August 15, 2007

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Attorney for Plaintiffs

Mr. David W. Ayers
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Pro-Se Defendant

Re: ***Michael Vickers & John Vickers v. David W. Ayers***
C.A. No.: 2005-11-121

Date Submitted: August 9, 2007
Date Decided: August 15, 2007

MEMORANDUM OPINION

Dear Mr. Lutness and Mr. Ayers:

Trial in the above captioned matter took place on Thursday, August 9, 2007 in the Court of Common Pleas, New Castle County, State of Delaware. Following the receipt of documentary evidence and sworn testimony the Court reserved decision. This is the Court's Final Decision and Order.[1]

The Complaint and Answer on Appeal.

The Joint Complaint on Appeal filed by plaintiff below, appellants Michael Vickers and John Vickers alleges that defendant, David W. Ayers ("Ayers") is a landowner of unimproved parcel of land located at 277 Union Church Road, Townsend, Delaware 19734. Plaintiffs allege that the parties entered into an Agreement of Sale ("Agreement") wherein defendant agreed to sell the property to plaintiffs in exchange for payment of $115,000.00. A deposit of $2,000.00 was made by the plaintiffs.

[1] The instant civil action is an *appeal de novo* brought to this Court pursuant to 10 *Del.C.* §9570 *et seq.*

Plaintiffs allege further in their Joint Complaint on Appeal that pursuant to paragraph 12 of the Agreement, the return of the $2,000.00 was contingent upon the following:

> … (1) a satisfactory site evaluation that will allow the Installation of an approved on site [sewerage and water] system in accordance with the regulation promulgated by the Department of Natural Resources and Environmental Control, that is acceptable to the buyer; (2) the availability of a water supply; and 3) the lot conforming with the local zoning ordinance; or this Agreement shall become null and void and all deposits shall be returned to the Buyer. Id.

Plaintiffs further allege in their Joint Complaint on Appeal they requested defendant designate plaintiff as an Agent to accept the decision on the Final Site Evaluation from the Department of Natural Resources and Environmental Control. Finally, plaintiffs allege that on the same date the defendant sent an Addendum to the Agreement indicating he had a subsequent contract on the property and that plaintiff had the first right of refusal. According to plaintiff, the Addendum indicated if the Buyer declares the contract null and void, the Buyer shall be released from to any and all obligations created by this contract and all deposit money shall be returned.

Finally, according to the Complaint, no deposit money was returned to the plaintiffs and defendant allegedly breached the Agreement and failed to allow plaintiffs to obtain a site evaluation that was acceptable to the Buyer. Plaintiffs seek $2,000.00 in damages plus costs, prejudgment interest and post-judgment interest. *See e.g.*, 6 *Del.C.* §2301 *et seq.*

Defendant has answered the Complaint and denied all allegations.

The Facts.

At trial, the parties heard testimony from Michael Vickers ("Michael Vickers"), John Vickers ("John Vickers") and David W. Ayers ("Ayers"). There is no dispute that the parties entered into an Agreement which was received into evidence by stipulation as Plaintiff's Exhibit No.1. In the instant lawsuit, Section 12 of the Agreement appears to be the dispositive issue for

the Court to interpret along and specifically the contingency clause in that section, Plaintiff's Exhibit No. 1. The Complaint seeks the return of the down payment of $2,000.00 pursuant to the terms of the contract. Section 12, in relevant part provides as follows:

> Sec. 12. NOTICE TO BUYER. If the property being purchased hereunder is an unimproved parcel of land, Buyer should consult with the appropriate public authority to ascertain whether central sewerage and water facilities are available, or if not, whether the property will be approved by the appropriate public authorities for the installation of a well and private sewerage disposal system. If central sewerage and water facilities are not available, then this Agreement is contingent upon: 1) a satisfactory site evaluation that will allow the Installation of an approved on site system, in accordance with the regulations promulgated by the Department of Natural Resources & Environmental Control, that is acceptable to the Buyer; 2) the availability of a water supply; and 3) the lot conforming with the local zoning ordinance; or this Agreement shall be come null and void and all deposits shall be returned to the Buyer. The Buyer/Seller's Authorization Agent shall request the site evaluation on or before June 1, 2005. Buyers shall pay all costs of complying with the provisions. The Buyer and Seller may modify these provisions or the Buyer may waive these provisions of the agreement by attaching an addendum signed by the Seller and the Buyer. (Emphasis Added).

When called by plaintiff at trial in their case-in-chief, Ayers was shown Plaintiff's Exhibit No. 2, also stipulated into evidence. It is a memorandum detailing that pursuant to the contract dated May 17, 2005, "Seller acknowledges that Buyer has 48 hours first right or refusal upon being notified of the receipt of another acceptable offer." Plaintiff's Exhibit No. 2 went on to provide in relevant part that "…this Addendum confirms the notification that such another acceptable offer has been provided and request that Buyer to exercise its option to either release the contingencies outlined in this Contract or declare the Contract NULL and VOID. A response is required by 5:00 p.m. on Friday, June 10, 2005."

Plaintiff's Exhibit No. 2 also provided that "If the Buyer declared the Contract NULL and VOID, the Buyer shall be released from any and all obligations created by this Contract and

all deposit money shall be returned to the Buyer." It was signed by David W. Ayers on Jun 8, 2005.

At trial Ayers conceded that he actually never received another contract or prospective buyer but did send the Instant Agreement to the plaintiffs. Plaintiff's Exhibit No. 2.

The subject of the dispute, introduced later at trial was Defendant's Exhibit No. 2 which was a $2,000.00 check written by Michael Vickers to Patterson Schwartz, the Real Estate Agent for the Instant Contract.

With regard to the status of the property at trial, Ayers testified in plaintiff's case-in-chief that he subsequently took the property off the market and kept the $2,000.00 deposited by plaintiffs. No buyer presented or made an offer on the property according to Ayers.

Ayers claimed at trial that since Michael Vickers did not sign the Contract he sent them as detailed in Plaintiff's Exhibit No. 2, that there is no contract and plaintiffs were still obligated to perform and buy the property in the Agreement.

Michael Vickers was called by plaintiffs at trial. He is one of the co-plaintiffs and signators to the contract. Michael Vickers testified he took the septic project to BSA Soil Scientist to perform the necessary analysis. Plaintiff's Exhibit No. 3 was moved into evidence without objection. He also instructed his Real Estate Agent to receive a copy of the BSA Report and send it to Mr. Ayers. Michael Vickers pointed out Section 12 of the Agreement simply requires that by June 1, 2005 he request a Site Evaluation pursuant to the terms of the Agreement. Michael Vickers testified that he therefore performed timely according to the terms of the Agreement by requesting the soil analysis and septic analysis by June 1, 2005 from BSA. Michael Vickers testified he hired BSA to perform this analysis who did test borings. Initially BSA had a "rain out day", but subsequently appeared on site at the property location and

performed the necessary borings. BSA sent a copy of the Final Report to Ayers' Real Estate Agent.

Michael Vickers testified at trial he never signed the Plaintiff's Exhibit No. 2 because he considered the contract null and void as Ayers informed him he had a new offer from a buyer and gave him only 48 hours to perform.

The defense presented its case-in-chief. Defense Exhibit No. 1 was moved into evidence which was a Patterson Schwartz Real Estate Property Description listing. It was shown to John Vickers who was a witness for the defense. He read into the record the real estate listing. John Vickers also read into the record again Section 12 of the Agreement, Plaintiff's Exhibit No. 1. Specifically John Vickers read into the record the language in Section 12 of the Agreement that requires by June 1, 2005 subparagraph 3 that he must request a Site Evaluation on or before June 1, 2005. John Vickers testified at trial that he did exactly that; he requested the Site Evaluation by June 1, 2005 and therefore was not in breach of the Agreement and should have his $2,000.00 deposit returned.

On cross-examination, John Vickers testified he never received the permit from DNREC and stopped pursuing the completion of the Agreement because he received Plaintiff's Exhibit No. 2, the Letter Agreement from Ayers with a 48 hour Right of First Refusal that he couldn't perform according to the terms of the Agreement.

The Law

There exists, "…an implied covenant of good faith and fair dealing is inherent in every contract." *Standard Distributing Company v. NKS Distributors, Inc.*, Del. Supr., C.A. No. 92C-05-036, at 6, N.5. Quillen, J. (January 3, 1996). "…The requirement of good faith extends to the satisfaction of contractual conditions or contingency or the breach of that requirement may be

overt or may consist of an action." *Rehoboth Resort Realty, Inc. v. Brittingham Enterprises, Inc.,* Del. Supr., C.A. No. 91C-03-035, at 2, Lee, J. (July 21, 1992). "Contingency clauses in the contract inherently contain an implied duty for the charged party to make a good faith effort towards the satisfaction of the contingency." See *Louise F. Nealon v. Harry Long*, C.A. No. 2000-06-0028, 2001 Del. C.P. LEXIS 30, Welch, C. (March 30, 2001).

Likewise, case law provides as follows: "Every contract imposes a duty of good faith in its performance." (Restatement 2.d) Contracts, Subsection 205 (1981).

It is also been ruled, for purposes in Chancery Court decisions that forfeiture is a highly disfavored act by the Courts, including those of Delaware, See *Old Time Petroleum Co. v. Turcol*, 18 Del. Ch., 121, 156 A.501 (1931); *Jefferson Chemical Company v. Mobay Chemical Co.,* Del. Ch., 267 A.2d 635 (1970), *Rehoboth Bay Marina, Inc. v. Rainbow Co., Inc.*, Del. Ch., 318 A.2d 632 (1974).

Order and Opinion

The question before this Court is whether the contingency clause set forth in Section 12 of the Agreement was complied with by the plaintiffs and therefore plaintiffs are entitled to their contingency money or deposit of $2,000.00 returned pursuant to the terms of the Agreement. As plead in the Joint Complaint on Appeal, the date for performance for a request for a Site Evaluation on June 1, 2005. Clearly the plaintiffs timely requested a Site Evaluation from the testimony presented. Clearly, co-plaintiffs also made a good faith effort to satisfy the contingency by June 1, 2005 and actually satisfied the contingency clause in Section 12 of the Agreement as detailed in their testimony at trial.

Second, it is clear that although the plaintiffs did not sign Plaintiff's Exhibit No. 2; defendant declared that the 48 hour contingency time period or by Friday, June 1, 2005 at 5:00

p.m. Defendant requested plaintiffs to either exercise their option to release the contingency or declare the contract null and void. As provided in Plaintiff's Exhibit No. 2, "…per the contract dated May 17, 2005 Seller acknowledges Buyer has 48 hours first right of refusal upon being notified of the receipt of another acceptable offer." Clearly at trial notice of such acceptable offer was pending and the plaintiffs correctly concluded that the offer to provide the property was being withdrawn as 48 hours was not sufficient time to perform.

The only other issue the Court should address is Ayers' erroneous factual conclusion in his testimony at trial that since he received a copy of the Real Estate Report from co-plaintiff's Real Estate Agent that they therefore had accepted his 48 hour Notice set forth in Plaintiff's Exhibit No. 2. That was erroneous on Ayers' part. Plaintiff never communicated that fact to Ayers, nor can this Court reach this conclusion.

Alternatively, The Court concludes by a preponderance of the evidence that plaintiffs satisfied the contingency clause and are therefore entitled to their $2,000.00 down payment returned. Plaintiffs are also awarded pre and post judgment interest at the legal rate, 6 *Del. C.* §2301 *et seq.* Each party shall bear their own costs.

IT IS SO ORDERED this 15th day of August, 2007.

John K. Welch
Judge

/jb

cc: Ms. Rebecca Dutton, Case Processor
CCP, Civil Division