IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

HARKINS PROPERTY, LLC, Plaintiff, v. DAVID H. DONOVAN, REGINA V. DONOVAN, MISCELLA QUEEN, and BEILER-CAMPBELL FINANCIAL SERVICES, LLC, Defendants.	)	C.A. No. 2003-11-197 ARBITRATION CASE

Submitted: September 3, 2004
Decided: September 24, 2004

DECISION ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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[1] Entered appearance for Miscella Queen on September 15, 2004 and did not participate in motion or briefing.

Plaintiff moves pursuant to Court of Common Pleas Civil Rule 56 for an order granting summary judgment against David H. Donovan, Regina V. Donovan, and Miscella Queen, defendants. Plaintiff alleges that there no issues of material facts in dispute, and it is entitled to judgment as a matter of law granting a return of its deposit in the amount of $25,000.

The facts indicate that the plaintiff, Harkins Property, LLC, (hereinafter "Harkins") began negotiations with defendants for the sale of certain real estate outside of Townsend, New Castle County, Delaware known as Lot No. 13 shown on New Castle County tax records as parcel # 14-017-00-006 consisting of approximately 72 acres of land. The parties attempted to enter into an agreement for the sale of the property on November 27, 2002, where the Donovan's signed as sellers of the property and Harkins signed as a buyer of the property. The agreement was not allegedly fully executed at this time because the purchasers of the property did not believe the signature of the agent for Miscella Queen was valid and there was no acknowledgement of that signature. Therefore, the purchasers of the property declined to proceed with the agreement until such time as an acknowledgement of the person signing for Miscella Queen could be obtained. The agreement was finally notarized with an acknowledged signature of Miscella Queen's agent on January 16, 2002 by a notary in Sussex County.

On or about May 19, 2004, Harkins notified the sellers of its decision to terminate the agreement and seek a refund of its $25,000 deposit. Section 4.1 of the Purchase Agreement provided that the purchasers have 150 days

commencing with the execution of the agreement to perform a due diligence investigation of the property and determine its suitability for buyer's purpose. Further, under Section 4.2 of the Agreement, the purchaser had the right to terminate the agreement and receive a full return of its $25,000 deposit, if timely notice was provided.

Harkins did not make the deposit payment of the $25,000 until January 6, 2003 to its agent Beiler-Campbell Financial Services. After this dispute arose, defendant Beiler-Campbell Financial Services LLC, pursuant to Court of Common Pleas 67, filed a motion with the Court to have the $25,000 in its custody deposit with the Court and sought to be dismissed as a party defendant. This Court on January 30, 2004, having heard and considered Beiler-Campbell's motion and having receiving the $25,000 as a deposit, dismissed Beiler-Campbell as a party defendant with prejudice.

David Donovan, Regina Donovan, and Miscella Queen oppose the motion for summary judgment arguing that the contract was fully executed on November 27, 2002 because the agent for Miscella Queen entered into a binding contract for the corporation. They argue that because Miscella Queen fully executed the contract on November 27, 2002, the 150 days expired before the May 19, 2004 notification by the sellers of its decision to terminate the agreement. The Donovans and Miscella Queen further argue, however, that since it had no control over the deposit of the $25,000, it completed all of its obligation to bring the contract into formation at the time it was initially signed on November 27, 2002.

The issue before the Court is whether the parties entered into a binding contract on November 27, 2002 when the agent for Miscella Queen signed the contract, but the notary refused to acknowledge his signature without further verification that the agent could sign for the corporation.

Upon a motion for summary judgment, the Court must view the facts and all reasonable inferences in the light most favorable to the non-moving party. The Court will grant summary only if the pleadings and the record show that there are no genuine issues as to any material fact and the moving party is entitled to judgment as a matter of law. Browning-Ferris v. Rockford Enterprises, Del. Super., 642 A.2d 820 (1993). Also, where the non-moving party bears the ultimate burden of proof, summary judgment may be granted only if the moving party can demonstrate a complete failure of proof concerning an essential element of the non-moving party's case. Birkhart v. Davies, Del. Supr., 602 A.2d 56, 59 (1991). The Court's decision must be based only on the record presented, including all pleadings, affidavits, depositions, admissions and answers to interrogatories, not on what evidence is potentially possible. Rochester v. Katalan, Del. Supr., 320 A.2d 704 (1974).

As stated above, the central question in this matter is, when was there a lawful contract among the parties? A contract consists of an offer, an acceptance and consideration. An offer is, in general terms, the manifestation of willingness to enter into a bargain so as to justify another person in understanding that his assent to that bargain is invited and will conclude it. Compliance by the

offeree with the terms of the offer generally constitutes acceptance, and to be effectual it must be identical to the offer. Acceptance can, however, be shown by acts or conduct indicating an assent to the offer, but the act must be intentional; that is, a conscious will to do the act must exist. Consideration is the inducement to contract, the right, interest, or benefit occurring to a party, or some forbearance, detriment, or loss suffered by the other. Murphy v. State Farm Insurance Company, Del. Super., 1997 WL 528160 (1997).

When determining whether the parties have formed a binding contract the Court must determine whether all the elements for contract are present. The facts in the record indicate that on November 24, 2002 Harkins submitted an agreement to purchase property to the Donovans and Miscella Queen, an artificial entity. This agreement provided that Harkins would deposit upon execution of the agreement the amount of $25,000.00 with Beiler-Campbell Real Estate. The Donovans and the agent for Miscella Queen signed the agreement on November 27, 2002. The signatures of the Donovans were acknowledged also on November 27, 2002. However, there was a dispute regarding the validity of the agent for Miscella Queen's authority to sign for the artificial entity and this signature was not acknowledged until January 16, 2003[2] The deposit required under the agreement was not made until January 16, 2003, when the dispute regarding the validity of the signature was resolved.

[2] While the documents reflect January 16, 2002, all parties agree the correct date is January 16, 2003.

While the parties disagree on the significance of the Harkins failure to accept the agent signature for Miscella Queen, it is clear that the signature was not acknowledged until January 16, 2003. Further, the consideration, which is the $25,000 deposit, was not made until January 16, 2003. There can be no legally binding contract between the parties if there is no consideration. Therefore, the Court finds that an enforceable contract was not formed as a matter of law until all of the elements came into being. There can be no lawful contract without consideration and there was no consideration until January 16, 2003. While the Donovans argue that they had no control over the time when payment of the deposit was made, this does not alter my conclusion that no lawful contract came into being until the deposit was made.

Under the agreement Harkins, had 150 days from the date of contract to conduct a feasibility study and terminate the agreement. The contract was legally binding on January 16, 2003; therefore, Harkins was required under paragraph 4 to give notice of termination by June 15, 2003. Notice of termination was given on May 19, 2003 (Affidavit of Dennis H. Satnick, dated May 22, 2004).

Accordingly, I find no dispute of material facts and Harkins is entitled to judgment as matter of law

SO ORDERED this 24th day of September, 2004

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Alex J. Smalls
Chief Judge