UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v. Case No. 8:09-cv-87-T-33CPT

ARTHUR NADEL,
SCOOP CAPITAL, LLC,
SCOOP MANAGEMENT, INC.

Defendants,

SCOOP REAL ESTATE, L.P.,
VALHALLA INVESTMENT PARTNERS, L.P.,
VALHALLA MANAGEMENT, INC.,
VICTORY IRA FUND, LTD.
VICTORY FUND, LTD.,
VIKING IRA FUND, LLC,
VIKING FUND, LLC, and
VIKING MANAGEMENT, LLC,

Relief Defendants.

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ORDER

This matter comes before the Court pursuant to the Receiver's Verified Motion to Authorize the Receiver to Retain a $100,000 Earnest Money Deposit (Doc. # 1419), filed on October 3, 2019. Archer Petroleum responded in opposition on October 25, 2019. (Doc. # 1423). The Receiver filed a reply on November 4, 2019. (Doc. # 1425). For the reasons given below, the Motion is denied.

I. Background

The story of how Quest Energy Management Group, Inc. came to be involved in this receivership case is a long one. For now it is sufficient to say that Quest was connected with the operators of a fraudulent scheme, and when those connections were unearthed, Burton W. Wiand (the "Receiver") was appointed as receiver for Quest to manage, martial, and liquidate its assets for the benefit of the scheme's creditors and victims. Since May of 2013, the Receiver has managed and operated Quest, a Texas oil and gas company, and "has long sought to sell Quest to monetize its assets for the Quest Estate and eventual distribution to creditors." (Doc. # 1024; Doc. # 1403 at 2, 3).

On July 24, 2019, the Receiver filed a motion requesting this Court's approval of a private sale of nearly all of Quest's assets to Archer Petroleum, Ltd. for $1 million. (Doc. # 1403). At that point, Archer had already paid a $100,000 earnest money deposit to the Receiver, which is currently being held in escrow. (Id. at 6; Doc. # 1419 at 2; Doc. # 1423 at 5).

On July 26, 2019, the Receiver published a notice of the pending sale in a Texas newspaper, as required by 28 U.S.C.

§ 2001(b). (Doc. # 1404). And on August 8, 2019, the Receiver notified the Court that 10 days had elapsed without the Receiver obtaining a bona fide offer, as that term is defined by statute. (Doc. # 1405).

On August 7, 2019, Archer demanded the return of its earnest money deposit in writing and informed the Receiver that it was cancelling the transaction. (Doc. # 1423-7). Two days later, but before the Court was informed of the cancellation, this Court issued its Order approving the sale of Quest. (Doc. # 1407).

A. The Asset Purchase Agreement

The parties' transaction was governed by an Asset Purchase Agreement (the "APA"), which the parties executed on or about May 8, 2019. (Doc. # 1419 at 4; Doc. # 1423 at 5). The APA provided that it would become effective "as of thirty days after [this Court] issues its final order approving the sale described herein." (Doc. # 1419-1 at 1). Under "Contingencies," the APA stated as follows:

> This Agreement is **contingent upon** (1) compliance with the publication procedures required by 28 U.S.C. § 2001(b), and (2) the non-receipt by Seller of a bona fide offer, under conditions prescribed by the Court, as described in 28 U.S.C. § 2001(b) (a "Bona Fide Offer"). Buyer understands and acknowledges that 28 U.S.C. § 2001(b) prohibits the Court's approval and confirmation of the transaction contemplated by this Agreement if

> Seller receives a Bona Fide Offer. As such, upon receipt of a Bona Fide Offer, Seller shall have the exclusive right to terminate this Agreement, and Buyer's sole and exclusive remedy for such termination is limited to the return of its Deposit, as set forth below. If the Seller does not receive a Bona Fide Offer after compliance with the publication procedures required by 28 U.S.C. § 2001(b), this Agreement is **further contingent upon** Seller obtaining an Order in substantially the form as Exhibit "B" attached hereto (the "Order") approving: (1) the sale of the Assets described in Exhibit "A" to Buyer free and clear of all liens, claims, encumbrances, and restrictions as provided for in the [Order] . . . and (2) Buyer's quiet enjoyment of all assets assigned to and assumed by Buyer (collectively, the "Contingencies").

(Id. at 2) (emphases added).

Importantly, the APA has a discrete section entitled "Earnest Money Deposit," in which Archer promised to pay $100,000 as an earnest money deposit into an escrow account that would be applied at closing to the purchase price. (Id.). Under the "Earnest Money Deposit" section, the APA further provides that:

> (a) Buyer hereby acknowledges and agrees that the Earnest Money Deposit becomes nonrefundable on the date the Court enters an Order . . . approving the sale of the Assets to Buyer.
>
> (b) In the event that Seller cannot satisfy the Contingencies within thirty (30) days from the date of the issuance of the Order (the "Contingencies Period") or is otherwise unable to conclude the transaction contemplated hereunder, Seller shall return the Earnest Money Deposit to Buyer within fifteen (15) business days following the expiration of the Contingencies Period.

(Id.).

The APA states that it is governed by Texas law and that this Court will resolve "all disputes and matters whatsoever arising under, in connection with, or incident to this Agreement[.]" (Id. at 6).

The Receiver now seeks to retain the $100,000 earnest money deposit paid by Archer. (Doc. # 1419). Archer, naturally, wants the money returned. (Doc. # 1423). The Court has reviewed the Receiver's Motion, Archer's response in opposition, the Receiver's reply, and the Motion is now ripe for adjudication.

II. Legal Authority

A federal court sitting in diversity must apply the forum state's choice of law rules. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941). It is well-settled that "Florida courts are obligated to enforce choice-of-law provisions unless a showing is made that the law of the chosen forum contravenes strong public policy or that the clause is otherwise unreasonable or unjust." Gilman + Ciocia, Inc. v. Wetherald, 885 So. 2d 900, 902 (Fla. 4th DCA 2004). No such showing has been made. Accordingly, this Court will apply Texas law, as contemplated in the APA, to the facts here.

Under Texas contract law, unambiguous contracts are construed as a matter of law. Plains Expl. & Prod. Co. v. Torch Energy Advisors Inc., 473 S.W.3d 296, 305 (Tex. 2015). A contract is not ambiguous if its language can be given a definite or certain meaning. Id. But if the contract is subject to two or more reasonable interpretations, the contract is ambiguous. Id.

"In construing a written contract, [a court's] primary objective is to ascertain the parties' true intentions as expressed in the language they chose." Id. The parties' intent must be taken from the agreement itself, and the agreement must be enforced as written. Jacobson v. DP Partners Ltd. P'ship, 245 S.W.3d 102, 106 (Tex. App. 2008). Courts consider the entire contract, giving effect to all of its provisions so that none are rendered meaningless. Plains Expl., 473 S.W.3d at 305; see also Coker v. Coker, 650 S.W.2d 391, 394 (Tex. 1983) (explaining that courts should favor an interpretation that "affords some consequence to each part of the [agreement] so that none of the provisions will be rendered meaningless"). Courts also give words their plain, common, or generally accepted meaning, unless the contract shows that the parties used the words in a different sense. Plains Expl., 473 S.W.3d at 305.

III. Analysis

The APA provides that the Earnest Money Deposit "becomes nonrefundable on the date the Court enters an Order . . . approving the sale[.]" (Doc. # 1419-1 at 2). The obvious implication of this language is that the parties intended that the deposit be **refundable** until that event occurred. See Huntley v. Enon Ltd. P'ship, 197 S.W.3d 844, 852 (Tex. App. 2006)(holding that where the clear and unambiguous terms of the contract indicated that earnest money became nonrefundable only upon assumption of a loan, and that condition never occurred, paying party was entitled to refund). The APA is not ambiguous on this point – the only reasonable interpretation of this language is that the escrow deposit was refundable at any point until the date this Court entered its Order. See Plains Expl., 473 S.W.3d at 305.

Here, Archer demanded a refund of its earnest money on August 7, 2019 — two days before this Court entered its Order approving the sale of Quest on August 9, 2019. Thus, under the plain terms of the APA, Archer is entitled to a refund of its entire $100,000 earnest money deposit.

The Receiver argues that the deposit "was only refundable if the Court specifically refused to approve the transaction" or if the Receiver failed to close within 30

days of the entry of the Court's Order. (Doc. # 1419 at 5; Doc. # 1425 at 3). If this is what the Receiver contemplated, he should have ensured that the APA said so. But it does not. The APA does not state that the deposit is nonrefundable "unless and until the Court refuses to approve the transaction." Instead, it expressly states that the deposit "becomes nonrefundable on the date the Court enters an Order . . . approving the sale of the Assets to Buyer." (Doc. # 1419-1 at 2). And while the Court acknowledges that the APA provides that the Receiver would return the earnest money deposit if it was "unable to satisfy the Contingencies within thirty (30) days" of the Court's Order, this is a separate provision from that governing what makes the deposit "nonrefundable."

The Receiver contends that the APA does not allow, or even contemplate, that Archer may cancel the agreement based upon its subjective determination that the Receiver required too much time to obtain the Court's approval of the sale. (Doc. # 1419 at 2, 11-12). Archer does not dispute that this was indeed its reason for cancelling the transaction, but argues that this Court entering its Order approving the sale was a condition precedent to the APA becoming effective. (Doc. # 1423 at 7-9). The Court agrees.

A condition precedent is an event that must happen or be performed before a right can accrue to enforce an obligation. Centex Corp. v. Dalton, 840 S.W.2d 952, 956 (Tex. 1992). Texas courts have construed contingent provisions in contracts as conditions precedent, typically in the context of buyers obtaining financing. See Knox v. Townes, 470 S.W.2d 290, 292 (Tex. Civ. App. 1971) ("Parties to a contract may agree that it shall not become effective or binding until or unless some specified contingency has been met. Such a stipulation creates a condition precedent, and no liability or obligation can arise on the part of the promisor, and there can be no breach of the contract by him, until the condition occurs or is performed." (citations omitted)); see also Watkins v. Williamson, 869 S.W.2d 383, 385 (Tex. App. 1993) (concluding that buyers did not obtain financing that was satisfactory to them and thus the condition precedent was never met).

Here, under the plain terms of the APA, the parties clearly intended that the APA was "contingent" on the Receiver obtaining Court approval of the sale and that the APA would not even become "effective" until 30 days after the Court issued such Order. (Doc. # 1419-1 at 1, 2).

It is true that Archer's unilateral cancellation of the agreement was not one of the scenarios explicitly envisioned

by the APA. But this does not change the clear directive that the escrow deposit was refundable up until this Court entered its Order. See SAS Inst., Inc. v. Breitenfeld, 167 S.W.3d 840, 841 (Tex. 2005) ("The intent of a contract is not changed simply because the circumstances do not precisely match the scenarios anticipated by the contract."). Similarly, the Receiver argues that it alone had the "exclusive right" to unilaterally terminate the contract, but the Court notes that the APA gave the Receiver that "exclusive right" only "upon receipt of a Bona Fide Offer," and did not include similar language with respect to the additional or further contingency of a Court order approving the transaction. (Doc. # 1419-1 at 2).

Reading the APA's provisions regarding its effective date, contingencies, and the refundability of the earnest money deposit together, and attempting to give effect to all provisions of the agreement, it is clear that Archer had the option of requesting a refund of the money and had no obligation to perform under the contract until the condition precedent – here, the Court's approval of the sale – had taken place. See Huntley, 197 S.W.3d at 852; see also Moayedi v. Interstate 35/Chisam Rd., L.P., 438 S.W.3d 1, 7 (Tex. 2014) (explaining that courts must "examine and consider the entire

writing in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless" (emphases omitted)).

Pursuant to the APA, Archer is entitled to a refund of its $100,000 earnest money deposit. The Receiver is directed to return the $100,000 earnest money deposit to Archer forthwith and file a notice with this Court confirming that it has done so.

Accordingly, it is now

ORDERED, ADJUDGED, and **DECREED:**

(1) The Receiver's Verified Motion to Authorize the Receiver to Retain a $100,000 Earnest Money Deposit (Doc. # 1419) is **DENIED.**

(2) The Receiver is directed to immediately return to Archer its $100,000 earnest money deposit and, when that has been completed, file a notice with this Court confirming that it has done so.

DONE and **ORDERED** in Chambers in Tampa, Florida, this 26th day of November, 2019.

Virginia M. Hernandez Covington

VIRGINIA M. HERNANDEZ COVINGTON
UNITED STATES DISTRICT JUDGE