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Transactional Issues/Remediation: Pennsylvania Court Addresses Whether Imposition of Environmental Covenant Constitutes Material Breach

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The Superior Court of Pennsylvania ("Court") addressed in a June 30th Opinion issues arising out of the sale and financing of a service station ("Property"). See *Schluth v. Krishavtar, Inc.*, No. 2013 EDA 2019, 2020 WL 3542236, at *1 (Pa. Super. Ct. June 30, 2020).

The issues involved the investigation and remediation of subsurface contamination on the Property.

William Schluth ("Schluth") owned a gasoline service station in Philadelphia, Pennsylvania for twenty-four years when Brian Panchal and Balkrushna Panchal ("Panchal") inquired as to whether the property was for sale.

On September 4, 2008, Krishavtar, Inc. ("Krishavtar") and Schluth entered into an Agreement of Sale ("Agreement"). Pursuant to the Agreement, Krishavtar would acquire the Property by putting a certain amount down and paying the remaining balance in monthly installments. The parties further agreed that a final payment would be paid on any remaining principal and accrued interest.

Krishavtar was to conduct any Pennsylvania Department of Environmental Protection Agency ("PADEP") testing by September 25, 2008. Schluth agreed to perform Phase I and Phase II environmental testing before closing on the purchase. Phase II testing results determined that there was contamination on the property that required remediation. Schluth agreed to pay for the remediation.

The parties subsequently entered into an Amendment to the Agreement. Further, Panchal signed a personal guarantee. The Amendment provided that Schluth would not select any remediation standard that would require an environmental covenant be imposed on the Property without the express written consent of Krishavtar. The parties also agreed that Schluth would take whatever action necessary to ensure that the remediation complied with all applicable laws.

To obtain PADEP approval, the Property had to be remediated under a combination of the Site-Specific and State Health Standards. Such approval required imposition of an environmental covenant. Krishavtar was stated to have been repeatedly advised since August 2009 that the Property would require remediation and an environmental covenant would likely be necessary. He is stated to have never indicated that an environmental covenant would not be executed under any circumstances.

Over a period of eight years, Schluth submitted several documents to the PADEP indicating the Site-Specific standard would be used, which necessarily required an environmental covenant. Krishavtar was never given the opportunity to review these plans, let alone give written consent.

On March 2, 2017 Panchal received a copy of the Environmental Covenant that was approved by the PADEP. He refused to sign the Environmental Covenant. This was despite the fact he was made aware of it in 2009. Panchal/Krishavtar stopped making payments on the Mortgage and Note in March 2017.

In June 2017, Schluth brought breach of contract and mortgage foreclosure actions against Panchal and Krishavtar. In response, Panchal and Krishavtar brought counterclaims against Schluth and argued that their performance was excused by Schluth's breach.

The Court agreed with the lower court's finding that Schluth breached the Agreement by failing to obtain Krishavtar's express written consent to the remediation standard. However, the Court noted that only a material breach would excuse Panchal and Krishavtar from making payments.

The Court considered the following factors in determining whether the breach was material:

1. the extent to which the injured party will be deprived of the benefit which he reasonably expected;
2. the extent to which the injured party can be adequately compensated for that part of the benefit of which he will be deprived;
3. the extent to which the party failing to perform or offer to perform will suffer forfeiture;
4. the likelihood that the party failing to perform or offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
5. the extent to which the behavior of the party failing to perform or offer to perform comports with standards of good faith and fair dealing.

Based on those factors, the Court affirmed the lower court's finding that Schluth's breach was immaterial. It reasoned that Krishavtar was repeatedly advised of the fact that the Property would have to be remediated under this standard.

The Court also noted that the requirements of the covenant would be applicable regardless of the remediation standard utilized because they are required of all gasoline service stations in the city of Philadelphia. Further, the Property was not going to be remediated to obtain the PADEP approval under any other standard. Therefore, Krishavtar was not deprived of any benefit that it was reasonably expected.

The Court affirmed the lower court's decision and remanded it in part to calculate damages.

A copy of the Opinion can be downloaded [here](#).