2020 WL 5843901

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,
Seventh District, Carroll County.

LINDA M. FISCUS, SUCCESSOR TRUSTEE OF THE MORVATZ FAMILY REVOCABLE LIVING TRUST DATED JULY 27, 1999, Plaintiff-Appellee,
v.
THOMAS NORDQUIST, Defendant-Appellant.

Case No. 19 CA 0936
|
Dated: September 24, 2020

Civil Appeal from the Court of Common Pleas of Carroll County, Ohio

Case No. 17CVH28906

JUDGMENT: Affirmed.

Attorneys and Law Firms

Atty. James Wherley Jr. and Atty. Whitney Willits, Black, McCuskey, Souers & Arbaugh, 220 Market Avenue South, Suite 1000, Canton, Ohio 44702, for Plaintiff-Appellee and

Atty. Mary L'Hommedieu and Atty. Kevin L'Hommedieu, L'Hommedieu & McGrievy, LLC, 100 North Main Street, Suite 350, Chagrin Falls, Ohio 44022, for Defendant-Appellant.

BEFORE: David A. D'Apolito, Gene Donofrio, Cheryl L. Waite, Judges.

OPINION AND JUDGMENT ENTRY

***1 D'APOLITO, J.**

{¶1} Defendant-Appellant, Thomas D. Nordquist appeals the judgment entry of the Carroll County Court of Common Pleas granting summary judgment in favor of Plaintiff-Appellee, Linda Fiscus, Successor Trustee of the Morvatz Family Revocable Living Trust Dated July 27, 1999, and overruling his cross motion for summary judgment, in this action alleging the breach of a contract to purchase real property. The trial court opined that Appellant breached the purchase agreement when he failed to terminate or complete the contract on or before the Phase II closing date, September 1, 2016. The trial court further opined that Appellant acted in bad faith when he predicated the termination of the contract on the discovery of wetlands on a nominal portion of the real property.

{¶2} In this appeal, Appellant contends that he had the right to terminate the contract prior to the Phase II closing date, which had been unilaterally extended by Appellee until October 28, 2016, based on the disclosure of wetlands on the Phase II property in a title survey completed on October 26, 2016. Because the extension of the Phase II closing date was not executed in writing and signed by both parties, as required by the contract, the entry of summary judgment in favor of Appellee and the denial of Appellant's cross motion for summary judgment is affirmed.

FACTS AND PROCEDURAL HISTORY

{¶3} The property at issue in this appeal was originally comprised of 51.79 acres of undeveloped land located in Center Township in Carroll County, and was part of the Morvatz family farm for several generations ("Property"). In early 2015, the Trust and its beneficiaries, Appellee and her four brothers, were not actively marketing the Property.

{¶4} About that time, Appellee was approached by a local realtor, JoAnn Clark, to gauge Appellee's interest in selling the farm to Appellant for the purpose of constructing an assisted living facility. Appellant had been involved in the construction, ownership, and operation of numerous medical centers, healthcare facilities, and assisted-living facilities in Ohio and Florida since 1981.

{¶5} On March 13, 2015, the parties executed the purchase agreement at issue in this appeal ("Purchase Agreement"), which reads, in pertinent part:

> Agreement to Purchase and Sell. Seller agrees to sell to Purchaser, and the Purchaser agrees to purchase from Seller, the Property in two phases upon the terms set forth

in this Agreement. The Phase I Property shall consist of approximately 17 acres, subject to survey, as depicted on "Exhibit B" attached hereto. The Phase II Property shall consist of the balance of the Seller's acreage, approximately 34.79 acres, after the conveyance of the Phase I Property.

Purchase Price. The purchase price to be paid by Purchaser to Seller for the Property (the "Purchase Price") shall be at Sixteen thousand dollars ($16,000.00) per acre as determined by actual survey and shall be approximately Two hundred seventy-two thousand Dollars ($272,000.00) for the Phase I Property and Five hundred fifty-six thousand six hundred forty Dollars ($556,640.00) for the Phase II Property.

*2 * * *

Closing. The closing of the sale of the Phase I Property to Purchaser (the "Phase I Closing" or "Phase I Closing Date") will occur within thirty (30) days following the expiration of the Inspection Period as set forth in Paragraph 8 hereof * * * . The closing of the sale of the Phase II Property to Purchaser (the "Phase II Closing" or "Phase II Closing Date") shall occur no later than twelve (12) months following the "Phase I Closing", provided however, that at Purchaser's option, he may extend the "Phase II Closing" an additional twelve (12) months by giving Seller written notice thereof prior to May 1, 2016 and placing an additional Ten Thousand and 00/100 Dollars ($10,000.00) on deposit with Escrow Agent * * *

{¶6} Section 5 of the Purchase Agreement, captioned "Evidence of Title and Zoning," reads in pertinent part, "[s]hould Purchaser desire, Purchaser may, at his sole cost and expense, obtain an ALTA survey of the Property." If a survey reveals any encroachment, lien, encumbrance or other defect in title to the Property, Appellant is required to deliver to Appellee a notice which specifies each alleged defect within ten days of the receipt of the survey. Upon receipt of the notice, Appellee is provided an opportunity to cure any defects. If the defects are not cured in thirty days, Appellant has the authority to terminate the Purchase Agreement. Any defects which are not identified in a defect notice that is not timely delivered to Appellant will be deemed to have been waived by Appellant and further deemed a "Permitted Exception." There is no time limit set forth in Section 5 for the completion of the ALTA survey.

{¶7} Section 8 of the Purchase Agreement, captioned "Inspection Period," comprises almost four full pages of the seventeen-page document. Section 8 reads, in pertinent part:

(a) Subject to the provisions of this Paragraph 8, Purchaser will have the right to enter upon the Property to investigate the Property and conduct environmental testing/studies, engineering studies, soil tests, land use and planning feasibility studies ... and other investigations that Purchaser desires, at Purchaser's sole cost and expenses, for a period of time beginning on the Effective Date of this Agreement and ending on May 1, 2015 (the "Inspection Period").

(b) If Purchaser determines, in Purchaser's sole and absolute discretion, not to acquire the Property on or before the expiration of the Inspection Period, then Purchaser may, at its option, terminate this Agreement by written notice to Seller on or before the expiration of the Inspection Period. Upon termination of this Agreement by Purchaser pursuant to this Paragraph 8(b), Seller and Purchaser will be relieved of any liability under this Agreement, and the Escrow Agent shall release the Deposit to the Purchaser. If Purchaser does not deliver written notice of termination to Seller pursuant to Paragraph 8(b) on or before the expiration of the Inspection Period, Purchaser will be deemed to have waived its right to terminate this Agreement pursuant to this Paragraph 8(b) and to have elected to proceed to the Closing.

*3 {¶8} Section 20 of the Purchase Agreement, reads, in its entirety, "No amendments, waivers, or modifications of this Agreement will be made or deemed to have been made unless in writing and executed by both Seller and Purchaser." As a consequence, when Appellant sought two extensions of the Inspection Period, first to June 15, 2015, and, later, to July 15, 2015, the parties executed signed written amendments. (Deposition of Thomas D. Nordquist, Exh. F, p. 87-89.)

{¶9} As a result of the second amendment, the latest the Closing Date of Phase I could occur was August 14, 2015. On that day, a third amendment was executed between the parties, which extended the Phase I Closing Date to September 1, 2015. (*Id.* at p. 90.) The third amendment extending the Phase I Closing Date acknowledges that Inspection Period ended

as of July 15, 2015. Each of the three amendments read, in pertinent part, "Except as hereinabove modified, all other terms and conditions, as well as the dates specified in the [Purchase Agreement], shall remain in full force and effect and are hereby ratified by the undersigned."

{¶10} Section 8(f) of the Purchase Agreement authorizes Appellant to conduct an "**Environmental Audit**" on or before April 15, 2015 and contains several definitions of terms used in the subsection. At the conclusion of the definitional portion of Section 8(f), and with no subheading or assigned subsection, Appellee makes "the following additional warranties, representations and covenants: * * * (G) To the best knowledge of Seller, the Property does not contain any wetlands."

{¶11} Section 10, captioned "Purchaser's Conditions to Closing," reads, in pertinent part: "Purchaser's obligation to buy the Property will be expressly contingent upon and subject to the satisfaction, [sic] the following conditions: * * * "(b) * * *all of the Seller's representations and warranties shall be true and correct in all material respects on the date of Closing * * *." Section 10 provides that any condition set forth in Section 10 is deemed to be satisfied and/or waived on the Closing Date unless and until Appellant notifies Appellee in writing that it has not been satisfied or waived. Appellant has the authority to terminate the agreement prior to the Closing Date pursuant to Section 10.

{¶12} Section 12, captioned "Termination," reads in pertinent part:

> (a) In addition to the express termination events set forth in this Agreement, this Agreement may be terminated and the transactions contemplated hereby may be abandoned at any time, but not later that the date of Closing:
>
> * * *
>
> (iv) by Seller or Purchaser if a condition to Closing is not satisfied or waived on or prior to the date of Closing.

{¶13} In her answers to interrogatories, Appellee was asked to "state when [she] became aware that there were wetlands on the Phase II portion of the property." Appellant responded, "the only wet area I'm aware of on the property is a small readily visible stream that runs along the driveway leading to Kensington Road in between the barn and the adjacent property the defendant would have easily seen himself with even a casual visit to the [Property]."

{¶14} At Appellee's deposition, Appellant's counsel asserted that her response to the interrogatory was incomplete, because she did not state when she became aware that there were wetlands on the Property. She responded, "other than the stream, I'm still not aware." (Appellee's Depo., p. 21.) When asked, "So how long have you been aware of the stream," she responded, "Ever since I first started going on the [Property.] It's adjacent to the barn." (*Id.*, p. 22.) At her deposition, Appellee never identified the first time she visited the Property, however she did testify that she never lived on the Property. (*Id.*, p. 6.)

*4 **{¶15}** Next, Appellee was asked, "[s]o at the time that you signed the contract, you believed there was a wetland on the [Property] in that stream?" Appellee responded, "It was water. Yes." (*Id.*) Opposing counsel replied, "I'm sorry. You just told me that the stream was a wetland. Is that correct?" Appellee responded "I don't know the definition of wetland." (*Id.*, p. 23.)

{¶16} Appellee was asked later in her deposition if she knew that there were wetlands on the Property when she executed the Purchase Agreement, and she responded, "No." (*Id.*, p. 36.) However, she conceded that she knew about the stream at that time, and further conceded that the stream is "damp. It's water." (*Id.*) Appellee observed "a wetland to me is the Everglades * * *, it's vast bird sanctuaries and marshes * * * Spongy ground in the spring on a farm is not a wetland to me." (*Id.* at 43-44.)

{¶17} Closing on the Phase I portion of the Property took place on September 1, 2015 for the purchase price of $272,000.00. Because the Phase I Closing took place on September 1, 2015, the Closing for Phase II was required to occur within twelve months, on or before September 1, 2016, unless the parties modified the contract pursuant to a signed written agreement, as they had done three times in the past.

{¶18} In August of 2016, Appellant had a conversation with Appellee, in which he advised her that he did not have sufficient funds to close on Phase II because the construction on Phase I exceeded the projected budget by $700,000.00. At that time, Appellant also informed Appellee that he had taken

fifteen test borings which showed that the Phase II Property was probably unbuildable.

{¶19} Appellant, who had opened Centreville Village Assisted Living on Phase I shortly before the Phase II Closing Date, testified:

> In the end, the offer was to let them try and cash out on their land, because I was in no position to do it, and I had no intent to four days after I opened the new facility, that I'm going to close on another half million dollars. That's ludicrous.

(Nordquist Depo., p. 122.)

{¶20} Despite his statement that the Phase II property was unbuildable, in August of 2016, Appellant offered to help Appellee negotiate a sale of the Phase II property to three hospitals that had allegedly expressed interest. Appellant further offered to enter into a joint venture with the Trust to develop the Property.

{¶21} The September 1, 2016 deadline expired. On September 7, 2016, Appellee, through counsel, sent a letter to Appellant reminding him of his obligations under the Purchase Agreement, the purchase price of the Phase II Property, and that the September 1, 2016 closing date had passed. Although the contractual time to extend had expired, Appellee offered to allow Appellant to extend the closing through September 1, 2017 (an additional year) if he paid a $10,000.00 non-refundable deposit into the escrow account. The letter also advised Appellant that the Trust was prepared to close on the Phase II property on October 1, 2016.

{¶22} At this point, Appellant engaged counsel. Closing did not occur on October 1, 2016, but emails were exchanged between the parties' counsel on the following day. Appellant sought a three-year extension of the closing date based on his inability to pay the purchase price for the Phase II property.

{¶23} In an October 20, 2016 letter to Appellant, Appellee advised him that the Trust was prepared to close on the Phase II property on October 28, 2016. Attached to the correspondence were the documents required to complete the sale of the Phase II property. The letter states, "Failure on your client's part to close on the date set forth herein will be deemed a breach and default on his part and I will advise my client accordingly." A follow-up e-mail was sent to Appellant's counsel on October 21, 2016, stating that the closing was scheduled for October 28, 2016 at 1:00 P.M.

*5 {¶24} In a letter dated October 25, 2016, Appellant's counsel, for the first time, asserted that there was a defect in the Phase II property, due to the presence of wetlands. As a consequence, Appellant informed Appellee that he was terminating the Purchase Agreement. The October 25, 2016 letter reads, in pertinent part:

> This is to inform you that [Appellant] does not intend to close this transaction on Friday, October 28, 2016.
>
> While we appreciate your willingness to discuss an extension of the Closing date, as you have now issued a date of Closing, we must exercise our contractual right to terminate this agreement due to, among other issues, a defect in the property and a failure of Seller to meet the Conditions of Closing.
>
> We learned yesterday, however, that the property has two dedicated streams and multiple wetland areas. This information was given to me and to [Appellant] by the surveyor completing the ALTA survey and will be reflected on the ALTA survey. We have asked that the ALTA survey be completed and delivered before Thursday, October 27, 2016 – in advance of your scheduled closing date.
>
> Paragraph 5 of the Agreement, "Survey; Evidence of Title and Zoning" is not tied to the Inspection Period and it permits that Purchaser to obtain an ALTA survey of the property with no time constraints. (Section 5(a)). Pursuant to this section, if the Survey shows any encroachment, lien, encumbrance or other defect in title to the property which will materially interfere with Purchaser's proposed use of the Property, as determined in Purchaser's reasonable discretion, Purchaser will, within ten days after the date on which the Survey is delivered to Purchaser, deliver to Seller a notice which specifies each alleged Defect.
>
> Please consider this letter our Notice of Defect, in that there are wetlands on the property and dedicated streams

which are encumbrances, encroachments, and defects significantly impairing the proposed use of the Property. We issue this notice in advance of the delivery of the survey because we have the information now * * * *

{¶25} The letter further cites Section 8(f)(G), which states "to the best knowledge of Seller, the Property does not contain any wetlands." The letter accuses Appellee of breaching the Purchase Agreement because Appellant had been informed that the property contains wetlands, and asserts that Appellee's representations and warranties were no longer true and correct in all material respects as of the date of Closing.

{¶26} Appellant testified about this letter as follows:

Q: What was the purpose of this correspondence to the best of your knowledge?

A: Just [Appellant's counsel] disclaiming the fact to have a closing on October 28th because I wasn't intending to do that and then a disclosure that some report that had been in the works for quite some time was now citing that there was multiple wetlands and dedicated streams, which never was disclosed to me prior to this.

{¶27} In a letter dated October 27, 2016, Vollnogle informed Appellant's counsel that the delineated wetland areas that negatively impact Phase II are 0.16 acres in total. Although the trial court's judgment entry states that 1.16 acres of wetlands were depicted on the ALTA survey, the ALTA survey actually showed 0.161 acres, not 1.16 acres of wetlands.

{¶28} Appellant's October 25, 2016 letter was the first time that Appellant asserted that there were wetlands on the property. The Inspection Period for conducting "environmental testing/studies" and terminating the Purchase Agreement due to such testing had ended on July 15, 2015. Not only had Appellant not raised any environmental issues, he had closed on the Phase I property.

*6 {¶29} In his October 25, 2016 letter, Appellant asserted that he had learned the previous day that the property has two dedicated streams and multiple wetland areas. However, over a year earlier, in a September 18, 2015 e-mail, Vollnogle referenced possible wetland areas upstream from the neighbor's pond. Vollnogle observed that some of the above concerns may not be a reality, but an environmental study would be necessary in order to alleviate liability concerns in today's environmentally conscientious political climate.

{¶30} Discovery in this litigation revealed that Appellant had an environmental testing performed well prior to October of 2016, and had been informed of the presence of wetlands. On March 8, 2016, Vollnogle e-mailed Appellant with the subject line "Chaela Enterprises - Environmental Assessment," writing:

> As I mentioned to you on Friday, our environmental subconsultant and I briefly observed the areas of environmental concern on your current 17 acres and the balance (Purchase Option) of the Morvatz Farm. He provided me with a proposal to perform a detailed investigation of the existing streams to the north and south sides of the property as well as potential wetlands in the vicinity of the lower portion of each stream * * * * His services for the report supplemented by some input from us will be approximately $4,000.00.

{¶31} On May 20, 2016, Vollnogle e-mailed the results of the environmental study to Appellant. Attached to the e-mail was a May 20, 2016 report created by Appellant's environmental "subconsultant" PVE Sheffler, captioned "Wetland and Stream Investigation Centreville Village." The report is fifteen pages long, and contains sections on "Wetlands Investigation," "Wetlands Delineation Plan," and "Wetlands Data Sheets." The report expressly found the presence of "five wetland areas and three Relatively Permanent Waterways were observed within the [Property] boundaries during this investigation."

{¶32} After Appellant's alleged termination of the Purchase Agreement, Appellee attempted to sell the Phase II property

without success. Appellee instituted the present lawsuit in the Carroll County Court of Common Pleas.

{¶33} The parties filed cross-motions for summary judgment, which were denied and the matter was scheduled for trial. The parties filed motions for reconsideration of the cross-motions for summary judgment, and, on May 23, 2019, the trial court issued a revised order granting the motion for summary judgment filed by Appellee and denying the motion for summary judgment filed by Appellant.

{¶34} The trial court found that Appellant breached the Purchase Agreement when it failed to close on Phase II and pay the purchase price of $556,640.00 by the contractual closing date of September 1, 2016, writing:

> Both parties agree that Phase I of the contract was completed upon the full performance of both parties. The closing on Phase I occurred on September 1, 2015, at the contracted purchase price. At this point, the Plaintiff became wholly dependent on the Defendant to complete this portion of the Agreement and close Phase II. Defendant had already started construction on the Phase I property and had even moved earth around on Phase II. Additionally, during this timeframe, Plaintiff had the Phase II property on hold waiting for Defendant to close on that portion, thereby losing any further marketability of Phase II.

(5/23/19 J.E., p. 11.)

{¶35} The trial court continued:

> As of September 1, 2016, Defendant had failed to perform his duty to close Phase II and the Defendant had breached the contract. Plaintiff's continued attempts to perform past the September 1st, 2016 closing[ ] date does not excuse Defendant's non-performance in accordance with this Agreement.
>
> *7 The question then becomes, did the Defendant have a valid defense for failing to perform his duty to close Phase II under the Purchase Agreement? Defendant tries to use several different arguments, but ultimately settles with the argument that he properly terminated the Purchase Agreement pursuant to Sections 10 and 12 of the Purchase Agreement. This Court finds this argument to have no merit.

(*Id.*)

{¶36} In so holding, the trial court rejected Appellant's reasons for not closing on Phase II:

> In addition, Defendant's continuing attempts to prolong the closing date, followed up by a last-minute excuse of undisclosed wetlands is a bad faith effort to terminate the Purchase Agreement. The wetlands in question cover a small percentage of the Phase II land (1.16 acres of a 35-acre tract) and more importantly this excuse for termination was given after the Defendant failed to close on September 1st, 2016. If Defendant wanted to use Sections 10 and 12 to terminate the Purchase Agreement, he should have done so no later than September 1st, 2016. The fact that Defendant waited so long to have an ALTA survey performed does not excuse his obligation to close the Purchase Agreement by September 1st, 2016. This termination argument appears to be offered only in a bad faith attempt to be free from the Defendant's agreement to purchase Phase II.

(*Id.* at 12.)

{¶37} Appellant appealed the May 23rd Judgment Entry, but we dismissed the appeal for lack of a final appealable order. In turn, Appellee filed a partial motion for summary

judgment seeking specific performance of the second phase of the contract and attorney's fees and costs. On October 15, 2019, the trial court issued a judgment entry granting the partial summary judgment. (10/15/19 J.E., at p. 3.) This timely appeal followed.

STANDARD OF REVIEW

{¶38} This appeal is from a trial court judgment resolving a motion for summary judgment. An appellate court conducts a de novo review of a trial court's decision to grant summary judgment, using the same standards as the trial court set forth in Civ.R. 56(C). *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Before summary judgment can be granted, the trial court must determine that: (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most favorably in favor of the party against whom the motion for summary judgment is made, the conclusion is adverse to that party. *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977).

{¶39} "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." (Emphasis deleted.) *Dresher v. Burt*, 75 Ohio St.3d 280, 296, 662 N.E.2d 264 (1996). If the moving party carries its burden, the nonmoving party has a reciprocal burden of setting forth specific facts showing that there is a genuine issue for trial. *Id. at 293.* In other words, when presented with a properly supported motion for summary judgment, the nonmoving party must produce some evidence to suggest that a reasonable factfinder could rule in that party's favor. *Doe v. Skaggs*, 7th Dist. Belmont No. 18 BE 0005, 2018-Ohio-5402, ¶ 11.

*8 **{¶40}** The evidentiary materials to support a motion for summary judgment are listed in Civ.R. 56(C) and include the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact that have been filed in the case. In resolving the motion, the court views the evidence in a light most favorable to the nonmoving party. *Temple*, 50 Ohio St.2d at 327.

ANALYSIS

THE TRIAL COURT ERRED BY GRANTING FISCUS'S MOTION FOR SUMMARY JUDGMENT ON HER CLAIM FOR BREACH OF CONTRACT BECAUSE NORDQUIST TERMINATED THE PURCHASE AGREEMENT ACCORDING TO ITS UNAMBIGUOUS TERMS.

{¶41} When reviewing a contract, the court's primary role is to ascertain and give effect to the intent of the parties. *Hamilton Ins. Serv., Inc. v. Nationwide Ins. Cos.*, 86 Ohio St.3d 270, 273, 714 N.E.2d 898 (1999). A contract that is, by its terms, clear and unambiguous requires no interpretation or construction and will be given the effect called for by the plain language of the contract. *Aultman Hosp. Assn. v. Community Mut. Ins. Co.*, 46 Ohio St.3d 51, 53, 544 N.E.2d 920 (1989). Review of an unambiguous written agreement is a matter of law for the court, which an appellate court reviews de novo. *Cadle v. D'Amico*, 7th Dist. Mahoning No. 15 MA 0136, 2016-Ohio-4747, 66 N.E.3d 1184, ¶ 22.

{¶42} Appellant contends that he had the right to terminate the contract at any time prior to October 28, 2016 based upon Appellee's extension of the Closing Date. He further contends that the discovery of wetlands was the result of the ALTA survey completed on October 26, 2016. Unlike the section of the Purchase Agreement governing environmental studies, which had a deadline for termination of the contract, the provision governing the ALTA survey had no similar deadline. Finally, he asserts that the veracity of Appellee's representation regarding wetlands on the property was a condition precedent to the completion of the Purchase Agreement. He invokes Sections 10 and 12 of the Purchase Agreement, which require that "all of the Seller's representations and warranties shall be true and correct in all material respects on the date of Closing."

{¶43} Appellee argues that her extension of the Closing Date on the Phase II property was merely an extension of time for Appellant to complete the contract, but did not waive any of her contractual rights previously accrued. Section 25, captioned "No Waivers," reads in its entirety, "Any waiver of

a breach of any provision contained in this Agreement must be in writing. No waiver of any breach will be deemed a waiver of any preceding or succeeding breach, nor of any other breach of a provision contained in this Agreement." Further, citing Section 20 of the Purchase Agreement, she argues that Appellant's right to terminate expired on September 1, 2016, because the October 20, 2016 letter and e-mail extending the Closing Date was not an amendment signed by both parties.

{¶44} Finally, Appellee argues that her deposition testimony fails to establish that she was aware that there were wetlands on the Property on the Closing Date. Appellee argues that her representation regarding wetlands on the Property was made to the best of her knowledge, that she misunderstood the definition of the term "wetlands," and that the clear intention of the parties to the Purchase Agreement was that Appellant would undertake environmental studies to determine with certainty whether there were wetlands on the Property. She further argues that Appellant was aware of the existence of wetlands in May of 2016, when the environmental report was issued, but did not terminate the contract.

*9 **{¶45}** Although the parties advance various legal and factual arguments regarding the propriety of Appellant's attempt to terminate the contract on October 25, 2016, we find that the trial court correctly concluded that Appellant's right to terminate the contract ended on September 1, 2016. Based on the Phase I Closing date, Phase II was to close no later than September 1, 2016.

{¶46} Section 20 of the Purchase Agreement prohibits the oral amendment or modification of the terms of the agreement "unless in writing and executed by both Seller and Purchaser." Appellant was aware of the requirements of Section 20 insofar as he executed not one, but three signed written amendments to the Purchase Agreement. The third amendment to the Purchase Agreement extended the Phase I Closing Date to September 1, 2015. Each amendment read in pertinent part, "Except as hereinabove modified, all other terms and conditions, as well as the dates specified in the [Purchase Agreement], shall remain in full force and effect and are hereby ratified by the undersigned."

{¶47} Although Appellee extended a written offer to extend the Closing Date to October 28, 2016, the written offer does not fulfill the Section 20 requirement that an amendment or modification to the Purchase Agreement must be reduced to writing and signed by both parties. Insofar as neither party has the authority to unilaterally amend the contract, we find that the deadline to terminate the contract, assuming for the purposes of this decision that Appellant had contractual authority to do so, was September 1, 2016.

{¶48} Accordingly, the judgment of trial court entering summary judgment in favor of Appellee and against Appellant, overruling Appellant's motion for summary judgment, and ordering specific performance of the Phase II portion of the contract is affirmed.

For the reasons stated in the Opinion rendered herein, the assignment of error is overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Carroll County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

Donofrio, J., concurs.

Waite, P.J., concurs.

All Citations

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