IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CIVIL DIVISION

MATTHEW 2535 PROPERTIES, LLC, Plaintiff	:	
v.	:	No. 18-1411
RICHARD E. DENITHORNE and PRISCILLA F. DENITHORNE, Defendants	:	

Leo V. DeVito, Jr., Esquire — Counsel for Plaintiff

Lindsey M. Cook, Esquire — Counsel for Defendants

MEMORANDUM OPINION

Serfass, J. - July 9, 2021

Matthew 2535 Properties, LLC (hereinafter "the Plaintiff" or "Buyer") initiated the instant breach of contract action against Richard E. Denithorne and Priscilla F. Denithorne (hereinafter "the Defendants" or "Seller") via complaint filed on July 6, 2018. The action concerns an Agreement of Sale dated January 13, 2018 (hereinafter "the Agreement") which was entered into by the parties for the sale of land and the improvements thereon, including the restaurant formerly known as Trainer's Inn. Pursuant to the Agreement, closing was to occur no later than June 30, 2018. The Agreement assigned the risk of loss to the Defendants and required remediation of the subject property in the event of a casualty, to the extent such remediation could be accomplished "without added cost to Seller." On March 17, 2018, the restaurant structure was destroyed by fire and deemed a total loss. The Plaintiff/Buyer

argues that the Defendants/Seller are contractually required to remediate the loss. Following a non-jury trial before the undersigned and our review of the post-trial submissions of counsel, this matter is now ripe for final disposition.

FACTUAL AND PROCEDURAL HISTORY

The Defendants, Richard and Priscilla Denithorne, are the owners of the subject property, which is situated in Franklin Township, Carbon County, and known as 845 Interchange Road, Lehighton, Pennsylvania (hereinafter "the subject property"). Mr. and Mrs. Denithorne purchased the subject property from Clayton R. Green and Linda Trainer Green in 1992. For over twenty (20) years, the Defendants' adult sons operated a popular local restaurant, known as Trainer's Inn, on the subject property through the corporate entity, Denithorne Brothers, Inc. Trainer's Inn ceased operation in February of 2017. While Trainer's Inn was actively operating, Denithorne Brothers, Inc. paid the expenses associated with the subject property including the insurance premiums. The Defendants admit that they made an insurance premium payment on behalf of Denithorne Brothers, Inc. after Trainer's Inn had closed.

In late 2017, the Defendants were approached by Catherine Jaindl-Leuthe and her husband, Tom Romanchik, who were interested in purchasing the subject property. Catherine Jaindl-Leuthe is the sole member of the limited liability company known as Matthew 2535, LLC (hereinafter collectively "the Plaintiff"). The

Plaintiff intended to renovate Trainer's Inn and open a restaurant on the subject property.

Both parties retained counsel to negotiate the terms of an Agreement of Sale for the subject property. However, Ms. Jaindl-Leuthe admits that her attorney drafted the Agreement. Of particular importance in this matter is paragraph 16 of the Agreement of Sale, which addresses the risk of loss, and provides as follows:

> **Risk of Loss/Condemnation:** Seller shall bear all risk of loss until Closing, and shall deliver the Property in its current condition as of this date. Seller shall coordinate any remediation of casualty with Buyer or arrange for the provision of the funds for remediation at Closing and may leave the Property in its damaged condition if the proposed insurance settlement is acceptable to Buyer. The parties shall cooperate and coordinate any remediation or assignment of proceeds to achieve the desired result of the Buyer without added cost to Seller …

The Agreement was signed by the parties on January 13, 2018. The agreed-upon sales price for the subject property was four hundred thousand dollars ($400,000.00). The Agreement also provided that closing was scheduled for April 30, 2018. However, the terms of the Agreement permitted the Plaintiff to extend closing by two (2) thirty-day (30-day) periods. Pursuant to paragraph 10(b) of the Agreement, closing was originally contingent on Ms. Jaindl-Leuthe's second company, Good Spirits 845, LLC, purchasing the restaurant's liquor license from

Denithorne Brothers, Inc. We note that Good Spirits 845, LLC and the Defendants entered into an Asset Purchase Agreement on January 13, 2018, for the sale and purchase of the assets utilized in the operation of Trainer's Inn and contained within the restaurant, including all equipment and inventory, for the sum of thirty-five thousand dollars ($35,000.00).

After entering into the Agreement, the Plaintiff arranged for a property inspection to be conducted, which included an inspection of the Trainer's Inn structure. The inspection revealed that major remedial work was needed relative to the storm drains, the parking pavement, retaining wall, windows and frames, exterior stairs, roof coverings, and roof drainage. Minor remedial work was needed relative to the curbs, gutters, sidewalks, landscaping, structural system, floors, and exterior walls.

On March 17, 2018, a fire engulfed the property and Trainer's Inn was destroyed. The parties later stipulated that the cause of the fire was undetermined. Ms. Jaindl-Leuthe expected that the Defendants would contact her to discuss remediation of the subject property as per the Agreement, but they failed to do so. On March 30, 2018, the Plaintiff received a letter from Denithorne Brothers, Inc. cancelling the Plaintiff's application for the liquor license. However, Ms. Jaindl-Leuthe alleges that she waived the liquor license acquisition contingency, pursuant to paragraph

10(c) of the Agreement, so that the purchase of the subject property could move forward.

The Plaintiff twice exercised its right to extend closing by thirty (30) days. However, closing did not occur on either May 30, 2018 or June 30, 2018. Both the Plaintiff and the Defendants allege that they were prepared to move forward with the transaction during this time. However, Ms. Jaindl-Leuthe testified that she would only be willing to place the purchase money in escrow until the Defendants remediated the loss of Trainer's Inn.

The Plaintiff contends that at the time she entered into the Agreement, she assumed that the Defendants had insured the subject property against loss pending the closing. However, the Plaintiff did not verify with the Defendants that the property was insured. In her communications with the Defendants after the fire, the Plaintiff continuously demanded that the insurance proceeds be assigned to her despite learning that the Defendants did not have an insurance policy on the subject property and had not received any insurance proceeds.[1]

The Agreement provides for different remedies in the event of default. Paragraph 20 of the Agreement addresses such remedies and provides as follows:

[1] Denithorne Brothers, Inc. owned the insurance policy covering Trainer's Inn. Denithorne Brothers, Inc. is not a party to the Agreement of Sale nor is it a party to the instant action. We note, however, that Defendant Priscilla F. Denithorne was appointed to serve as President/Secretary/Treasurer of Denithorne Brothers, Inc. via unanimous consent of the shareholders and directors of the corporation dated February 2, 2018.

> **Default**: If Buyer defaults, then Seller's sole remedy shall be to retain the Deposit paid or due at the time of the default as liquidated damages. Seller acknowledges that the remedies to Buyer and Seller are different, since Buyer is investing substantial time and effort and funds for the intended investigation, design and work contemplated herein. If Seller shall default, then Buyer or its assign, shall be entitled to a return of the Deposit paid and may file a lis pendens and seek Specific Performance.

Additionally, paragraph 23 of the Agreement clarified that in the event of litigation, the Agreement should not be construed against either party as the "drafter." The reasoning was that both parties had the opportunity to discuss the Agreement with their respective legal counsel and had the ability to participate in the drafting of the Agreement.

Although the Defendants have not re-listed the property for sale, they claim that they have received an unsolicited offer to purchase the subject property, along with the liquor license, for the sum of three hundred seventy-five thousand dollars ($375,000.00). This offer was conveyed to the Defendants after the fire. Additionally, the Plaintiff acknowledged that the subject property still has value even without the structure.

DISCUSSION

There are three elements necessary to prove a cause of action for breach of contract: (1) the existence of a contract; (2) a breach of contract; and (3) resultant damages. Meyer, Darraugh,

Baerbenk & Eck P.L.L.C. v. Law Firm of Malone Middleman, P.C., 137 A.3d 1247, 1258 (Pa. 2016) (*citing* J.F. Walker Co., Inc. v. Excalibur Oil Grp., Inc., 792 A.2d 1269, 1272 (Pa. Super. 2002)). When performance of a duty under a contract is due, any nonperformance is a breach. Widmer Eng'g, Inc. v. Dufalla, 837 A.2d 459, 467 (Pa. Super. 2003).

In this case, the Plaintiff has met the first element of the above test. It is undisputed that the parties entered into an Agreement of Sale for the subject property on January 13, 2018.

However, the Plaintiff alleges that the Defendants breached the Agreement by failing to remediate the damages caused by the March 17, 2018 fire as outlined in paragraph 16 of the Agreement. The Defendants assert that they are not required to remediate the damages to the subject property caused by the fire because paragraph 16 of the Agreement should be interpreted to mean that their "maximum exposure in the event of loss would be the amount, if any, of their insurance proceeds" (Defendant's Memorandum of Law p. 2-3). The Defendants also argue that since the Agreement imposed no requirement that they purchase insurance, any remediation would be considered an additional cost to them.

The Plaintiff asserts that paragraph 16 of the Agreement should be interpreted to mean that "[i]n the event of a casualty prior to Closing, the [Denithornes] had two options; (1) they could remediate the Property and then close or (2) they could proceed

with Closing and provide sufficient funds at Closing to perform the remediation" (Plaintiff's Legal Memorandum p. 10). Contrary to the Defendants' position, the Plaintiff argues that the purchase of an insurance policy was merely an option by which the Defendants could choose to fulfill their obligation to remediate the subject property in the event of a casualty. However, since the Defendants elected not to insure the subject property, the Plaintiff contends that they should be considered self-insured and that the remediation or replacement of the restaurant structure is not an additional cost to them, but merely an expense.

"A basic rule of contract interpretation is that a contract should be construed in such a way as to give effect to all its provisions." J.W.S. Delovau, Inc. v. Eastern America Transport & Warehousing, Inc., 810 A.2d 672, 681 (Pa. Super. 2002). However, "[A] contract will be found to be ambiguous: [I]f, and only if, it is reasonably or fairly susceptible of different constructions and is capable of being understood in more senses than one and is obscure in meaning through indefiniteness of expression or has a double meaning. A contract is not ambiguous if the court can determine its meaning without any guide other than a knowledge of the simple facts on which, from the nature of language in general, its meaning depends; and a contract is not rendered ambiguous by the mere fact that the parties do not agree upon the proper construction." Metzger v. Clifford Realty Corp., 476 A.2d 1, 5

(Pa. Super. 1984) (*citing* Commonwealth State Highway and Bridge Authority v. E.J. Albrecht Co., 430 A.2d 328, 330 (Pa. Cmwlth. 1981)).

"In determining whether a written contract contains such an ambiguity, the court may consider 'whether alternative or more precise language, if used, would have put the matter beyond reasonable question.'" Metzger, 476 A.2d at 6 (*citing* Celley v. Mutual Benefit Health and Accident Ass'n, 324 A.2d 430, 434 (Pa. Super. 1974)). Once the court finds that a contract or term is ambiguous, "it is for the finder of fact to resolve ambiguities and find the parties' intent." Metzger, 476 A.2d at 5 (*citing* Easton v. Washington Cnty. Ins. Co., 137 A.2d 332 (Pa. 1957)).

Typically, when a contract or term is ambiguous, it is construed against the drafter of the contract. Windows v. Erie Ins. Exch., 161 A.3d 953, 957 (Pa. Super. 2017). However, "it is equally clear that the rule is not intended as a talismanic solution to the construction of ambiguous language. Rules of construction serve the legitimate purpose of aiding courts in their quest to ascertain and give effect to the intention of parties to an instrument. They are not meant to be applied as a substitute for that quest. Where a document is found to be ambiguous, inquiry should always be made into the circumstances surrounding the execution of the document in an effort to clarify the meaning that the parties sought to express in the language which they chose. It

is only when such an inquiry fails to clarify the ambiguity that the rule of construction ... should be used to conclude the matter against that party responsible for the ambiguity, the drafter of the document." Windows, 161 A.3d at 957-958 (*citing* Burns Mfg. Co. v. Boehm, 356 A.2d 763, 767 n.3 (Pa. 1976)).

Additionally, "[w]hen an ambiguity in contractual language exists, 'parol evidence is admissible to explain or clarify or resolve the ambiguity, irrespective of whether the ambiguity is patent, created by the language of the instrument, or latent, created by extrinsic or collateral circumstances.'" Id. at 958 (*citing* Miller v. Poole, 45 A.3d 1143, 1146 (Pa. Super. 2012)).

It is clear in this case that the language of paragraph 16 of the contract is capable of being understood in more than one way based on the fact that the parties had different understandings for the term "without added cost to Seller." The Defendants believed that the term protected them from any liability for loss other than the amount of insurance proceeds, if any existed. The Plaintiff believed the term to mean that the Defendants would either purchase insurance to protect against any loss or remediate the property themselves should a casualty occur.

There are a number of ways that the parties could have drafted the Agreement to avoid the discrepancy in understanding. The Agreement could have mandated the Defendants' purchase of insurance. Alternatively, the parties could have agreed on a more

detailed procedure as to what should happen in the event of a casualty if the Defendants chose not to insure the property. Because the term in paragraph 16 could be interpreted in multiple manners and because it could have been drafted differently using more precise language, we must find that the term "without added cost to Seller" in paragraph 16 of the Agreement is ambiguous.

There was no parol evidence presented during the non-jury trial concerning the pre-Agreement discussions of the parties or the circumstances leading up to execution of the Agreement. Additionally, neither party referenced any such evidence in their post-trial brief. Therefore, we are constrained to consider only the testimony and documents presented at trial in attempting to determine the intent of the parties as to the ambiguous term at the time that the Agreement was executed.

According to the testimony of Ms. Jaindl-Leuthe, she assumed that the Defendants had insurance on the property when she entered into the Agreement. Additionally, Mr. Denithorne testified that, upon learning of the fire at Trainer's Inn, he did not believe that the Agreement mandated the performance of any remediation of the subject property. Ms. Jaindl-Leuthe did not testify that she had expected, prior to entering into the Agreement, that the Defendants would remediate any damages using their own funds.

Following our analysis of the parties' intent, what is clear is that paragraph 16 of the Agreement required the Defendants to

deliver the property to the Plaintiff "in its current condition" as of January 13, 2018. The Defendants failed to deliver the property in this condition because the fire destroyed the restaurant. Therefore, we must find that the Defendants did breach the Agreement and that the Plaintiff is entitled to relief.

It is also clear that paragraph 16 of the Agreement required the Defendants to bear all risk of loss until closing. It is equally clear that paragraph 16 required, in the event of loss, that "[t]he parties shall cooperate and coordinate any remediation or assignment of proceeds to achieve the desired result of the Buyer without added cost to Seller …" Therefore, in reviewing the plain language of the Agreement, we find that the parties contemplated that the Defendants' maximum exposure in the event of loss would be the amount of insurance proceeds paid as a consequence of such loss. Although the Defendants did not personally insure the subject property, their adult sons, through Denithorne Brothers, Inc., did insure the property.

The Plaintiff has sought specific performance of the contract pursuant to paragraph 20 of the Agreement. It should be noted that specific performance, as a remedy for breach of contract, is not a matter of right, but of grace. Barnes v. McKellar, 644 A.2d 770, 776 (Pa. Super. 1994). Specific performance will only be granted if the plaintiff is clearly entitled to such relief, there is no adequate remedy at law, and justice requires such relief. Barnes,

644 A.2d at 776. "Courts in this Commonwealth consistently have determined that specific performance is an appropriate remedy to compel the conveyance of real estate where a seller violates a realty contract and specific enforcement of the contract would not be contrary to justice." Oliver v. Ball, 136 A.3d 162, 167 (Pa. Super. 2016), *appeal denied*. "As explained in the second restatement [of contracts]: Contracts for the sale of land have traditionally been accorded a special place in the law of specific performance. A specific tract of land has long been regarded as unique and impossible of duplication by the use of any amount of money." Oliver, 136 A.3d at 167 (*quoting* Restatement (Second) of Contracts, § 360 cmt. e.). Thus, in the context of realty agreements, specific performance is available because all parcels of land are unique and an award of damages will not allow a plaintiff to acquire the same parcel of land anywhere else. Id. at 167. Accordingly, we can assume that a buyer has no adequate remedy at law. Snyder v. Bowen, 518 A.2d 558, 560 (Pa. Super. 1986).

Given the context of the Agreement and the Plaintiff's intentions with the subject property, we do find that the Plaintiff is entitled to specific performance in this case. However, in ordering specific performance of the Agreement, we are mindful that the subject property no longer contains the restaurant structure as a result of the fire. The Plaintiff has sought other possible forms of relief, but they are not feasible. We cannot

order the parties to coordinate the remediation of the property because remediation in this case would require the Defendants to construct an entirely new restaurant on the property. There has been no testimony or evidence presented to this Court concerning the value of the restaurant structure prior to the fire. There has been no testimony or evidence presented to this Court as to the timeframe or cost of constructing a new restaurant on the property. Moreover, this Court is unwilling to become entangled with the oversight of that process and becoming, in effect, a construction manager. We have neither the time nor the technical expertise required for such an endeavor. We also cannot order the Defendants to provide the insurance proceeds to the Plaintiff because the insurance proceeds were not paid to the Defendants, but to Denithorne Brothers, Inc.

Based on the foregoing, we find the most equitable remedy to be one where the Plaintiff may purchase the subject property for the sum of four hundred thousand dollars ($400,000.00), as set forth in the Agreement, minus the amount of the insurance proceeds paid to Denithorne Brothers, Inc. for the total loss of the restaurant structure, excluding therefrom any sum paid by the insurance company for the loss of personal property contained within the restaurant.[2] We find that because there was no testimony

[2] We again note that the Plaintiff had negotiated a separate agreement, the Asset Purchase Agreement, between Good Spirits 845, LLC and the Defendants dated January 13,

or evidence presented as to the value of the damaged and destroyed restaurant, the insurance proceeds provide the best estimate as to the true value of that structure. By ordering this form of relief, the Plaintiff is able to realize the benefit of its bargain and acquire the subject property, albeit without the restaurant structure. In purchasing the property for the agreed-upon sum minus the amount of the insurance proceeds, which represents the value of the restaurant structure, the Plaintiff is, in effect, receiving the value of the insurance settlement as negotiated by the parties in the event of a loss and a failure to remediate on the part of the Defendants. As a result, the Defendants are receiving the agreed-upon purchase price, minus the amount of the insurance proceeds, which was understood to be their maximum exposure in the event of a casualty.

CONCLUSION

For the reasons set forth hereinabove, we find in favor of the Plaintiff and against the Defendants and enter the following

2018, for the purchase of equipment and inventory contained within the restaurant. That agreement is not at issue in the instant matter.

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CIVIL DIVISION

MATTHEW 2535 PROPERTIES, LLC, Plaintiff	:	
v.	:	No. 18-1411
RICHARD E. DENITHORNE and PRISCILLA F. DENITHORNE, Defendants	:	

Leo V. DeVito, Jr., Esquire — Counsel for Plaintiff

Lindsey M. Cook, Esquire — Counsel for Defendants

VERDICT

AND NOW, to wit, this 9th day of July, 2021, after a non-jury trial held before the undersigned, and following our review of the post-trial submissions of counsel, and in accordance with our Memorandum Opinion bearing even date herewith, it is hereby **ORDERED and DECREED** that judgment is entered in favor of the Plaintiff, Matthew 2535 Properties, LLC, and against the Defendants, Richard E. Denithorne and Pricilla F. Denithorne, for specific performance of the parties' Agreement of Sale and purchase of the subject property, as follows:

Within sixty (60) days of the date of judgment, the Plaintiff and the Defendants shall proceed to closing and consummate the purchase and transfer of the subject property to the Plaintiff for the sum of four hundred thousand dollars ($400,000.00), as per the Agreement of Sale dated January 13, 2018, minus the amount of

insurance proceeds paid to Denithorne Brothers, Inc. for the loss of the restaurant structure, excluding therefrom any amount paid for the loss of equipment and inventory contained within the structure.

PURSUANT to Pa.R.C.P. 227.4, the Prothonotary shall, upon praecipe, enter judgment on the verdict if no motion for post-trial relief has been filed under Pa.R.C.P. No. 227.1 within ten (10) days after the filing of this decision.

BY THE COURT:

Steven R. Serfass, J.