IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Frank S. Perano, t/a GSP Management Co.	:	
v.	:	
Zoning Hearing Board of Tilden Township and Tilden Township Board of Supervisors	:	
Appeal of: Board of Supervisors of Tilden Township	:	No. 223 C.D. 2010 Argued: October 12, 2010

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: December 22, 2010

Tilden Township Board of Supervisors (Township) appeals from the Order of the Court of Common Pleas of Berks County (trial court) which granted the Motion to Enforce filed by Frank S. Perano t/a GSP Management (GSP).

This action was originally filed in 1997 as a Notice of Appeal from the Township's adoption of a zoning ordinance which GSP claimed impeded its ability to develop Pleasant Hills Mobile Park. After an appeal to this Court in 1998, the parties decided to settle their dispute and entered into a Stipulation and Consent Order (Consent Order) which was approved by the trial court on November 16, 1999.

The Consent Order provided that the Township and GSP would "cooperate and use their best efforts" to develop a public municipal water and sewer in the area of the mobile home park. Specifically, the Consent Order provided that the Township would make available to GSP "30,000 gallons of sewage and water capacity" subject to GSP securing a letter of credit to secure the cost of the sewage capacity, and subject to the Township acting as intermediary to assist GSP in the acquisition of sewage capacity. Stipulation and Consent Order and Decision, November 16, 1999, at 6; Reproduced Record (R.R.) at 36a.

Upon receipt of approval of the Final Plan, GSP was to install a new sewage collection and transportation system and public water distribution system separate from the existing sewage and water systems. The cost of the design and installation of the new sewer system and water system was to be shared by the Township and GSP. The Township was to make water available to GSP within 5 years of the approval of the Final Plan. Stipulation and Consent Order and Decision, November 16, 1999, at 7; R.R. at 37a.

Phase VI of the Mobile Home Park received conditional final approval from the Township on July 7, 2006. The letter which conditionally approved Phase VI provided 10 conditions of approval and was signed by GSP. One of the conditions provided that the "developer [GSP] needs to address the source of potable water … for this development." Township Conditional Approval Letter, July 7, 2006, at 1-2; R.R. at 126a-127a.

On February 13, 2008, GSP filed a Petition to Enforce provisions of the Consent Order relating to sewer and water. Specifically, GSP alleged that the Township failed to discharge its duties when it failed to make available to the

mobile home park 30,000 gallons of water capacity upon final land development approval. GSP requested that the trial court direct the Township "to immediately deliver to the Petitioner [GSP] thirty thousand (30,000) gallons of water capacity for Phase VI." Petition to Enforce at 4; R.R. at 49a.

Four hearings were held. GSP's witnesses testified that there were a number of possible water sources that were not explored by the Township. Two wells could have been abandoned and replaced with one, or a new well could have been drilled. Also, water could be purchased from a neighboring municipality.

On January 7, 2010, the trial court entered an order which granted the Petition, in part. The trial court concluded that the Township efforts were "sporadic at best" and that the Township did not use its "best efforts" to develop a public municipal water and sewer system for the mobile home park. Trial Court Opinion, April 30, 2010, at 6. The trial court ordered the Township to, within 90 days, **develop a plan** to provide water to the mobile home park and either: (1) apply to the DEP to use existing Blue Water Mountain Cooperative (BWMC) public water wells; or (2) separate existing wells from BWMC, if necessary, and secure a permit from the DEP so that the water might serve as community water for Phase VI; or (3) drill a new well on existing property or obtain property for a well to serve as community water for Phase VI; or (4) secure water from an additional source to serve as a community water system for Phase VI.

On appeal[1], the Township raises two issues: (1) whether the trial court erred when it granted the Petition of GSP to Enforce where "conditions precedent" were not met, and the Petition to Enforce was premature; and (2) whether the trial court erred when it concluded that the Township failed to make its best efforts to comply with the provisions of the Consent Order regarding public water for Phase VI and where GSP did not make its best efforts?

I.

Was the Petition to Enforce Premature?

First, the Township argues that the Petition to Enforce was premature. The Township argues that GSP was required to meet certain prerequisites before the Township was required to perform. Specifically, the Township alleges that GSP did not obtain Final Plan approval for Phase VI and did not post the required financial security (a letter of credit) as required by Paragraph 13(A)(i) of the Consent Order. The Township contends that these were "conditions precedent" to its duty to perform.[2]

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[1] This Court's review is limited to determining whether the trial court abused its discretion, committed an error of law, or reached a conclusion not supported by substantial evidence. Groner v. Monroe County Board of Assessment Appeals, 569 Pa. 394, 803 A.2d 1270 (2002).

[2] The Township also contends that by "signing off" on the July 7, 2006, conditional approval letter, GSP agreed to "provide a water source for the development" and waived any provision in the Consent Order which the trial court interpreted as requiring the Township to procure the water source. Township Conditional Approval Letter, July 7, 2006, at 1-2; R.R. at 126a-127a. This Court does not agree that the letter trumped the Consent Order. Further, the letter simply stated that the developer [GSP] agreed to "address" the source of potable water.

Generally speaking, a condition precedent is a condition that must occur before a duty to perform under a contract arises. Davis ex rel. Davis v. Government Employers Insurance Company, 775 A.2d 871 (Pa. Super. 2001). While parties to a contract need not utilize any particular words to create a condition precedent, an act or event designated in a contract will not be construed as one unless that is the parties' clear intention. Id. at 874.

Here, the Consent Order did not specifically define these items as conditions precedent and it is not clear that the parties intended that GSP obtain final plan approval and provide financial security before the water source was located. In fact, according to GSP witnesses, whom the trial court credited, GSP could not obtain final approval or move forward with development until it had an identifiable water source.

In this regard, James Perano (Mr. Perano) acknowledged that he did not have final approval for Phase VI, but had conditional approval. Hearing Transcript, June 24, 2008 (H.T.), at 31; R.R. at 283a. However, he explained that the Township did not provide the water that was required for final approval of Phase VI. H.T. at 46; R.R. at 287a. Mr. Perano testified that GSP did not apply for an occupancy permit, or sign an improvement agreement because the water was not yet acquired and he did not know if the development would go forward. H.T. at 32; R.R. at 283a. Mr. Perano further explained: "All of [these conditions for final land approval] are expensive and will result in an investment on my part of hundreds of thousands of dollars. I'm not going to invest money until I know I have the water. I have requested the water three times and the Township hasn't responded." H.T. at 47; R.R. at 283a.

Mr. Perano further explained during his testimony, "all of those conditions are triggered by the availability of water. Without water, why would I build the distribution system? Where would I know where to put my lines?" H.T. at 26; R.R. at 282a.

With respect to financial security, the Consent Order provided that a letter of credit was required for *sewer* service, not water service. Paragraph 18(A)(i) specifically provided that the Township would provide 30,000 gallons of sewage and water capacity upon receipt of final approval of Phase VI and VII. The final approval was contingent upon GSP receiving "a letter of credit **to fully secure the cost of sewage capacity** incurred by [the Township] in purchasing sewage capacity…" Stipulation and Consent Order and Decision, November 16, 1999, at 7; R.R. at 37a (Emphasis added).

Mr. Perano explained that he was not going to invest in the sewer infrastructure without having the water in place, and that is why he did not provide the letter of credit. H.T. at 31; R.R. at 283a. Mr. Perano testified: "I'll be happy to [provide a letter of credit] most quickly. All I need to know is where I'm getting the water." H.T. at 34; R.R. at 284a. The trial court accepted Mr. Perano's explanation and noted:

> To require GSP to expend considerable sums of money to install a sewer collection and transportation system and/or public water distribution system, without even an assurance that there will be water available, defies logic.

Trial Court Opinion, April 30, 2010, at 8.

Here, the trial court merely required the Township, pursuant to Consent Order, to "develop a plan" for the procurement of water to the mobile home park. The trial court based its four alternatives on the pleadings and submitted testimony and on what it believed was feasible and appropriate under the Consent Order. It was the trial court's intention that once the plan was in place, then GSP would be able to apply for final approval and move forward with installation of the water distribution and sewer system, and likewise move forward with the development.

This Court agrees with the trial court that "[t]here must be some determination as to how the necessary water will be procured" and that the Township must "make some clear concerted effort to these ends to comply with its obligations under the Consent [Order], and to finally reach a resolution to this case." Trial Court Opinion, April 30, 2010, at 7.

The trial court's resolution of the dispute was reasonable and its decision was supported by substantial evidence.

II.

Did the Trial Court Err When it Found the Township Had not Made its Best Efforts to Provide Water to GSP?

In its second issue, the Township argues that the trial court erred when it concluded that the Township did not use its best efforts, and what the trial court ordered the Township to do was beyond what it was required to do under the Consent Order. The Township asserts that the trial court violated the Pennsylvania Supreme Court's declaration in Merritz v. Circelli, 361 Pa. 239, 64 A.2d 796 (1949), that a court may not "enforce a contract so radically different from that

which the parties entered into and so beyond their contemplation as to work both a probable hardship and an injustice." Merritz, 361 Pa. at 245; 64 A.2d at 799. Here, BWMC wells were not a feasible as a water source, and there was no obligation under the Consent Order to drill a well. The Consent Order was simply an agreement to attempt to locate a source of public water for the mobile home park.

Initially, this Court notes that contrary to the Township's position, the trial court's order did not compel the Township to actually deliver water. Actually, the trial court only required the Township to develop a plan and take steps to secure the water source. The trial court clearly stated in its opinion:

> This Court in its discretion directed Tilden [Township] to merely come up with a plan as to the feasibility of producing water. This Court did not direct Tilden [Township] to immediately 'make available the water.' There is nothing in the Consent Order to preclude Tilden [Township] at this juncture from finally coming up with a plan as to how the acquisition of water will proceed.

Trial Court Opinion, April 30, 2010, at 5.

The Township also contends that the Consent Order required both parties "to use their best efforts" and "cooperate with each other" with respect to "the development of public municipal water." The Township claims that the trial court erred when it found that the Township had not used its best efforts.[3] The Township has recounted the testimony of its witnesses who explained its efforts to

[3] "Best effort" is an obligation greater than the usual good faith required in the performance of a contract. See National Data Payment Systems v. Meridian Bank, 212 F.3d 849 (3d Cir. 2000), quoting 2 E. Allen Farnsworth, Farnsworth on Contracts, 383-84 (2d. Ed. 1998).

find a public municipal water supply and the reasons why converting the BWMC system was not feasible. Those reasons had to do with "wellhead protection distance requirements." According to the Township's witnesses, application for permit to the DEP would have been futile. Finally, the Township argues that the testimony demonstrated that GSP did not use its best efforts.

GSP counters that the Township is the actual owner of BWMC and that this water source contained three supply wells, and a half-million gallon water storage tank. At the time, there was a permit which authorized 160,000 gallons per day. If the wells ran continuously, they could have produced up to 360,000 gallons per day. A permit for greater usage could have been requested.

Witnesses for the Township admitted that they had not taken any steps to procure a water source between 1999 and 2003, and that on January 23, 2003, there was a single meeting between the Township and DEP regarding water for the mobile home park. At that meeting the DEP did not inform the Township that it would be impossible to convert the water system to a community water system. In the last ten years since the Consent Agreement was signed, the Township did one thing: it had a meeting with the DEP in January 2003. GSP argues that the single meeting may not be deemed as the equivalent of making one's best efforts.

This Court discerns no error in the trial court's conclusion that the Township did not use its best efforts. Whether a party fulfills its best efforts requirement is a factual determination which depends on all the circumstances. Lowell v. Twin Disc, Inc., 527 F.2d 767 (2d. Cir. 1975). Here, the trial court clearly considered all of the evidence and made credibility determinations and conclusions based on that evidence.

The evidence adequately supported the trial court's conclusion that the Township failed to diligently pursue all reasonable means to achieve the objectives set out in the Consent Order. Ronald Tirpak, the Township's engineer, admitted that between November of 1999 and January of 2003, the Township took no action to ascertain the feasibility of obtaining water. H.T. at 115; R.R. at 304a.

There were reasonable, viable means for achieving the objectives of the Consent Order that were simply not investigated or pursued by the Township and these options were reasonable in light of the Township's ability and means. With respect to the BWMC wells, the record established that the Township made no effort to apply to the DEP to permit any of the existing wells at the BWMC or even begin the application process. Further, the record established that the Township also could have pursued a protective easement or proceed in eminent domain to secure the Well Head Protective Zones necessary for use of the existing wells.[4] Also, the Township did not consider Well #4 as a possible water source and made no attempt to determine its yield or location. Finally, the Township never looked into the cost or feasibility of purchasing water from a neighboring municipality.

The evidence established that despite a nine-year time lapse, the Township did not use its best efforts to provide water to the mobile home park.

[4] The record reflects that the Township did not apply to the DEP to permit the existing wells; therefore, its suggestion that wellhead protection could not be met was speculative and properly disregarded by the trial court.

The Order of the trial court is affirmed.

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BERNARD L. McGINLEY, Judge

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O R D E R

AND NOW, this 22nd day of December, 2010, the order of the Court of Common Pleas of Berks County in the above-captioned case is hereby affirmed.

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BERNARD L. McGINLEY, Judge