SUPERIOR COURT
OF THE
STATE OF DELAWARE

VIVIAN L. MEDINILLA
JUDGE

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Re: *Investment Property Associates, LLC v. Southbank Associates, LLC*
C.A. No.: N17C-08-015 VLM

Dear Counsel:

This Court has reviewed Investment Property Associates, LLC ("IPA") and Southbank Associates, LLC ("Southbank")'s Cross-Motions for Summary Judgment. Pursuant to Superior Court Civil Rule 56, this Court finds that there are genuine issues of material fact as to both parties' motions. For the reasons stated below, both motions are **DENIED**.

Factual and Procedural Background

This action arises from an Agreement of Purchase and Sale (the "Agreement") between IPA and Southbank. On December 14, 2016, the IPA and Southbank entered into the Agreement for the purchase and sale of property located in Wilmington, Delaware (hereinafter the "Property").[1] IPA provided a $250,000 deposit to Southbank according to the Agreement.[2] On January 27, 2017, IPA and

[1] Compl. ¶ 3-4.

[2] *Id.* ¶ 5.

Southbank entered into a First Amendment to Agreement of Purchase and Sale.[3] This Agreement was terminated by IPA on February 27, 2017 after the discovery of two underground storage tanks ("USTs") located near one of the buildings.[4] IPA terminated the Agreement and the deposit was returned to it.[5]

After the Agreement was terminated, Southbank entered into a contract with J&M Industries to remove and remediate the gasoline tank.[6] IPA expressed an interest in re-engaging contract discussions with Southbank subject to a No Further Action letter.[7] On May 8, 2017, the Parties entered into a Reinstatement and Amendment to the Agreement of Purchase and Sale ("Reinstatement") and provided a $250,000 deposit.[8] The Reinstatement included an Underground Storage Tank Remediation Provision and a Settlement Date Provision. The Reinstatement provided that Southbank would remove/remediate the underground storage tanks ("USTs") and any remediation needed to be accomplished to the satisfaction of IPA's environmental engineer and/or environmental counsel. Upon execution of the Reinstatement, the results of the soil test had not yet been released from the lab.[9]

On June 15, 2017, the Delaware Department of Natural Resources and Environmental Control ("DNREC") issued a "No Further Action Required 'with Conditions'" letter ("NFA with Conditions letter"). This letter was sent to IPA on June 19, 2017.[10] On June 29, 2017, IPA advised Southbank it would not go forward due to the NFA with Conditions letter.[11] On July 19, 2017, Southbank sent a Notice

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[3] Compl. ¶ 7.

[4] Opening Brief of Plaintiff Investment Property Associates, LLC in Support of its Summary Judgment Motion at 4 [hereinafter Pl.'s Opening Br.].

[5] Defendant/Counterclaim Plaintiff Southbank Associates, LLC's Motion for Summary Judgment at 8 [hereinafter Def.'s Opening Br.].

[6] Pl.'s Opening Br. at 6.

[7] *Id.* at 7.

[8] Compl. ¶ 9; Def.'s Opening Br. at 9.

[9] Pl.'s Opening Br. at 9.

[10] Def.'s Answer, Affirmative Defenses, and Counterclaim ¶ 23 [hereinafter Def.'s Answer].

[11] Pl.'s Opening Br. at 12.

of Default letter to IPA due to IPA's failure to settle on the Property by July 10, 2017.[12] During the four weeks between June 19 and July 19, Southbank did nothing to remove the remaining contaminated soil on the property or cure the problem of excessive lead levels in the soil.[13] IPA did not settle on the property by July 10, 2017 due to the environmental conditions noted,[14] and terminated the Agreement on July, 28, 2017 based on an opinion letter of IPA's counsel dated July 27, 2017.[15]

On August 2, 2017, IPA filed this action against Southbank for the recovery of its $250,000 deposit on the Property, alleging that it was not satisfied with the UST Removal Work under the remediation provision of the Reinstatement.[16] Southbank filed a counterclaim asserting that IPA defaulted on its obligation to settle under Paragraph 9 of the Reinstatement and is therefore entitled to retain the $250,000 deposit as liquidated damages.[17]

Both sides filed their respective Motions for Summary Judgment on April 2, 2018. Responses and Replies were also received by August 29, 2018. Oral arguments on the cross-motions were heard on September 20, 2018. This matter is now ripe for review.

Contentions of the Parties

IPA argues that it is entitled to summary judgment because the Reinstatement is clear and unambiguous and a NFA with Conditions letter does not trigger the twenty days to settle requirement under Paragraph 9 of the Reinstatement.[18] IPA also argues that even if the Reinstatement is ambiguous, it is entitled to summary judgment, based on various communications between the parties.[19] It argues that

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[12] Pl.'s Opening Br. at 12.

[13] *Id.* at 13.

[14] Def.'s Answer ¶ 24.

[15] Pl.'s Opening Br. at 14.

[16] *See generally* Compl.

[17] Def.'s Answer ¶¶ 20-27.

[18] *See* Pl.'s Opening Br. at 18-24.

[19] *Id.* at 25-34.

Southbank was aware that IPA was going to re-engage in the sale of the Property subject to a NFA letter (not a NFA with Conditions letter) and that Southbank was aware of the difference between the two types of letters.[20]

Southbank argues it is entitled to summary judgment because IPA forfeited the deposit after it defaulted under the Agreement by not settling within twenty days of receipt of the NFA letter and terminating the Agreement.[21] It argues that nothing in the Reinstatement required the NFA letter be without conditions to trigger the settlement requirement under Paragraph 9.[22] Additionally, Southbank argues that under the original Agreement between the parties, the property was being sold "as is" and IPA assumed the risk that the "[p]roperty may not be entirely fit for residential use."[23] Thus, Southbank maintains that IPA defaulted when it terminated the agreement outside the timeframe of the Agreement.[24]

Standard of Review

Under Superior Court Civil Rule 56, the burden of proof on a motion for summary judgment falls on the moving party to demonstrate that "there are no genuine issues as to any material fact and that the moving party is entitled to judgment as a matter of law."[25] If the moving party satisfies its initial burden, the non-moving party must sufficiently establish the "existence of one or more genuine issues of material fact."[26] Summary judgment will not be granted if there is a material fact in dispute or if "it seems desirable to inquire thoroughly into [the facts] in order to clarify the application of the law to the circumstances."[27] "All facts and

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[20] Pl.'s Opening Br. at 32-33.

[21] Def.'s Opening Br. at 19-26.

[22] *Id.* at 20-21.

[23] *Id.* at 24.

[24] *Id.* at 27-28.

[25] DEL. SUPER. CT. CIV. R. 56(c).

[26] *Quality Elec. Co., Inc. v. E. States Const. Serv., Inc.*, 663 A.2d 488, 1995 WL 379125, at *3-4 (Del. 1995). *See also* Rule 56(e); *Moore v. Sizemore*, 405 A.2d 679, 681 (Del. 1979).

[27] *Ebersole v. Lowengrub*, 180 A.2d 467, 469-70 (Del. 1962).

reasonable inferences must be considered in a light most favorable to the non-moving party."[28]

When cross-motions for summary judgment are filed, it "does not act *per se* as a concession that there is an absence of factual issues."[29] If cross-motions for summary judgment are filed, it does not waive the "movant's right to assert the existence of a factual dispute as to the other party's motion."[30] The moving party "concedes the absence of a factual issue and the truth of the nonmoving party's allegations only for purposes of its own motion, and does not waive its right to assert that there are disputed facts that preclude summary judgment."[31]

Discussion

If the contract language is clear and unambiguous, the contract terms are interpreted by the Court according to their ordinary meaning.[32] However, a contract is ambiguous when "the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings."[33]

The relevant Reinstatement provisions at issue include Paragraphs 6 and 9. Paragraph 6 of the reinstatement provides the Underground Storage Tank Remediation provision.[34] It states:

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[28] *Nutt v. A.C. & S. Co., Inc.*, 517 A.2d 690, 692 (Del. Super. 1986) (citing *Mechell v. Plamer*, 343 A.2d 620, 621 (Del. 1975); *Allstate Auto Leasing Co. v. Caldwell*, 394 A.2d 748, 752 (Del. Super. 1978)).

[29] *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997).

[30] *Id.*

[31] *Id.* (citations omitted).

[32] *GMG Capital Investments, LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 780 (citing *Paul v. Deloitte & Touche, LLP*, 974 A.2d 140, 145 (Del. 2009)).

[33] *Rhone-Poulenc Basic Chemicals Co. v. American Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992) (citing *Hallowell v. State Farm Mut. Auto. Ins. Co.*, 443 A.2d 925, 926 (Del. 1982)).

[34] Compl. ¶ 10.

> 6. Underground Storage Tank Remediation. On or before April 30, 2017, Seller shall initiate work on the removal/remediation of all underground storage tanks ("USTs") at the Property as detailed in the J&M proposal dated March 20, 2017 (the "UST Removal Work") and shall thereafter diligently pursue and complete the UST Removal Work, including any needed remediation of the Property, to satisfaction of Purchaser's environmental engineer and/or environmental counsel, prior to July 31, 2017.[35]

Additionally, Paragraph 9 of the Reinstatement provides:

> 9. Settlement Date. Notwithstanding any other provisions in the Contract to the contrary, the Settlement Date shall be on or before twenty (20) days after receipt by Seller and submittal to Purchaser of No Further Action Letter from DNREC regarding the USTs.[36]

Southbank indicates no obligation was required on their part and relies on the relevant provision of the "as is, where is" language found in Paragraph 3.02 of the Agreement, which states:

> 3.02. "As-Is Where Is". Notwithstanding Section 3.01 above, except as specifically set forth elsewhere in this Agreement, Seller makes no representations or warranties as to the condition of the Property or its fitness for the intended purpose and reference is made to Section 4.01 herein.[37]

Further, under Paragraph 4.01 of the Agreement, it states that:

> Purchaser acknowledges and agrees that to the maximum extent permitted by law, except as specifically provided

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[35] Appendix to Opening Br. of Plaintiff Investment Property Associates, LLC in Support of its Summary Judgment Motion at 279-81 [hereinafter IPA A-__].

[36] IPA A-278.

[37] IPA A-153.

> elsewhere in this Agreement, THE SALE OF THE PROPERTY IS MADE ON AN "AS IS, WHERE IS" CONDITION AND BASIS WITH ALL FAULTS, KNOWN OR UNKNOWN, PATENT, LATENT, OR OTHERWISE.[38]

Here, the provisions in the Reinstatement and Agreement are susceptible to different interpretations and therefore ambiguous. Each party has a separate version of how the Agreement and Reinstatement are to be interpreted, specifically regarding whether there is a difference between a NFA letter and a NFA letter with Conditions for purposes of satisfying the Reinstatement provisions.

IPA argues the NFA with Conditions is not the same or equivalent to a NFA (without conditions), using the opinion of an environmental expert to support this assertion.[39] IPA asserts that this letter did not trigger the twenty-day settlement period under Paragraph 9 of the Reinstatement, while Southbank argues that the NFA with Conditions letter satisfied Paragraph 9 to trigger settlement within twenty days. Thus, there is a factual dispute as to whether the NFA with Conditions letter satisfies Paragraph 9 of the Reinstatement. There is also disagreement about what constituted sufficient remediation under the Reinstatement.

Where provisions of both the Agreement and the Reinstatement are ambiguous, the ambiguity prevents granting summary judgment for either party. Summary judgment "is not a mechanism for resolving contested issues of fact."[40] Factual disputes arise when reasonable minds may differ to the contract's meaning, which requires the fact-finder to consider admissible extrinsic evidence.[41] It is in these types of cases that summary judgment should not be granted.[42]

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[38] IPA A-154.

[39] Pl.'s Opening Br. at 28.

[40] *GMG Capital Investments*, 36 A.3d at 783 (citing *Williams v. Geier*, 671 A.2d 1368, 1389 (Del. 1996)).

[41] *Id.* (citations omitted).

[42] *Id.*

Conclusion

The Reinstatement and Agreement are susceptible to conflicting interpretations. Both parties' claims are littered with factual disputes that create unresolved issues of material fact. Extrinsic evidence must be considered by the fact finder to resolve the ambiguity in the parties' Reinstatement and Agreement. This renders summary judgment inappropriate. Where there are genuine issues of material fact, neither party is entitled to judgment as a matter of law. The parties' respective Motions for Summary Judgment are **DENIED**.

IT IS SO ORDERED.

Vivian L. Medinilla
Judge

oc: Prothonotary