**STATE OF MICHIGAN**
**IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND**
**BUSINESS COURT**

**OAKLAND TECHNOLOGY PARK ASSOC, LLC,**
**Plaintiff,**

**v.** **Case No. 14-141037-CZ**
**Hon. James M. Alexander**

**ARROW ACQUISITION, LLC,**
**Defendant.**
**_____/**

**OPINION AND ORDER RE: SUMMARY DISPOSITION**

This matter is before the Court on Plaintiff's Motion for Summary Disposition. On January 16, 2014, the parties entered into a written Purchase Agreement, whereby Defendant would purchase certain real property in Auburn Hills from Plaintiff. The same date, Defendant and non-party D&G Investment entered into a Construction Management Contract, whereby D&G (apparently a Plaintiff-related entity) would build on the property.

Each of the Purchase Agreement and the Construction Management Contract refers to other – as if they were intended to work in conjunction with one another.

Ultimately, the closing never took place as agreed on March 1, 2014. According to Defendant, its financing fell through. As a result, Plaintiff filed the instant action on a single claim of breach of contract – seeking Defendant's specific performance under the Purchase Agreement.

To this end, Plaintiff now moves for summary disposition under MCR 2.116(C)(9) and (C)(10). A (C)(9) motion tests whether the defendant's defenses are so clearly untenable as a

matter of law that no factual development could possibly deny plaintiff's right to recovery. *Lepp v Cheboygan Area Schools*, 190 Mich App 726 (1991). And a (C)(10) motion tests the factual support for Plaintiff's claims. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

In support of its request, Plaintiff claims that Defendant admitted that it executed the Purchase Agreement and the Construction Management Contract and has failed to state a valid defense for not consummating the transaction.

In response, Defendant claims four basic defenses. First, the Purchase Agreement violates the statute of frauds because it does not specifically identify the property. Second, the Agreement is null and void because the closing never occurred. Third, a condition precedent to the Agreement, Defendant's financing, did not occur. Finally, in the event that the Court determines that it did breach the Agreement, Plaintiff is not entitled to specific performance.

Both parties' arguments are based on language found in written contracts. In order to prove breach of contract, a plaintiff must establish: (1) the existence of a contract; (2) a breach of that contract; and (3) damages resulting from that breach. *Stoken v JET Electronics & Technology, Inc*, 174 Mich App 457, 463; 436 NW2d 389 (1988).

Michigan law is well-established that "[a] contract must be interpreted according to its plain and ordinary meaning." *Holmes v Holmes*, 281 Mich App 575, 593; 760 NW2d 300 (2008), citing *St Paul Fire & Marine Ins Co v Ingall*, 228 Mich App 101, 107; 577 NW2d 188 (1998). "Under ordinary contract principles, if contractual language is clear, construction of the contract is a question of law for the court. If the contract is subject to two reasonable interpretations, factual development is necessary to determine the intent of the parties and summary disposition is therefore inappropriate." *Holmes*, supra at 594; quoting *Meagher v Wayne State Univ*, 222 Mich App 700, 721-722; 565 NW2d 401 (1997).

1. Statute of Frauds?

Defendant first argues that the Purchase Agreement violates the statute of frauds because it does not specifically identify the property. Paragraph 2 of the Agreement, titled "Description of Property," describes the property as "approximately ___ [blank] acres situated in the City of Auburn Hills, County of Oakland and State of Michigan commonly known as TBD Deep Woods Drive." This paragraph also goes on to state that the property's legal description is provided in an attached "Exhibit A," but no such exhibit is actually attached.

Plaintiff argues that the legal description was to follow after the City of Auburn Hills approved the site plan – which both parties were well aware of. Further, Michigan Courts have held that a common description that both parties understand can be sufficient – making application of the statue of frauds inappropriate. *Cramer v Ballard*, 315 Mich 496; 24 NW2d 80 (1946).

The Court finds this is just such a circumstance. It cannot be disputed that both parties understood what property was being conveyed. In fact, Defendant apparently spent approximately $30,000 on site plans or a down payment – unlikely if Defendant did not know what it was purchasing. For these reasons, the Court finds that the Purchase Agreement does not violate the statute of frauds.

2. Purchase Agreement null and void?

Second, Defendant argues that the Agreement is null and void because the closing never occurred. In support of its argument, Defendant cites to language found in the Purchase Agreement and the Construction Management Contract.

The Purchase Agreement, at paragraph 9.6, provides:

> Construction. Purchaser acknowledges that Seller is entering into this Agreement based on Purchaser entering into a construction contract (the "Construction Contract") with Seller for a 36,200 s.f. facility to be located on the Property. At Closing Purchaser will execute the Construction Contract. If Purchaser fails to execute the Construction Contract with Seller or Sellers (sic) affiliates this Purchase Agreement shall be null and void.

As stated, on the same day as the parties entered the Purchase Agreement, Defendant and non-party D&G executed the Construction Management Contract, which provides at paragraph 22.0:

> Closing of Purchase Agreement. If Closing (as defined in the Purchase Agreement) fails to occur for any reason, this Agreement shall immediately terminate and be of no further force or effect, and neither party shall have any liability hereunder.

Defendant argues that the closing never occurred because it failed to obtain financing – which constitutes "any reason" under the Construction Management Contract. As a result, said Agreement "immediately terminate[d]" and had "no further force or effect." Therefore, Defendant argues, it did not execute a Construction Contract with Plaintiff or its affiliates – because the same was "immediately terminate[d]" – making the Purchase Agreement null and void. The Court disagrees.

The Purchase Agreement only requires that Defendant "execute the Construction Contract," and Defendant did just that – on January 16, 2014. Because Defendant **executed** a Construction Contract with a Plaintiff affiliate, paragraph 9.6 of the Purchase Agreement is not implicated to nullify said Agreement.

3. Was there a condition precedent?

Third, Defendant argues that the Purchase Agreement cannot be enforced because Defendant could not obtain financing, which was a condition precedent to the Agreement. In

support of this argument, Defendant cites to no evidence that this was contemplated, nor was such a provision contained in the parties' written contract.

Further, as Plaintiff points out, sections 15.6 and 15.7 of the Purchase Agreement contain broad integration clauses that bar any promise or term not contained in writing, and no such writing exists.

As a result, the Court finds that Defendant's obtaining financing was not a condition precedent to execution and subsequent enforcement of the Purchasing Agreement.

For all of the foregoing reasons, the Court finds that Defendant has failed to offer any valid defense to Plaintiff's breach of contract claim. Defendant failed to close as agreed in the parties' written contract, and as a result, has breached said agreement.

4. Plaintiff is not entitled to specific performance?

Finally, Defendant requests that, in the event that the Court determines that it did breach the Agreement, Plaintiff is not entitled to specific performance. In support, Defendant argues that it is no longer an operating entity, and therefore, has no ability to purchase the property. Additionally, Defendant claims that specific performance may not be proper when Plaintiff could sell the land, thereby mitigating its damages, and seek judgment against Defendant for any shortfall.

In support, Defendant quotes our Supreme Court in *Lutz v Dutmer*, 286 Mich 467, 482-483; 282 NW 431 (1938), which reasoned:

> It is well established that in a case in which specific performance is otherwise a proper remedy the vendor may obtain specific performance of a contract for the sale of realty, the vendee being ordered to accept the deed and to pay the purchase price, or if he refuses to accept a conveyance and pay the purchase price, the land

> may be ordered sold to satisfy the vendor's so-called 'lien,' and execution issue for any unsatisfied balance of the purchase money remaining after the sale of the land. (internal citations omitted).

In its Reply Brief, Plaintiff does not address this argument. Indeed, in equity, the Court is unaware how it could order a non-operating business to purchase a piece of property and develop said property with another agreement with a seller affiliate. And if the Court did so, Defendant could not possibly comply, and the parties would end up in the same situation that they are now.

The Court finds that the appropriate remedy in this case (all things considered) is to order the property be sold, with the sale proceeds credited toward the $400,000 purchase price, and Plaintiff receiving a judgment for any shortfall. But, in the event of any shortfall, Defendant should receive a credit up to the amount of any down-payment.

For the foregoing reasons, Plaintiff's motion for summary disposition under MCR 2.116(C)(9) and (C)(10) is GRANTED. The Court, however, retains jurisdiction to confirm the sale and enter an appropriate judgment against Defendant in the event of a shortfall.

This Order is a Final Order that resolves the last pending claim and closes the case.

**IT IS SO ORDERED.**

January 7, 2015_____ __/s/ James M. Alexander_____
Date Hon. James M. Alexander, Circuit Court Judge