IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

MICHAEL BERRY	)	
	)	
Plaintiff Below,	)	
Appellant,	)	
	)	
v.	)	C.A. No. CPU4-09-003607
	)	
WILLIAM BECKER	)	
	)	
Defendant Below,	)	
Appellee	)	

Submitted: May 7, 2010
Decided: June 1, 2010

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DECISION AFTER TRIAL

This matter is an appeal from an order of the Justice of the Peace Court *for trial de novo* pursuant to 10 *Del.C.* §9571(c). Trial was held on April 13, 2010. The parties submitted arguments to support their respective positions and this is the Court's decision and order.

Michael Berry (herein Berry or Plaintiff) alleged that William Becker (herein Becker or Defendant) breached a contract to purchase real estate and sought damages for

this breach. Defendant denied there was any breach of the contract and counterclaimed for return of the initial deposit tendered when the contract was signed. Defendant also alleged the contract was void pursuant to the Statute of Frauds.

PERTINENT FACTS

Berry, by an agreement dated May 21, 2008, agreed to sell his residential property known as 1307A Shipley Road, New Castle County, Delaware to Becker. Berry and Becker never discussed the sale agreement between themselves and did not meet personally until they met at a court hearing. The agreement was negotiated by real estate agents acting for Berry, Dan Devine, and for Becker, Carl Law. Both agents are experienced realtors.

The agreement of sale was prepared by Carl Law. It provided for a sales price and initial deposit of $5000. due when the agreement was signed. This deposit was paid and was held, and continues to be held, by Berry's agent. An additional deposit of $5000. was to be paid. The line in the agreement providing for the additional deposit has a space for a due date but this was not filled in. However, on another line which relates to the initial deposit a date, June 6, 2008, is typed in. Plaintiff states that the date for the added deposit was June 6, 2008 and that it was misplaced on the agreement form. Defendant's position, thru his agent, is that June 6, 2008, is an error, and the correct date was June 13, 2008, by which date other items in the agreement were to be completed.

When the agreement was signed on May 21, 2008, Becker was divorced by decree entered in Pennsylvania. A property division issue was not resolved at that time. Becker's marital status was never questioned nor was it raised by Berry or either agent

although it appears that Law was aware of it. Becker's mortgage broker was aware that he was divorced and that fact appears to have been disclosed in his mortgage application.

The agreement was contingent on Becker securing mortgage financing described in the agreement. This contingency was to be cleared by June 13, 2008.

The second payment of $5000. was not delivered to Berry's agent. Becker did provide the funds to his agent who did not turn them over to Berry's agent.

Dan Devine made demand for the second payment but no action was taken at that time to enforce this condition or to void the contract for failure to provide the funds.

On June 13, Becker received a mortgage commitment with several conditions that had to be cleared before closing and before the mortgage funds would be released. Becker determined that he could clear all the conditions except for a copy of a Property Settlement Agreement from his divorce. He spoke with the attorney representing him in the Pennsylvania divorce proceeding and was told that the approval of this document could not be expedited since counsel had no control over its issuance and that it might be several months before the Court would issue its approval of the Property Settlement Agreement. Becker, thru Law, tried to renegotiate the terms of the sales agreement but was unsuccessful. No action was taken at this time by Berry to void the sales agreement for failure to make the second required payment except for the demands by Devine. Becker, thru Law, mailed an addendum to the Agreement of Sale on June 18, 2008 in which he sought to be released from the sale agreement because of failure to obtain a mortgage commitment and sought a return of his initial $5000. deposit. Berry did not agree to the addendum but it is unclear whether this was by rejection or simply by inaction.

The settlement date specified in the agreement, June 24, 2008, passed with no action for extension or otherwise. On June 30, 2008, Berry mailed notice to Becker stating that Becker was in default of the sale agreement because he failed to make the second payment to the deposit as required, and because he failed "to properly disclose" his "ongoing divorce proceeding to the proposed lender", and these unresolved breaches violated the "time is of the essence" provision in the agreement. Berry concluded the default notice by outlining terms for possible settlement of the open issues and probable added costs and claims if the matter was not resolved. Added facts will be noted hereafter as necessary.

DISCUSSION AND ANALYSIS

In a civil claim for breach of contract, the burden of proof is on the plaintiff to prove a claim by a preponderance of the evidence. *Interim Healthcare, Inc. v. Spherion Corp.*, 844, A.2d 513 (Del. Super 2005). To state a claim for breach of contract, the plaintiff must establish the following: (1) a contract existed; (2) the defendant breached the contractual obligations; and (3) the breach resulted in damage to the plaintiff. *VLIW Technology*, LLC v. Hewlett-Packard Co. STMicroelectronics, Inc., 840 A.2d 606, 612 (Del.Supr. 2003).

Defendant disputes that the parties entered into a binding contract for the sale of real estate. He points to the fact that the agreement was never signed personally by Berry. Rather, the agreement was signed by Devine, his agent. Defendant claims to have been unaware of this fact until the date of trial in the Justice of the Peace Court. Berry contends that Devine was acting as his agent and was authorized to sign on his behalf. Devine testified that Becker and Law were fully aware of this arrangement. Any contract

concerning the sale of land is required to be in writing under the Delaware statute of frauds, 6 Del. C. Sec. 2714(a), which reads in part as follows:

> No action shall be brought to charge any person upon any agreement […] upon any contract or sale of lands, tenements, or hereditaments […] unless the contract is reduced to writing [and] signed by the party to be charged therewith ….

"The purpose of the statute is explained by its title, namely to afford protection against fraud …." *Taylor v. Savage,* WL 549913, at *2 (Del. Com. Pl., 2007) (citing *Durandv. Snedecker*, 177 A.2d 649, 651 (Del. Ch. 1962)). Therefore, any agreement regarding Defendant obtaining an interest in land from Plaintiff would be subject to the statute of frauds and would require a written memorandum signed by Defendant.

The Court finds that the evidence supports the fact that the aforementioned requirements were met in this case. Defendant, the "party to be charged" did in fact sign the agreement on May 21, 2008, the date of the execution. The document was signed by Devine acting in his capacity as Plaintiff's agent. Plaintiff has not disowned the agreement. The Court finds Plaintiff's testimony that Devine had notified the Defendant or his agent that he was acting in his capacity as Plaintiff's agent to be more convincing. The Court concludes that there was a valid agreement between the parties for the sale of the property. The remaining issues before the Court are whether the Defendant committed a breach of said contract and, if so, what damages flow from the breach.

1. Breach of Contract

Plaintiff has asserted a claim of breach of contract due to Defendant's failure to issue the second escrow payment and to disclose that he was going through a divorce. As to the second escrow payment Plaintiff and Defendant are at odds as to whether the June

6, 2008 date in Paragraph 3 relates to the second escrow payment or whether June 13, 2008 a date omitted from Paragraph 3 was the agreed upon date,

A. Second Escrow Payment

To resolve this issue the Court must determine whether the Defendant defaulted on the terms of the Agreement when he failed to make the second escrow payment on or before the date set forth in the Agreement. The parties are in agreement that a second escrow payment of $5000. was to be made. However, the parties differ on whether the June 6, 2008 date in Paragraph 3 relates to the second escrow payment or whether the June 13, 2008, was the agreed upon date. Paragraph 3C of the Agreement provides for an "ADDL. DEPOSIT DUE WITHIN _____ DAYS OF ACCEPTANCE" in the amount of "$5000.00." There is no date in Paragraph 3C, however, the date of June 6, 2008 appears misplaced in Paragraph 3B in the area marked "in the form of … Other".

With an ambiguous term in a document, one that can be reasonably be read to yield more than one meaning, it is appropriate to look to extrinsic evidence to ascertain the intended meaning. *See, e.g., Cephalon, Inc., v. Johns Hopkins Univ.*, 2009 WL 4896227, at *8 (Del.Ch. Dec. 18, 2009) ("If a contract's language is ambiguous, extrinsic evidence should be admitted and considered, and the interpretation of the ambiguity becomes a question for the trier of act.")

Law testified that although he drafted the Agreement, he could not explain the June 6, 2008 date and indicated that it was likely that a mistake had been made when filling out the form. He testified that the date when the second deposit was due was June 13, 2008, despite the fact that that date does not appear at in Paragraph 3. Law testified that the June 13, 2008 date was meant to coincide with the various inspections done on

the home as required by Paragraph 21, and the completion of any negotiations that might have resulted. Defendant testified that although he had remitted the payment to Law, he himself was unfamiliar with the date when the payment was supposed to be made and instead relied on Law.

Plaintiff testified that it was his intention when executing the agreement that the second escrow payment was to be made by Defendant on June 6, 2008. Devine testified that this was also his understanding at the time he executed the agreement on Plaintiff's behalf. Devine testified that based on this understanding, he attempted to collect the second payment from Law's office on June 9, 2008. Devine testified that he was informed that Law's office did not have the payment. He returned on June 12, 2008, and was once again informed that the payment was unavailable.

The Court finds Defendant's evidence that the June 13, 2008 date was the due date for the second payment and was meant to coincide with the inspection of the home and any negotiations that resulted to be more credible. Pursuant to Paragraph 21 of the Agreement titled PROPERTY INSPECTION CONTINGENCY, any and all inspections and negotiations stemming from the inspections were to be concluded by June 13, 2008. The Court credits Law's testimony that this was to ensure that the property was declared free and clear of any defects or deficiencies prior to closing.

The Court is also persuaded by the fact that Plaintiff took no action to cancel the agreement until June 30, 2008. Plaintiff asserts that Defendant was in breach of the contract when he failed to make the second escrow payment on June 6, 2008. Alternatively, Plaintiff contends that if June 13, 2008 is the date when the second deposit was due, Defendant still breached the contract because he was unsure if he could secure a

mortgage commitment on that date. Accordingly, per the terms of the agreement upon an event of default by Defendant, Plaintiff asserts he had the right to cancel the agreement, retain the first deposit of $5, 000.00 as liquidated damages and sue Defendant for any additional costs which he incurred in the process. However, Plaintiff took no such action on June 6, 2008, his chosen date. Plaintiff took no action on June 13, 2009, when informed that the mortgage commitment was in doubt. In fact, Plaintiff did not take any action until June 30, 2008, when he mailed a letter of default to Plaintiff. The Court concludes that Defendant and his agent Law made reasonable attempts to resolve the issue even after June 13, 2008 until it became clear that the mortgage commitment was no longer viable. Plaintiff's inaction by failing to take any action despite being appraised of the situation and despite the good faith efforts of Defendant to salvage the sale was not reasonable and put Defendant in an unfair position which could lead him to conclude that the agreement was voided without more.

B. Failure to Disclose Divorce

Berry argues that Becker failed to disclose that he was divorced and this is a breach of the agreement. At trial, Berry seemed to imply that Becker's failure to tell him or his agent of the divorce was wrong because he probably would not have entered into the agreement if he knew of this issue.

This does not square with the reason Berry gave in his default notice to Becker on June 30, 2008. That notice states: "Additionally, your failure to properly disclose your ongoing divorce proceeding to the proposed lender constitutes a breach of …" Thus, the question is posed – was it a failure to advise Berry or was it a failure to advise the mortgage broker of the divorce proceeding that caused an alleged breach.

The Court concludes that under either approach, Plaintiff's position is without merit. Nothing was presented to the Court to show how the divorce issue was not "properly" presented to the mortgage broker. The matter was known to the lender otherwise the condition on the separation agreement would not have been included in the commitment. Becker testified that his mortgage broker was fully aware of his marital status and the Court accepts this data. Law testified that the broker was aware of Becker's marital status.

Both agents testified that the marital status of a buyer is not an issue they check or delve into when preparing a sales agreement. Plaintiff's notation that he probably would not have entered into the agreement if he knew of the divorce proceeding appears to be an afterthought. In any event, he could have asked his agent to delve into this issue, but, as noted, Mr. Devine agreed with Law that ordinarily they, as real estate agents, would not have considered a buyer's marital status as an underlying issue to be resolved before a real estate sale agreement is drafted or signed.

CONCLUSION AND ORDER

"Under Delaware law, an implied covenant of good faith and fair dealing inheres in every contract. As such, a party to a contract has made an implied covenant to interpret and act reasonably upon contractual language that is on its face reasonable." *Caldera Properties-Lewes/Rehoboth VII, LLC v. Ridings Development, LLC*, WL 3323926, at *15 -16 (Del.Super.). With respect to financing contingency clauses that are a condition of real estate contracts, Delaware Courts have held that, "[c]ontingency clauses in a contract inherently contain an implied duty for the charged party to make a good faith effort toward the satisfaction of the contingency." *Nealon v. Long*, 2001 WL 1555882, at *3

(Del.Com.Pl.) (citing *Rehoboth Resort Realty, Inc. v. Brittingham Enterprises Inc.*, 1992 WL 207262, at *2 (Del.Super.)).

It is clear that Becker made a good faith effort to obtain a mortgage pursuant to the agreement. He testified that payment of the second escrow amount was made to his real estate agent on or about June 9, 2009, although it was never turned over to Plaintiff. Defendant testified that on June 13, 2008, he received his loan commitment from the mortgage company with several conditions that needed to be met prior to closing. Law testified that the second payment was available but not made when the Property Division agreement was made a pre-closing contingency. Becker admitted that he knew after June 13, 2008, that he could not satisfy all the conditions in the mortgage commitment prior to the closing because he was told that he would be unable to provide a copy of the Property Settlement Agreement from his divorce for several months.

Defendant made a reasonable effort to purchase the property. Defendant made a good faith effort to pursue the mortgage commitment. He performed the various inspections on the property as required by the agreement. It is undisputed that the agreement was contingent upon obtaining the mortgage. Defendant made reasonable attempts to resolve the issue until it became clear that the conditions could not be resolved on or before the closing date, June 24, 2008.

At the end of the closing date, June 24, 2008, Becker may have been able to put up the added deposit, but the deal was off because he could not get the financing described in the agreement. He did what he had to do under the contract but he could not close for a reason beyond his control. The agreement, in Paragraph 6, provides that in such circumstances, any deposit is to be returned to the buyer.

Judgment is entered in favor of Defendant for $5000. The seller's agent must return the deposit to Defendant. No pre-judgment interest is allowed. Post-judgment interest will be allowed. Costs are assessed against the Plaintiff.

IT IS SO ORDERED

Alfred Fraczkowski
Associate Judge[1]

[1] Sitting by appointment pursuant to Del. Const., Art. IV, §38 and 29 Del. C. §5610.