Elkins Radio Corp., 278 F.3d 401, 406 (N.D. W. Va. 2002). A commitment letter commands the payment of a fee and constitutes "an option to the applicant to obtain the loan at the specified terms." Peterson Development Co., Inc. v. Torrey Pines Bank, 284 Cal. Rptr, 367, 374 (Cal. App. 4th Dist. 1991). It is "not binding on the lender unless it contains all of the material terms of the loan, and either the lender's obligation is unconditional or the stated conditions have been satisfied." Id.

The American Farm October 31 letter initially notifies the Lynches that their request for a loan has been "approved." It then goes on to state the "following terms and conditions", which put the Lynches on notice that they will be receiving a "final commitment letter" that will contain more specific information with respect to the loan. Significantly, the terms of the loan state that the commitment fee is "due at the time of final commitment." The terms of the loan as stated by American Farm fail to set an interest rate, payment dates and amounts, or the date of the last payment. The October 31 letter also notifies the Lynches that an appraisal of the property, survey, FmHA guarantee, verification of wages and financial statement are requirements that "must be met prior to [American Farm] issuing final commitment." In closing, American Farm asks the Lynches to "acknowledge the terms and conditions set out above by signing where indicted below".

After examining this evidence, it is clear that American Farm did not commit to an extension of the proposed loan despite its own language referring to its October 31 letter as a "commitment". Rather, the loan was to be extended upon "final commitment" to the Lynches subject to the conditions enumerated above. See Runnemede Owners, Inc., v. Crest Mortgage Corp. 861 F.2d 1053, 1054 (7th Cir. 1988). While DFMC may

argue that it is customary that commitment letters contain conditions that must be satisfied prior to closing, this Court need not rest its conclusion that the October 31 letter is not a commitment solely on the presence of those conditions.

A commitment letter is not binding upon a lender unless it contains all the material terms of the loan, including the terms for repayment. Peterson Development, *Supra*. In Teachers Insurance and Annuity Assoc. of America v. Tribune Co., 670 F. Supp. 491, 501-502 (S.D. N.Y. 1987), the court held that while relatively minor terms such as those regarding appropriate documentation may be omitted, the letter of commitment must contain all substantive economic terms deemed essential to the transaction, including the principal amount, interest rate, and collateral. Even assuming without deciding that, American Farm in fact "committed" to a prevailing interest rate, this is not evident from the letter itself, which states only that the interest rate would "be established upon final commitment." American Farm's failure to specify the interest rate for the loan therefore prevents this Court from finding that its October 31 letter is in fact a "commitment".

Aside from the presence of conditions and the failure to specify the interest rate and repayment terms for the loan, the American Farm letter of October 31 also suffers from other defects. DFMC's contention that this

document was a commitment, despite the fact that no commitment fee was due until the time of "final commitment", certainly contradicts the holding of Peterson Development, *supra*. Such a contradiction supports this Court's conclusion that American Farm did not "commit" to extending a loan to the Lynches. Moreover, selected language used throughout the letter serves as evidence that American Farm made no "commitment" to the Lynches. The repetitious use of the term "final commitment" in relation to the time when the interest rate and repayment schedule would be established belies Appellants contention that the October 31 letter was much more than an offer to engage in further negotiations. In sum, after noting the American Farm letter's presence of conditions, its failure to specify the interest rate and repayment schedule, its failure to impose a commitment fee until "final commitment", and selected language used throughout, this Court must conclude that the October 31 letter from American Farm is not in fact a "commitment letter."

The Wilmington Trust Loan

Since the Court has already held that DFMC is not entitled to recover its financial consulting fee based on the American Farm letter, it remains to be decided whether DFMC may collect that fee based on the Lynches dealings with Wilmington Trust. The Agreement states that DFMC shall

have earned its fee upon "commitment" by a lender and is due and payable within thirty days of commitment or settlement, whichever is sooner.

Testimony was presented at trial establishing that the Lynches received a loan approval letter from Wilmington Trust on November 16, 1995, which is a date within the ninety-day period contemplated by the Agreement. Evidence was also presented establishing that the Lynches and Wilmington Trust settled on a $340,000.00 loan on January 18, 1996, which is a date that is more than ninety-days from the date on which the Agreement was signed. This Court need not determine whether the November 16 letter is a "commitment" since the Agreement provides that the term of the contract shall extend to the completion of either negotiations or the loan application begun during the 90-day term of the contract. The application process for the Wilmington Trust loan had begun within the ninety-day period, and the Agreement provides that the term shall extend to the completion of that application, which occurred at settlement on January 18, 1996. Therefore, the Lynches had received a loan within the term specified by the Agreement, and DFMC is entitled to its financial consulting fee of one percent of the monies loaned by Wilmington Trust. Since the Lynches did not pay this fee within thirty days of either commitment of settlement, they must be found in breach of the Agreement.

Defenses to Enforcement

The second issue before this Court concerns whether Appellees have any meritorious defenses available against the enforcement of the Agreement. Appellees urge this Court to consider three possible defenses: (1) termination of the contract; (2) the terms of the contract were overly broad, vague, and unconscionable; and (3) failure of consideration. The merits of these three defenses are considered below in that order.

First, Appellees would have this Court hold that they properly terminated the Agreement with Appellant and therefore cannot be held liable, even assuming *arguendo* that Appellant had in fact performed its obligations at some point. This claim is untenable. A unilateral attempt to terminate a contract is a repudiation. Rochdale Village, Inc. v. Public Service Employees Union, 605 F.2d 1290, 1297 (2nd Cir. 1979). If the contract does not provide a right to terminate the contract unilaterally, then the repudiation does not terminate the contract but instead breaches it. See Id; *Restatement of Contracts* § 317, 318. Since no provision in the Agreement even arguably allows Appellees to unilaterally terminate the contract, their repudiation does not serve as a defense to enforcement of the Agreement.

Second, Appellees contend that the terms of the Agreement were overly broad, vague, and unconscionable. This Court cannot agree. Where the contractual language is clear and unambiguous, the intent of the parties is ascertained by giving the language its ordinary and usual meaning. Northwestern National Insurance Co. v. Esmark, Inc. 672 A.2d 41, 43 (Del. 1996). Moreover, contractual language is not ambiguous simply because the parties disagree on its meaning; rather, the contract is ambiguous only when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings. E.I. du Pont de Nemours & Co. v. Allstate Insurance Co., 693 A.2d 1059, 1061 (Del. 1997). The contractual language of the provisions discussed above is unambiguous; therefore, this Court holds that the Agreement is neither overly broad nor vague when the provisions in controversy are given their ordinary and usual meaning.

As to the claim that the terms of the Agreement are unconscionable as a matter of law, this Court again cannot agree. A mere disparity in the allocation of bargaining power of the parties cannot support a finding of unconscionability. Progressive International Corp. v. E.I. duPont de Nemours & Co., 2002 WL 1558382 *11, Strine, V.C. (Del. Ch.), *citing* Tulowitzki v. Atlantic Richfield Co., 396 A.2d 956, 960 (Del. 1970). The

traditional test of unconscionability is if the contract is one which "no man in his senses and not under delusion would make on the one hand, and as no honest or fair man would accept, on the other". Tulowitzki, *supra*, as cited in Progressive International, *supra*. It is sufficient here merely to state that based on the evidence presented at trial, this Court cannot interpret the terms of the Agreement to be so oppressive as to be held unconscionable.

Third, Appellees contend that there was failure of consideration. The Agreement requires "reasonable good faith efforts" on the part of Appellant to obtain the financing requested by the client. Based on the evidence presented at trial, it is quite clear that Appellant did in fact perform the services requested by Appellees since a loan approval from American Farm was obtained by the former and for the latter. In light of the short amount of time in which Appellant procured such a loan approval., it would be quite fair to suggest that not only did Appellant fulfill its obligation to perform, but that it was actually quite diligent in its performance. Moreover, it appears that Appellant's efforts in securing a loan approval from American Farm may well have been instrumental in Appellee's receipt of a similar loan from Wilmington Trust. Appellee Cheryl Lynch testified that a representative of Wilmington Trust did not want to lose Appellees as customers to American Farm. Therefore, the defense of failure of

consideration must fail, and Appellees are unable to present a meritorious defense to enforcement of the Agreement. Judgment must be entered in favor of Appellant as to its claim concerning the financial consulting fee.

The Counterclaim

The third issue before this Court concerns whether Appellees are entitled to recover on their counterclaim brought under the authority of the Credit Services Organizations Act, *6 Del. C. §*2401, *et seq*. The Delaware Superior Court has held on two prior occasions that Appellant is not a credit services organization within the meaning of *6 Del. C. §*2402. See Delaware Financial Management Corp. v. Steen., 1998 WL 961772 *5, Del Pesco, J. (Del. Supr.); Delaware Financial Management Corp. v. Vickers, 1999 WL 458633 *5, Graves, J. (Del. Supr.). In Vickers, for example, the defendants experienced financial troubles in the operation of two dairy stores. Id. at *1. They engaged the plaintiff's services and sought to restructure their personal and business finances so that they could cover their debts and continued the operation of both stores. Id. In the case now before this Court, very similar facts have been presented and Appellees failed to sufficiently distinguish their situation from the facts in Vickers and Steen. Thus, this Court is bound by prior holdings that Appellant is not a credit services organization. In

accordance with Vickers and Steen, the counterclaim brought by Appellees is without merit and judgment is therefore entered in favor of Appellant.

CONCLUSION

Appellant is entitled to recover the financial consulting fee of $3,400.00 for Appellees' breach of contract. Since the Agreement also provides for the recovery of attorney's fees and other costs reasonably incurred in the enforcement of the contract, this Court also awards Appellant $30.00 in court costs and $2,487.66 in interest, as well as reasonable attorney's fees. Accordingly, judgment is entered for Appellant in the amount of $5,917.66 plus reasonable attorney's fees. Counsel for Appellant shall submit an affidavit outlining said fees.

IT IS SO ORDERED.

Hon. Rosemary Betts Beauregard
Judge