IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

THOMAS R. JOHNSON and AMY T. JOHNSON,	)	
Plaintiffs,	)	C.A. No.: 2007-03-326 (Arbitration)
v.	)	
BENCHMARK BUILDERS, INC., a Delaware Corporation,	)	
Defendant and Counterclaim Plaintiff.	)	

Thomas R. Johnson
Amy T. Johnson
264 South Dillwyn
Newark, DE 19711

Tara M. DiRocco, Esquire
Simon & Cross, LLC
913 North Market St., 11th Fl.
Wilmington, DE 19801

I. ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

On or about January 29, 2008, plaintiffs Thomas R. Johnson and Amy T. Johnson filed a Motion for Summary Judgment in the above-captioned matter. Thereafter, on or about February 21, 2008, Defendant/Counterclaim Plaintiff Benchmark Builders filed a response to plaintiffs' motion and a Cross Motion for Summary Judgment. On Friday, March 7, 2008 the Court heard argument on both motions. This is the Court's Decision and Order on Plaintiffs' Motion for Summary Judgment and on Defendant's Cross Motion for Summary Judgment.

I. The Facts

On January 2, 2007, the parties entered into a sales agreement (hereinafter "Agreement") for the purchase of real estate located at 807 Colorado Drive, Newark, Delaware 19713. Pursuant to the terms of the Agreement, plaintiffs Thomas R. Johnson

and Amy T. Johnson (hereinafter "the Johnsons"), agreed to pay defendant Benchmark Builders (hereinafter "Benchmark") a total purchase price of $485,555.00 for the property, and would make deposits totaling $30,000 by March 1, 2007, in accordance with a schedule included within the terms of the Agreement. The balance due on the date of settlement was to be $455,555.00. The Agreement also contained a mortgage contingency clause which required plaintiffs to obtain a conventional mortgage in the amount of $455,555 over a thirty-year period. Plaintiffs' failure to obtain the necessary financing would void the contract, and any deposit monies would be returned to the plaintiffs. In this matter, however, the plaintiffs did obtain financing on January 31, 2007, but were only able to qualify for $388,444.00, which was an amount substantially less than what the sales agreement required.

II. Discussion

In this Motion for Summary Judgment, the Johnsons are seeking to recover $5,000 from Benchmark, which represents the amount paid by them as a deposit towards the purchase of the property. Benchmark argues it is entitled to keep the $5,000 deposit, stating that there is a genuine issue of material fact as to whether the plaintiffs ever applied for a loan in the required amount of $455,555, because according to the terms of the agreement, failure to do so would be a breach of the sales agreement, entitling the defendant to retain the deposit.

Benchmark also has a Cross Motion for Summary Judgment stating the Johnsons did not pay a second deposit in the amount of $10,000, which was due on or before February 1, 2007, pursuant to the terms of the deposit addendum to the sales agreement. Benchmark now seeks to recover the $10,000 deposit, in addition to retention of the

initial $5,000 deposit. The motion also argues that the Johnsons' failure to list their current residence for sale, which was a part of the contingency addendum to the sales agreement, was a breach of the Agreement and further entitles Benchmark to retain the deposit.

III. The Law

In order to prevail on a Motion for Summary Judgment, the moving party must prove that there are no genuine issues as to any material fact and that it is entitled to judgment as a matter of law. *Browning-Ferris, Inc. v. Rockford Enterprises, Inc.* 642 A.2d 820, 823 (Del. Super. 1993). In reviewing the record, the Court must review all facts and all reasonable inferences in the light most favorable to the non-moving party. *Stein v. Griffith*, 2002 WL 32072578 at 1 (Del. Com. Pl. Dec. 12, 2002). If a motion for summary judgment is properly supported, the burden shifts to the nonmoving party to demonstrate that there are material issues of fact. The motion for summary judgment will be denied if the Court finds any genuine issues of material fact. *Moore v. Anesthesia Services*, 2008 WL 484452 (Del.Super. February 15, 2008) at *4.

In the matter of *Baldwin v. Conner*, the Superior Court found that real estate contracts impose a duty of good faith in performance, and when the terms of a contract are contingent upon the purchaser receiving a mortgage at a specific rate, there is an implied duty upon the purchaser to seek such financing in good faith. *Baldwin v. Conner*, 1999 WL 743276 at *2.

IV. Opinion and Order

Regarding the Johnsons' Motion for Summary Judgment, in deciding whether the plaintiffs are entitled to recover there deposit, the Court must determine that there are no

genuine issues as to any material fact. The Johnsons have indicated that, pursuant to the terms of the contingency clause in the Agreement, they are entitled to receive their $5,000 because they failed to obtain the necessary financing to purchase the property in question. Although it is clear to the Court from the record that the Johnsons were not able to secure the $455,555 financing required by the Agreement, there is a genuine issue of material fact as to whether the Johnsons applied for a loan in that amount. Benchmark indicated during the hearing that it has requested the Johnson's loan application, but has not received it and the Johnsons have stated that they do not have access to this document. Because Delaware law imposes a duty upon the purchaser of real estate to obtain financing in good faith, the critical issue in this matter is whether the Johnson's ever sought the amount of financing required by the contingency clause in the Agreement. Therefore, because there is a genuine issue of material fact, the Johnson's Motion for Summary Judgment is hereby denied.

Benchmark's Cross Motion for Summary Judgment is based on two separate arguments. Defendant first contends that it is entitled to retain the $5,000 deposit and also recover $10,000 additional deposit monies based on the Johnsons' failure to pay the $10,000 which was due on February 1, 2007, thereby breaching the sales contract. Nevertheless, the Court finds that there is a genuine issue of material fact as to whether Benchmark is entitled to recover the $10,000 deposit, because the terms of the mortgage contingency clause were executory at the time the second deposit was due. According to the record, the clause did not have to be satisfied until February 10, 2007 and the $10,000 deposit was due on February 1, 2007. As of January 31, 2007 the Court notes that, from the terms of the loan agreement, the plaintiffs could not get the financing required under

the sales contract. Therefore, there is a genuine issue of material fact as to whether the contingency clause terms became void on January 31, 2007, which is the date the loan agreement was executed.

Benchmark further contends that it is entitled to Summary Judgment relief based on the Johnsons' failure to re-list their residence according to the terms of a contingency addendum to the Agreement. The addendum indicated that Plaintiffs were to list their residence with a professional, licensed real estate company no later than January 22, 2007. However, the addendum further stated at paragraph 3 that the purchaser could remove the contingency "at any time" by providing notice to the seller in writing. The record indicates that on February 10, 2007, the Johnsons sent Benchmark a letter indicating it was not able to successfully secure a buyer for their residence. This fact raises a genuine issue of material fact as to whether the Johnsons actually violated the terms of the addendum, which by its own terms permitted them to remove the contingency at "any time" by written notice.

Based on these genuine issues of material fact, the Court denies Benchmark's Cross Motion for Summary Judgment.

OPINION AND ORDER

The Court hereby DENIES the Johnsons' Motion to for Summary Judgment, and also DENIES Benchmark's Cross Motion for Summary Judgment pursuant to Rule 56.

IT IS SO ORDERED this 17th Day of March 2008.

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JOHN K. WELCH
Associate Judge