March 17, 2008

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Re: ***Locks & Protection Devices, Inc. v. Pettinaro Enterprises-Chadds Ford West Location***
C.A. No.: 2007-11-274

Date Submitted: March 7, 2008
Date Decided: March 17, 2008

LETTER OPINION

Dear Counsel:

Oral Argument on Defendant's Motion to Dismiss was presented to the Court on Friday, March 7, 2008 at 9:00 a.m. The Court reserved decision. This is the Court's Final Order and Opinion.

THE FACTS

Defendant, Pettinaro Enterprises – Chadd's Ford West Location ("Pettinaro") has moved to Dismiss pursuant to *Court of Common Pleas Civil Rules* 12(b)(6) and 41(b). Pettinaro seeks an Order from this Court dismissing the Complaint with prejudice because of the alleged failure of Defendant-Below/Appellee, Locks & Protection Devices, Inc. ("LPD") to state a claim upon relief can be granted.

THE FACTS (cont'd)

Pettinaro points out that on December 28, 2007 LPD filed a Complaint in this Court against Pettinaro. The Complaint alleged a breach of contract by LPD and claimed $13,250.00 in damages, attorney's fees, interest and costs.

The litigation, according to Pettinaro, arises from a Contract entered into between LPD and Pettinaro for an alarm system/installation service/ monitoring at the Chadds Ford West Location. According to Pettinaro, LPD agreed to provide Pettinaro on several commercial properties, including the "Chadds Ford West" (the "Contract") alarm services and the parties entered into a written contract.

According to Pettinaro, Eric S. Campbell ("Campbell") signed the Contract on behalf of LPD on April 29, 2006. Thereafter Richard Pittaccio ("Pittaccio") executed the Contract on behalf of Pettinaro on May 11, 2006.

Pettinaro claims LPD asserted in its Complaint that Pettinaro accepted and paid for alarm services through December 31, 2006. However, in January 2007 Pettinaro, as stated in paragraph 4 of the Motion to Dismiss "without reason" refused to pay for further services rendered by LPD allegedly breaching the contract. Hence, the instant civil complaint by LPD.

I. The Contract

Pettinaro claims the Contract provided an initial term of sixty (60) months beginning approximately May 11, 2006 and ending on May 11, 2011 (the "Initial Term"). According to Pettinaro paragraph seven (7) of the contract states and provides as follows: "This Agreement may be TERMINATED by either party by giving notice at least 30 days prior to the expiration of the initial term or any renewal term."

Pettinaro asserts in its Motion that despite LPD's allegation (paragraph five (5) of the Complaint) paragraph 7 of the Contract that Pettinaro was not required to provide any reason for

seeking to terminate the instant Contract. Pettinaro alleges the only condition precedent to terminating the Contract is notice of the intent to terminate and giving the other party "at least 30 days prior to the expiration of the initial term or any renewal term." *See* ¶ *7, Contract.*

According to Pettinaro, on January 4, 2007 it provided written notice to LPD that it intended to terminate the Contract. In response, in an email to Pitaccio to Campbell Pettinaro allegedly informed LPD that "[y]our services for. . . Chadds Ford. . . will no longer be needed." (*See Exhibit C* to Pettinaro's Motion to Dismiss.) Pettinaro then attached an email to its Motion from LPD and claims that LDP improperly alleged that Pettinaro was in breach of the Contract as a result of refusing to pay LPD for "further services" after it forwarded a Notice of Termination on January 4, 2007.

In the email Pettinaro asserts that LPD did not claim or seek to have LPD provide any "further services". In its Motion Pettinaro claims LPD, therefore is not entitled to compensation beyond the date of termination or $13,250.00 in damages.

II. <u>LPD's Response</u>.

LPD has filed a written Answer and Response to Pettinaro's Motion to Dismiss. LPD points out that *Court of Common Pleas Civil Rule* 12(b)(6) should be treated as a Motion for Summary Judgment and therefore the only issue is whether there is a genuine material issue of fact and any doubt regarding the existence of such an issue should be resolved against the movant. *See Scureman v. Judge*, 626 A. 2d 5, 10-11 (Del.Ch. 1992). LPD correctly points out this legal issue because Pettinaro filed matters outside the pleading when it attached an email to its Motion to Dismiss under *Court of Common Pleas Civil Rule* 12(b)(6) and the Motion should therefore be treated as a Motion under *Court of Common Pleas Civil Rule* 56. The Court agrees.

Pettinaro as the moving party has the burden of demonstrating "with reasonable certitude that there is a genuine issue of material fact, and this [it] is entitled to judgment as a matter of law."

Matas v. Green, 171 A.2d 916 (1961); *Watson v. Shellhorn & Hill, Inc.*, 22 A.2d 506 (Del. Super. 1996); *Borish v. Graham*, 655 A.2d 831) (Del. Super. 1994). The Court must weigh the facts in light most provable for the non-moving party. *New Castle County Council v. State*, 698 A.2d 401 (Del. Super. 1996); *aff'd* 688 A.2d 888 (Del. Supr. 1996).

DISCUSSION

Clearly the issue in the instant dispute involves an interpretation of ¶ 7 of the Instant Contract which, *inter alia,* permits a party to cancel the initial term of the Agreement simply by giving notice at least thirty (30) days prior to the expiration of the Initial Term. The threshold inquiry is whether this Court should, as Pettinaro urges, that ¶ 7 is an "at will" cancellation clause, or, alternatively a thirty (30) day notice clause at the end of the term of the Contract to not renew. Clearly, this Court finds after a review of ¶ 7 that following oral argument an ambiguity exists in the interpretation of the Contract. Delaware Courts, as LPD has pointed out, have indicated contracts are ambiguous ". . . [w]hen the provisions and controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings." *See e.g. United Rentals, Inc. v. RAM Holdings, Inc.*, 937 A.2d 810, 830 (Del.Ch., 2007). LPD points out correctly that Delaware adheres to the "objective" theory of contracts meaning a contract's construction is interpreted as an objective, a reasonable third party would understand the contract to mean. "Contract terms themselves will be controlling [only] when they establish the parties' common meaning so that a reasonable person in the position of either party would have no expectations inconsistent with the contract language." *See HIFN, Inc. v. Intel Corp.* 2007 WL 1309376 (Del. C., 2007).

If the Court were to construe Pettinaro's interpretation or version of ¶ 7 of the Contract, it would be read as an "at will" cancellation clause. LPD points out that Pettinaro's argument would be unreasonable because "by its logic." that LPD asserts that Pettinaro could have signed the Contract; LPD "could have expended time and expense in purchasing equipment;" "surveying

LPD's system, performing required work;" "having the work inspected and approved;" and then Pettinaro could have simply sent a letter two weeks later notifying LPD it was terminating the contract." *See p.3, LPD's Answer to Motion to Dismiss.* The Court believes, subject to any oral testimony at trial, or extrinsic evidence to be introduced in discovery that Pettinaro's interpretation is illogical.

The Court clearly finds that the Contract was for an initial term of sixty (60) months which would be automatically renewed unless terminated within thirty (30) days of the Contract. Pettinaro's interpretation does not represent what an objective reasonable third-party would understand to be the Contract terms or the parties' intent. *See HIFN, Inc. v. Intel Corp.* In addition, the email sent by Campbell and appended to Pettinaro's Motion to Dismiss is not dispositive. Clearly extrinsic evidence may be introduced at trial or discovery to explain what one employee of LPD intended when it unilaterally responded to Pettinaro's purported Motion to Cancel. As LPD pointed out in its Answer; "Mr. Campbell asked for the effective date of Pettinaro's termination as it was important for billing reasons; without knowing the effective date of the termination, LPD could not calculate the remaining time left in the initial sixty (60) month period and bill Pettinaro according. *(p. 3 LPD's Response).*

OPINION AND ORDER

Clearly genuine issues of material facts exist under *Court of Common Pleas Civil Rule* 56(c). In addition the Court lacks a record or legal authority to dismiss the instant Complaint pursuant to *Court of Common Pleas Civil Rule* 41(b). Even construing plaintiff's Motion pending before the Court as strictly a Motion to Dismiss for Failure to State a Claim under *CCP Civ. R.* 12(b)(6), it must be denied. *Battista v. Chrysler Corp.*, 454 A.2d 286 (Del. Super. Ct. 1982); *Nix v. Sawyer*, 466 A.2d 507 (Del. Super. Ct. 1983); *Spence v. Furl*, 396 A.2d 967 (Del. Super. Ct. 1978). Clearly, defendant has not

set forth a record in Pettinaro's Motion that plaintiff would not be entitled to recover any reasonably conceivable set of circumstances and that the Court should dismiss the instant action. This matter shall be set for trial by the Civil Clerk at the Court and parties earliest convenience.

IT IS SO ORDERED this 17th day of March, 2008.

John K. Welch
Judge

/jb

cc: Karen Gallagher, Supervisor
CCP, Civil Division