CLOSING EXTENSION SNAFU

COUNSEL'S CORNER

On January 28, 2013, KIT Projects entered into a Contract to purchase real estate from PLT Partnership. Closing was initially scheduled for March 26, 2013. Then it was extended two days to March 28, 2013.

On March 28 Buyer did not have the funds to close, so Buyer asked Seller for an extension – until April 30, 2013. Both Seller and Buyer signed and delivered an extension Amendment. It provides "In consideration for this 30 day extension, Buyer agrees to pay an additional $10,000 extension fee directly to [Seller]. This fee is non-refundable and not applicable to the sales price."

A check was delivered to Seller on March 28. Also delivered was a suggestion that the check was not good. So Seller told Buyer that the check could be held for a few days, to give Buyer an opportunity to fund the check.

The check was deposited on April 3. Seller signed the Amendment on April 4. The check bounced on April 8. Buyer never replaced the check with good funds, although Buyer offered to do so on April 9.

In the afternoon of April 9 Seller delivered to Buyer a letter by email stating that "there is no existing contractual agreement" between the two parties.

Buyer asserted a lawsuit to force Seller to honor the terms of the Contract and sell the property to Buyer. Seller denied that it had breached the Contract, claiming that Seller had the right to terminate the Contract since the $10k check bounced. The trial court agreed with Seller.

Buyer appealed.

On appeal, Buyer asserted that the consideration for the amendment was Buyer's *promise* to pay the $10k extension fee. Seller asserted that the consideration was the $10k *payment*. The difference in Texas law, is a *covenant* vs. a *condition*.

The Court of Appeals recast Seller's argument as an assertion that the payment was a *condition* to the extension of the closing date. We call this a *condition precedent* in law.

To determine if a condition precedent existed, the Court looked hard at the amendment for terms such as *provided that*, *on condition that*, *if* _____, *then* _____ and similar.

If no such language is used, the terms will typically be a *covenant*. Not a *condition*. When a *covenant* is breached, the contract is valid but a party has a claim or lawsuit for damages. When a *condition* is breached, the entire contract may be forfeited.

Courts do not favor conditions as they tend to have unintended and overly harsh consequences.

This Court of Appeals had little difficulty determining that the language used was indicative of a covenant, not a condition. And yes there was still ample consideration although the check failed, as consideration ". . . may consist of a benefit to one party or of a detriment to the other party."

The Court concluded that the consideration for the extension of the closing date was Buyer's *agreement to pay*, rather than Buyer's *tender of lawful payment*. The Judgment of the trial court is reversed. The case is remanded back to the trial court for a do-over, but with instructions to the trial court that the Amendment did not fail just because Buyer's check was rubber.

See ***KIT Projects, LLC v. PLT Partnership;*** Cause No. 14-14-00118-CV; Texas Court of Appeals; 14th District; November 19, 2015.

Lessons learned:

1. If the parties intend to be allowed to terminate a Contract based on non-performance, there must be consistent provisions.

2. Typically a Seller or Landlord will prefer a *condition* for the Buyer or Tenant's obligations, and a *covenant* for the Seller or Landlord's duties. And of course vice versa when you are representing a Buyer or Tenant.

3. Still confused? You are not alone. Be sure your principal has an experienced Texas real estate attorney who knows the difference.

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