IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

LOCAL UNION 1183 UAW BUILDING CO.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
WILLIAM HOLDING, LLC and	)	C.A. No. 08C-07-135 RRC
KENNETH WILLIAMS,	)	
	)	
Defendants, and	)	
Third-Party Plaintiffs	)	
	)	
WILLIAM GANC and	)	
WHITE REALTY ASSOCIATES, LLC	)	
	)	
Third-Party Defendants.	)	

Submitted: April 6, 2009
Decided: June 2, 2009

On Plaintiff Local Union 1183 UAW Building Co.'s
Motion for Summary Judgment
DENIED.

On Defendants/Third-Party Plaintiffs
Williams Holdings, LLC and Kenneth Williams'
Motion for Summary Judgment
GRANTED.

On Third-Party Defendants William Ganc and
White Realty Associates, LLC's
Motion for Summary Judgment
GRANTED.

MEMORANDUM OPINION

Donald L. Gouge, Jr., Esquire, Donald L. Gouge, Jr. LLC, Wilmington, Delaware, Attorney for Plaintiff.

Stephen B. Potter, Esquire, Potter, Carmine & Associates, P.A., Wilmington, Delaware, Attorney for Defendants/Third-Party Plaintiffs.

Douglas B. Catts, Esquire, and B. Brian Brittingham, Esquire, Schmittinger & Rodriguez, P.A., Attorneys for Third-Party Defendants.

COOCH, J.

I. INTRODUCTION

Local Union 1183 UAW Building Co. (Plaintiff) entered into an Agreement for Purchase and Sale of Real Estate ("Agreement") to sell approximately nine acres of land located near Newark, Delaware to Williams Holdings, LLC and Kenneth Williams ("Defendants"). During the course of the transaction, Defendants were represented by real estate agent William Ganc and White Realty Associates, LLC ("Third-Party Defendants").[1] The Agreement contained a "due diligence" provision, giving Defendants the option to terminate the Agreement and to receive a full refund of their deposit, as long as written notice of termination was received by Plaintiff by 5:00 p.m. on April 30, 2008.

[1] For purposes of the pending motions for summary judgment, Defendants' and Third-Party Defendants' interests are essentially aligned. Thus, Defendants and Third-Party Defendants are collectively referred to as "Defendants," unless noted otherwise.

The parties have filed cross motions for summary judgment. Plaintiff seeks to retain a $20,000 deposit, while Defendants seek return of the deposit. The sole issue before this Court is whether Defendants' e-mail purporting to terminate the Agreement received by Plaintiff's real estate agent on April 30 at approximately 3:48 p.m. was valid notice under the terms of the Agreement which provided "all notices . . . shall be in writing and deemed duly given when mailed by certified mail, return receipt requested, postage prepaid." For the following reasons, the Court concludes that Defendants' e-mail constituted legally sufficient written notice and was properly delivered. Therefore, Plaintiff's Motion for Summary Judgment is **DENIED**, Defendants' Motion for Summary Judgment is **GRANTED** and Third-Party Defendants' Motion for Summary Judgment is **GRANTED**.

II. FACTUAL AND PROCEDURAL HISTORY

The parties have stipulated to the factual and procedural history:[2]

1. On September 14, 2007, Plaintiff, Local Union 1183 UAW Building Co., and the Defendant, Williams Holdings, LLC, entered into an agreement (hereinafter "Agreement") for the purchase and sale of real estate.

2. The Agreement was in regard to 0 Deer Run Dr., Newark, Delaware (Tax Parcel # 09-037.00-137). This property was owned by Plaintiff and was being offered for sale to Defendant.

3. The total purchase price for this property pursuant to the Agreement was $950,000.00. Upon entering the Agreement, Defendant Williams Holdings, LLC, placed into escrow a deposit of $10,000.00 pursuant to the terms of the Agreement.

[2] Stipulation of Facts for Summary Judgment Motions D.I. 22.

4. At all times relevant, its agent Jon Czech of McConnell Johnson Real Estate Company, LLC, represented Plaintiff. At all times relevant, the offices of McConnell Johnson Real Estate Company, LLC, were located at 1201 North Market Street, Suite 1605, Wilmington, Delaware.

5. At all times relevant, its agent William Ganc of White Realty Associates, LLC, represented Defendant Williams Holdings, LLC. At all times relevant, the offices of White Realty Associates, LLC, were located at 3704 Kennett Pike, Suite 200, Greenville, Delaware.

6. The Agreement entered into between Plaintiff and Defendant Williams Holdings, LLC, contained a clause titled "Notices" at Paragraph 8 of the Agreement. It states:

> 8. Notices – All notices required or to be given hereunder shall be in writing and deemed duly given when mailed by certified mail, return receipt requested, postage prepaid, addresses as follows:
>
> | If to Buyer: | If to Seller: |
> |---|---|
> | Ken Williams | UAW Local 1183 |
> | 533 Rogers Rd. | 698 Old Baltimore Pike |
> | New Castle, DE 19720 | Newark Castle (*sic*), DE 19702 |

7. The Agreement entered into between Plaintiff and Defendant Williams Holdings, LLC, contained a clause titled "Default/Remedy" at Paragraph 9 of the Agreement. It states, in relevant part:

> 9. Default/Remedy – If Buyer violates or fails to fulfill and perform any of the terms or conditions of this Agreement, Seller's sole option shall be to retain the Deposit, together with all interest (if any) earned thereon, as liquidated damages for such breach.

8. The Agreement entered into between Plaintiff and Defendant Williams Holdings, LLC, contained a clause titled "Due Diligence Period and Other Conditions to Closing" at Paragraph 11 of the Agreement. It states, in relevant part, at 11.2:

> 11.2 Buyer's obligations hereunder shall be subject to Buyer's conducting such surveys, tests and inspections of the Premises as Buyer solely deems necessary, including but not limited to any environmental tests, soil or soil suitability tests, property surveys, as well as surveys of any wetlands on the Premises, and/or review of zoning or title within ninety (90) days from the full execution of this Agreement. Buyer shall deliver to Seller a Certificate of Insurance naming Seller as additional insured prior to the commencement of any on-site inspection if requested by Seller. If Buyer is not satisfied with the results of any such surveys, tests or inspections, or for any other reason or no reason, Buyer may terminate this Agreement upon written notice to Seller within such ninety (90) day period,

whereupon any deposits made by Buyer hereunder shall be promptly paid to Buyer together with any interest accrued thereon.

9. The parties extended the due diligence period until April 30, 2008, at 5 p.m.

10. On January 31, 2008 at 4:38 p.m., Ganc sent to Czech via email an agreement to extend the due diligence period to February 29, 2008 at 5:00 p.m. Two minutes later Ganc sent a notice of termination via email to Czech. The agreement to extend the due diligence period was executed by UAW on February 1, 2008.

11. On February 28, 2008, a second extension of the due diligence clause was proposed by Ganc to Czech, via email. The proposed extension called for another $10,000 deposit. The due diligence period was extended to April 30, 2008 at 5:00 p.m.

12. On April 30, 2008, at 3:48 p.m. Ganc sent via email notice of termination of the Agreement. This letter followed up an earlier telephone conversation between Ganc and Czech in which Ganc stated that Williams may terminate the Sales Agreement. Although Czech was out of the office on April 30, 2008 at 3:48 p.m., Czech believes that his computer received the e-mail from Ganc at or soon after 3:48 p.m. on April 30, 2008.

13. Czech was unable to reach UAW to discuss Ganc's email dated April 30, 2008 at 3:48 p.m. until May 2, 2008.

14. Williams sought to terminate the agreement due to difficulty with obtaining the necessary approvals from NCC.

15. It is common practice in the real estate industry that when a party to a transaction is represented by an agent, communications are generally conducted between agents.

16. At all times relevant to this matter, it was routine for agents Czech and Ganc to deal and communicate by electronic mail.

III. CONTENTIONS OF THE PARTIES

Plaintiff contends that the plain meaning of Paragraph 8 of the Agreement requires notice to be in writing and delivered by certified mail. Plaintiff maintains that an e-mail communication does not satisfy the Agreement's delivery provision, and thus Defendants did not timely

terminate the Agreement. Plaintiff therefore argues that it should retain the $20,000 deposit.

In response, Defendants contend that the Agreement is ambiguous in that it yields more than one reasonable interpretation and that while Paragraph 8 of the Agreement requires notice of termination to be in writing, it does not require delivery by certified mail to the exclusion of other forms of delivery. Rather, Defendants maintain certified mail was one of several methods by which delivery could be effected. Defendants also argue that plaintiff waived its right to object to delivery of notice of termination by e-mail because Plaintiff did not object to Defendants' January 31, 2008 termination letter, which was timely delivered by e-mail.

IV. STANDARD OF REVIEW

Upon cross motions for summary judgment, this Court will grant summary judgment to one or more of the moving parties. No genuine issues of material fact exist as a matter of law where opposing parties have sought summary judgment.[3] Superior Court Civil Rule 56(h) provides:

> Where the parties have filed cross motions for summary judgment and have not presented argument to the Court that there is an issue of fact material to the disposition of either motion, the Court shall deem the

[3] Super. Ct. Civ. R. 56(h); *Gallaher v. USAA Cas. Ins. Co.*, 2005 WL 3062014, * 1 (Del. Super.) (citing Super. Ct. Civ. R. 56(h) in granting plaintiff's cross motion for summary judgment where there were no genuine issues of material fact and where plaintiff was entitled to collect benefits under the plain language of the contract).

> motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions.

The sole question before the court is one of law, and the parties, by filing cross motions for summary judgment, have in effect stipulated that the case is ripe for a decision on the merits.[4]

V. DISCUSSION

The issue before this Court is whether the language of Paragraph 8 of the Agreement is ambiguous, and, if so, whether written notice could be delivered by e-mail.

The language that is central to the parties' dispute is Paragraph 8 of the Agreement:

> Notices – All notices required or to be given hereunder shall be in writing and deemed duly given when mailed by certified mail, return receipt requested, postage prepaid, addresses as follows:
>
> | If to Buyer: | If to Seller: |
> |---|---|
> | Ken Williams | UAW Local 1183 |
> | 533 Rogers Rd. | 698 Old Baltimore Pike |
> | New Castle, DE 19720 | Newark Castle (*sic*), DE 19702 |

Plaintiff maintains that Paragraph 8 requires that written notice of termination must be delivered by certified mail. Defendants agree that Paragraph 8 requires written notice, but contend that certified mail is not the exclusive means of delivering written notice and that because the parties regularly communicated about the termination clause of the Agreement by e-

[4] *Scottsdale Ins. Co. v. Lankford*, 2007 WL 4150212, * 3 (Del. Super.).

mail, Defendants' April 30, 2008 e-mail (which was received by Plaintiff's real estate agent around 3:48 p.m., though not read until the following day) constituted proper notice within the meaning of the Agreement.

Plaintiff does not dispute that Defendants' letter attachment to its April 30, 2008 e-mail constituted a "writing" within the meaning of the Agreement; rather, Plaintiff maintains that the Agreement requires delivery by certified mail.[5]

The issue before the Court is one of contract interpretation. "When the language of a contract is plain and unambiguous, the intent of the parties expressed in that language is binding. If, however, the language of the contract is ambiguous, the court may look to extrinsic evidence to determine the parties' intent."[6] In construing an ambiguous contractual provision, a court may consider evidence of prior agreements and communications of the parties as well as trade usage or course of dealing.[7]

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[5] Mot. of Pl. for Summ. H. and in Opp'n to Defs' and Third Party Defs' Mots. For Summ. J. at ¶ 8 ("All Ganc had to do was mail the notice on April 30, 2008 via certified mail, return receipt requested. If he had done that, as required by the Sales Agreement, there would be no basis for this lawsuit.").

[6] *Sun-Times Media Group, Inc. v. Black*, 954 A.2d 380, 389 (Del. Ch. 2008) (citing *Citadel Holding Corp. v. Roven,* 603 A.2d 818, 822 (Del.1992)).

[7] *Eagle Industries, Inc. v. DeVilbiss Health Care, Inc*., 702 A.2d 1228, 1233 (Del. 1997) (reversing a decision of Court of Chancery and holding that (1) indemnification provision was ambiguous as to whether seller's obligations depended on date on which product caused injury or date on which product was manufactured or purchased, and (2) trial court should have considered admissible extrinsic evidence).

In the instant case, the language of Paragraph 8 is ambiguous because it gives rise to two reasonable, differing interpretations: 1) Paragraph 8 requires both written notice and delivery by certified mail, or 2) Paragraph 8 requires written notice, and if written notice is delivered by certified mail, it is "deemed duly given when mailed." Because the language is ambiguous, the Court will consider the parties' course of dealing. The parties stipulated that "at all times relevant to this matter, it was routine for agents Czech and Ganc to deal and communicate by electronic mail."[8] Furthermore, throughout the course of their dealings pertinent to the instant contract, the parties utilized e-mail to communicate about the termination clause and to extend the due diligence period:

> 10. On January 31, 2008 at 4:38 p.m., Ganc sent to Czech via email an agreement to extend the due diligence period to February 29, 2008 at 5:00 p.m. Two minutes later Ganc sent a notice of termination via email to Czech. The agreement to extend the due diligence period was executed by UAW on February 1, 2008.
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> 11. On February 28, 2008, a second extension of the due diligence clause was proposed by Ganc to Czech, via email. The proposed extension called for another $10,000 deposit. The due diligence period was extended to April 30, 2008 at 5:00 p.m.
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> 12. On April 30, 2008, at 3:48 p.m. Ganc sent via email notice of termination of the Agreement. This letter followed up an earlier telephone conversation between Ganc and Czech in which Ganc stated that Williams may terminate the Sales Agreement.[9]

[8] Factual and Procedural History, *supra* p. 5 at ¶ 16.

[9] *Id.* at ¶ 10-12.

Given the parties' course of dealing, it is clear that they relied on e-mail, rather than certified mail, to effect delivery of communications pertinent to the due diligence provision. In fact, no evidence was presented that certified mail was ever used by either party. Therefore, the Court concludes that Paragraph 8 does not exclude notification by e-mail as a means of delivering written notification; rather, Paragraph 8 provides one method of delivering notice. This conclusion is supported by the fact that, in essence, the second clause of Paragraph 8 articulates the "mailbox rule," a contracts principle by which an acceptance becomes effective—and binds the offeror—once it has been properly mailed, not at the later time of delivery.[10] Thus, Paragraph 8 provided a means by which notification of termination can be effected prior to receipt. In contrast, an e-mail would not, in the language of Paragraph 8, be "deemed given" when it was sent; rather, delivery of an e-mail is effective when it is received in another party's computer inbox, which occurred in this case at 3:48 p.m. on April 30, 2008.[11] Similarly, had Defendants sent written notice by some other form (for example, by non-

[10] *Carr v. State*, 554 A.2d 778, 780 (Del. 1989) (declining to adopt a "mailbox rule" for pro se prisoners, thereby requiring notice of appeal to be received (not mailed) within 30 days after the date of the judgment or decree, pursuant to 10 *Del.C.* § 147); BLACK'S LAW DICTIONARY (8th ed. 2004).

[11] Because the Court finds that Paragraph 8 is ambiguous and that it does not require delivery of notice of termination by certified mail, the Court need not reach the issue of waiver.

certified mail or by hand-delivery) then notice would not be deemed "duly given" until it was delivered, as opposed to the earlier time of dispatch. Therefore, the Court concludes that Defendants e-mail provided written notice of termination within the time frame of the due diligence period.

VI. CONCLUSION

For the foregoing reasons, Plaintiff's Motion for Summary Judgment is **DENIED**, Defendants' Motion for Summary Judgment is **GRANTED**, and Third-Party Defendants' Motion for Summary Judgment is **GRANTED**.

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Richard R. Cooch

oc: Prothonotary