

IN THE SUPREME COURT OF OHIO

06-2110

HERBERT A. HOWARD,

OHIO SUPREME COURT NO:

PLAINTIFF-APPELLANT

ON APPEAL FROM THE LUCAS
COUNTY COURT OF APPEALS
SIXTH APPELLATE DISTRICT

V.

WILLIAM D. CANNON

COURT OF APPEALS
CASE NO. L-05-1421

DEFENDANT-APPELLEE

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT HERBERT A. HOWARD

JOHN G. RUST (O.S. CT. 0000098)
4628 LEWIS AVENUE
TOLEDO, OHIO 43612
419-476-0347
419-476-0410 (FAX)
ATTORNEY FOR
PLAINTIFF-APPELLANT.

ARNOLD N. GOTTLIEB (O.S. CT. 0002403)
608 MADISON AVE., STE. 1532
TOLEDO, OHIO 43604-1148
419-255-3344
419-255-1329 (FAX)
ATTORNEY FOR
DEFENDANT-APPELLEE

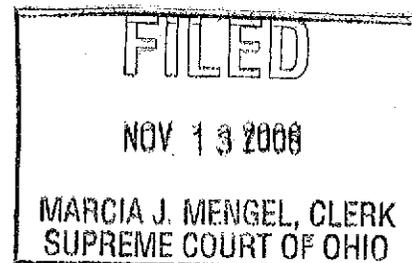


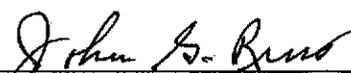
TABLE OF CONTENTS

	<u>PAGE</u>
EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION	1
STATEMENT OF THE CASE AND FACTS	2
PROPOSITION OF LAW NO. I	10
ENFORCEABLE CONTRACT, UNDER THE DOCTRINE OF STATUTE OF FRAUD, IS FORMED, WHEN THE SELLER, WRITES ON THE BACK OF THE CHECK, OF THE BUYER, THE FOLLOWING WORDS: "BASIC TERMS-PRICE \$175,000, RENT-\$1,000 MO FOR 18 MOS., BALANCE-\$150,000, SUBJECT TO LEGAL OKAYS RE COLLATERAL FOR SECURITY, SALE TO THOMAS HOWARD, DEAL TO CLOSE WITHIN 30 DAYS". WHEN THE PARTIES LATER HEAR THE OBJECTIONS ABOUT THE COLATERAL, THE BUYER THEN OFFERS TO PAY THE REMAINING \$170,000.00, SECURES A BANK LOAN, AND THE SELLER AND SELLER'S ATTORNEY AGREE TO THIS OFFER FORM THE BUYER. IN TIME THEN, THIS CONTRACT BECAME ENFORCEABLE IF TENDER WERE MADE WITHIN A REASONABLE TIME.	
CONCLUSION	15
APPENDIX	<u>APP. PAGE</u>
COURT OF APPEALS, SIXTH APPELLATE DISTRICT OPINION AND JUDGMENT ENTRY OF SEPTEMBER , 2006	
LUCAS COUNTY, OHIO COURT OF COMMON PLEAS OPINION AND JUDGMENT ENTRY JOURNALIZED NOVEMBER 28, 2005	

APP. 1
APP. 13

CERTIFICATE OF SERVICE

This is to certify that a copy of the MEMORANDUM IN SUPPORT OF CLAIMED JURISDICTION was sent via regular U.S. Mail to ARNOLD N. Gottlieb, Esq., 608 Madison Avenue, Ste. 1532, Toledo, Ohio 43604-1148, this 12th day of NOVEMBER, 2006.


JOHN G. RUST, APPELLANT'S ATTORNEY

EXPLANATION OF WHY THIS CASE IS A CASE OF
PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES
A SUBSTANTIAL CONSTITUTIONAL QUESTION.

This Zppeal, if taken, will result in needed clarification of the Law on any veto given to a Buyer or Seller's Attorney; and on the Law of where offer to pay balance of purchase price by a bank loan, forms a binding contract.

Also, this case can be a vehicle for telling Judges to allow more Hearings on Summary Judgment Motions, so Parties are not taken by surprise when the Court determines Summary Judgment on a case found only by the Court.

This point can prevent many Appeals.

STATEMENT OF THE CASE AND FACTS

In this Action for Specific performance of a contract for the sale of Defendant Cannon's Ottawa Hills, Ohio property of 4258 Bonnie Brook to Plaintiff for a total sale price of \$175,000.00, Plaintiff Howard in his Complaint, filed September 18, 2001, alleged in Paragraph 1:

"1. Defendant William Cannon is the owner of the single piece of the piece of property, which is the subject of this law suite, which consists of a house and the adjoining grounds all located in Ottawa Hills, Lucas county Ohio. The house and a part of the grounds for which the legal description is plot 4 Lot 640, in Ottawa Hills and for that part of the property the street address is 2312 Talmadge Rd Toledo, Ohio 43606, and the other part of the said of the single piece of property are the adjoin grounds for which the legal description is plot 4 lot 641 Ottawa Hills, and the street description of the said grounds is 4258 Bonnie Brook Rd Toledo, Ohio 43606 Defendant Cannon is the owner of the two aforesaid parcels of property which constitutes the single piece of property."

Defendant in his Answer, Counterclaim and Third-Party Complaint.. etc., filed October 22, 2001, Paragraph 1, alleged:

"1. This defendant admits the allegations contained in paragraph one (1) of the Complaint."

Plaintiff can now see that Defendant himself has made an Admission identifying the property being sold. This Counsel at that time didn't realize the Admission.

The essential terms of the valid written contract as stated by Plaintiff, Paragraph 3 of the Complaint reads as follows:

"Defendant Cannon and Plaintiff Howard then entered into a written contract for the sale of the said property for the price of \$175,000.00, and pursuant thereto Mr. Howard gave his check for \$5,000.00 to Mr. Cannon, and Mr. Cannon then, as instructed and

agreed, went to the American Petroleum Station at Upton and Monroe, and there, as agreed, gave the check to Mr. Howard's son Thomas, who then gave Mr. Cannon \$5,000.00, and the parties then agreed that the aforesaid single piece of property in Ottawa Hills would be sold to Mr. Howard or his designee within thirty days, as provided, by the aforesaid check, and the back thereof, a copy of which is attached hereto as Exhibit A.. All the words on the back of the check were chosen, authorized and written by Defendant Cannon in his own handwriting." (Underlining Counsel's).

and Complaint,

To the Reply, Plaintiff attached as Exhibit A, photocopies of Exhibit A, in which Defendant Cannon in his own words had written his promises to sell the said property, which reads:

"Basic Terms

- (1) price \$175,000
 - (2) Rent - \$1,000 mo
for 18 mos.
 - (3) balance - \$150,000
subject to legal okays
re collateral for security.
- Sale to Thomas Howard.
Deal to close within 30 days.
William Cannon"

Defendant by his Answer made the admission in Paragraph 1 of his Answer as to the identification of the property being sold, but denied there was a binding contract, and Counterclaimed, alleging Plaintiff and The Four Howards had conspired to prevent Defendant Cannon from selling the property in question to a bona fied buyer, and claimed damages.

Plaintiff Howard, about the day after filing the Complaint, found in his hip pocket, an additional receipt of the \$5,000.00 paid to Defendant Cannon, and this receipt, written by Defendant also identified the property being sold as 4258 Bonnie Brook, Ottawa Hills, Ohio, and that receipt as Exhibit B, is on the aforesaid Ex. A., showing the written evidences of the contract. On December 18, 2001, Plaintiff filed his Reply and Answer To Defendant's Counterclaim, attaching Exhibits A & B, and The

Four Howards filed their Answer To Defendant's Third Party Complaint.

On January 16, 2002, Defendant filed his Motion For Summary Judgment, claiming Plaintiff had not complied with the Statute Of Frauds, claiming first the property in quesiton was not identified, 2) Defendant claimed that the provision, "Subject to legal okays re: collateral for security", gave Defendant's Attorney Gottlieb the right to veto the entire sale and deal, as if the words "Subject to Defendant's Counsel to veto the sale.", had been used.

Plaintiff Cannon on January 31, 2002, filed Plaintiff's Affidavit In Opposition, and Plaintiffs Motion For Preliminary Injunction, to complete the sale, alleging the Ex. B. identified the property to be sold as Defendant's 4238 BonnieBrook, and Plaintiff's offer made timely to pay timely the remaining \$170,000.00 by a bank loan, to which Defendant & Counsel had agreed. Plaintiff cited proper and valid precedents that a street address was sufficient identification; Sanders v. McNeil, 147 O. State 408 (1947)

Defendant Cannon had signed, and Plaintiff was correct that a valid contract had been presented.

On May 8, 2002, Plaintiff filed the Affidavit of Thomas H. Howard, denying all liability of The Four Howards. On May 9, 2002, Plaintiff filed his Second Affidavit, showing Exhibits A & B were written in a matter of days of each other. Plaintiff cited cases that by offering to pay timely the balance of the \$175,000.00 purchase price, that such tender was sufficient as to payment, and entitled Plaintiff to a Deed.

Defendant Cannon filed a Counterclaim against the Four Howards alleging Mr. Howard and his four (4) Sons were in partnership. Defendant Howard denied that claim. The Four Howards did not appeal from the Court Of Common Pleas Final Judgment, and are not involved in this Appeal.

In time, no Sanctions were finally issued against Plaintiff nor The Four Howards.

This Counsel will discuss the Motions filed by Plaintiff to Reconsider The Summary Judgment For Defendant, in the Argument part of this Brief.

On March 19, 2004, Plaintiff, by Attorney Potts filed "Plaintiff's Motion For Reconsideration".

On May 1, 2004, Defendant Cannon voluntarily dismissed Defendant's Counterclaim and Third Party Complaint Without Prejudice.

On October 7, 2004, Defendant moved for Summary Judgment on his Counterclaims for Abuse Of Process, and Defendant's claims against The Four Howards responded by their Affidavits, and then "Opposition To Defendant" on October 26, 2004,

On January 31, 2002, Plaintiff filed a Motion For Preliminary Injunction, and a Memorandum Of Law answering Defendant's claims on the Statute Of Frauds.

Defendant then on or about February 19, 2002, filed his Reply Memorandum Of Law, supporting his Motion For Law, in conclusory terms.

On May 9, 2002, Plaintiff filed his Second Affidavit Opposing Summary Judgment, pointing out that Paragraph 1 of Defendant's Answer, was an admission that Defendant's property at 4258 Bonnie-Brook, was the property identified in the Answer. Plaintiff further pointed out that Plaintiff had obtained a Bank loan, and had offered to pay the remaining \$170,000.00 due on the sale price, by the Bank loan, to which Defendant and his Counsel orally agreed, but later Defendant refused.

Plaintiff on May 27, 2002, filed for Leave To File Instantly his Memorandum Of Law, 24 pages, For Oral Hearing and to file an Amended Complaint. The Memorandum Of Law established compliance

with the Statute Of Fraud, and cases holding, that tender of the unpaid balance of \$170,000.00 entitled Plaintiff to a Deed.

Later, Defendant voluntarily dismissed all claims against The Four Howards, apparently because there was no evidence introduced showing The Four Howards had entered the deal, and they hadn't.

On August 8, 2002, Plaintiff filed a Motion For Leave To File An Amended Complaint For Reformation Of Contract; and For Oral Argument On Summary Judgment Motions.

On May 31, 2003, Judge Doneghy issued his Opinion And Judgment Entry on Defendant's Motion For Summary Judgment. The Court held that the terms on the back of the check, Exhibit A, did constitute an enforceable contract, The Court at Page 8 held Exhibits A and B constituted an enforceable contract:

"In this case, the Court finds that the Howard Check the Receipt set forth the terms of a valid contract for the sale on the Bonnie Brook parcel ("the Check Agreement") that would be enforceable under the Statute of Frauds." (Underscoring Counsel's).

and then the Court at Page 10 held, that since the entire contract was subject to the legal okays of Mr. Cannon's Attorney, and since Attorney Gottlieb objected, the contract was not to be enforced. This conclusion came on Page 10 of the Opinion and Judgment Entry:

"Second, Mr. Cannon asserts that the transaction contemplated in the Check Agreement was conditioned upon preceding "approval by legal counsel." (Cannon Affid. para.1.) Mr. Howard acknowledges this condition. (See, for example, Howard Jan. 31, 2002 Affid. para.4; Howard Second Affid. para.6.) Mr. Cannon argues that, because Attorney Gottlieb did not approve the Check Agreement, the contract never became binding. (Cannon Motion pp.2, 4.) There is no dispute that Attorney Gottlieb objected to the collateral. (Howard Jan. 31, 2002 Affid. para.4; Howard Second Affid. para.6.)

The Court notes that a condition precedent is a condition that must be performed before the

agreement of the parties becomes a binding contract, or is a condition that must be fulfilled before the duty to perform an existing contract arises. Kandel v. Gran (June 17, 1981), Stark App. No. 5475, 1981 Stark App. No. 5475, 1981 Ohio App. Lexis 12445, *10-11. Additionally, when such a contractual condition is present, that is when the fulfillment of a contract is dependent upon an act or consent of a third person, the contract cannot be enforced unless the act is performed or the consent is given. Id. at *12. Thus, the Court finds that the condition at issue in this case is of a type that is ordinarily enforceable.

Mr. Howard argues that the condition is not enforceable in this case because Attorney Gottlieb had a good faith duty to reject the Check Agreement only upon reasonable grounds. However, Mr. Howard fails to cite any language in the Check Agreement or any other binding legal authority imposing such a duty. To the contrary, as a general rule, the reasons for the third person's failure to act or to give consent are immaterial; conditions precedent are valid provisions that effect the enforceability of contracts. Kandel v. Gran, supra, 1981 Ohio App. Lexis 12445, *12. Additionally, Mr. Howard has failed to provide evidence that Attorney Gottlieb's rejection of the Check Agreement was anything other than reasonable in this case. Mr. Howard testifies that, as as soon as Mr. Cannon and Attorney Gottlieb told Mr. Howard of Attorney Gottlieb's objection, Mr. Howard "immediately" made a counter offer to pay \$170,000 in cash, which Mr. Cannon orally accepted. (Howard Jan. 31, 2001 Affid para.4.) Attorney Gottlieb's apparent preference for a cash deal over the self-financed sale contemplated in the Check Agreement (i.e., 18 10 or 20 months of "rent") is completely understandable given the lack of evidence to the contrary.

Accordingly, as a matter of law, the Court finds that the land sale agreement embodied in the Check Agreement is not enforceable by Mr. Howard because conditions within that agreement were never satisfied."
(Underscoring Counsel's).

Further, the Court held that there could be no Reformation Of the Contract because Attorney Gottlieb could veto sale. Thus, at Page 13, Judge Doneghy ruled:

"Mr. Howard asserts that, because Attorney Gottlieb mistakenly did not know about the Receipt, because Mr. Howard had cash available (via a loan from Key Bank) before the contemplated closing date of

September 17, 2001 (as set forth in the Howard Check), and because Mr. Cannon orally agreed on August 20, 2001 to accept the cash deal, equity requires the parties' agreement be "reformed" to encompass the cash deal and that the deal should be enforced by specific performance. The Court does not agree.

First, without the Howard Check, the Receipt does not stand on its own to satisfy the Statute of Frauds. While the Receipt does identify the property and contain Mr. Cannon's signature, it does not specify any other terms. Following Attorney Gottlieb's objection of the Check Agreement, the terms recited by the Howard Check, and its terms, were rejected. An enforceable contract must have several essential terms.

"A contract is generally defined as a promise, or a set of promises, actionable upon breach. Essential elements of a contract include an offer, acceptance, contractual capacity, consideration (the bargained for legal benefit and/or detriment), a manifestation of mutual assent and legality of object and of consideration. * * *. A meeting of the minds as to the essential terms of the contract is a requirement to enforcing the contract." (Citation omitted; emphasis added.) Kostelnik v. Helper, 96 Ohio St.3d 1, 2002-Ohio-2985, 770 N.E.2d 58, ¶16.

The Receipt provides no written expression of mutual assent or consideration. These are required if the reformed contract is to be enforced. Id." (Underscoring Counsel's).

Judge Doneghy then held also as a ground for granting Summary Judgment at Page 13, of his Opinion and Judgment Entry, as just quoted above, the irrelevant basis, the true contract rule that each Party to a written contract must have signed, if that Party is to be held. But under Ohio Law, to comply with the Statute Of Frauds Statute, only the Party sued must have signed, see 51 O. Jur.3d Statute Of Frauds ¶506, P. 236:

"§106 Necessary signatures
Research References
West's Key Number Digest, Frauds, Statute of
(Key) 115.1 to 115.4, 116(1)

In order to satisfy the Statute of Frauds, the memorandum of an agreement must be signed by the party to be charged therewith or some other person thereunto by him or her lawfully authorized.¹ It is not essential that both parties sign a contract required by the statute to be in writing; it is sufficient if the party to be charged, meaning the person against whom the contract is sought to be enforced in the particular action or proceeding by² the other party to the contract, has signed.²"

Once, Mr. Howard sued as Plaintiff, he admitted the Contract, Ex. A. and B., and the Complaint, so both sides in Court were bound.

The Argument that Mr. Cannon, who was the Party signing, was not bound is "Judicial Reaching", making holding not supported by Law and the cases. For this the Trial Court and Opposing Counsel should each be criticized and held responsible.

ARGUMENT

PROPOSITION OF LAW NO. I.

ENFORCEABLE CONTRACT, UNDER THE DOCTRINE OF STATUTE OF FRAUD, IS FORMED, WHEN THE SELLER, WRITES ON THE BACK OF THE CHECK, OF THE BUYER, THE FOLLOWING WORDS: "BASIC TERMS- PRICE \$175,000, RENT-\$1,000 MO FOR 18 MOS., BALANCE-\$150,000, SUBJECT TO LEGAL OKAYS RE COLLATERAL FOR SECURITY, SALE TO THOMAS HOWARD, "DEAL TO CLOSE WITHIN 30 DAYS. WHEN THE PARTIES LATER HEAR THE OBJECTIONS ABOUT THE COLLATERAL, THE BUYER THEN OFFERS TO PAY THE REMAINING \$170,000.00, SECURES A BANK LOAN, AND THE SELLER AND SELLER'S ATTORNEY AGREE TO THIS OFFER FROM THE BUYER. IN TIME THEN, THIS CONTRACT BECAME ENFORCEABLE IF TENDER WERE MADE WITHIN A REASONABLE TIME.

Again, Common Pleas Judge ruled that the words "subject to legal okays re collateral for security", gave the Seller the right to veto the entire deal if the Seller's Attorney so ruled; and in fact, he did so rule here. Appellant Howard claims the words "subject to legal okays re collateral for security" merely gave the Seller's Attorney the right to veto any matters relating to collateral for security only, but once that Appellant Howard offered to pay the remaining balance of \$170,000.00 by a bank loan and the Seller and his Attorney agreed, that was an enforceable and binding agreement, enforceable at Law, although the words were merely spoken.

The Trial Court ruled that gave an entire veto to the Seller's Attorney. Once Mr. Howard offered to pay the remaining \$170,000.00, due under the agreed selling price, then Mr. Howard was entitled to enforce the entire contract, if he came forth with the bank loan within that time. In fact, he came forth with the bank loan within that time, and therefore, he was entitled to enforcement, we claim, of this contract.

In Law, our position is strengthened by the fact that the words in the "basic terms" were chosen by the Seller, Defendant Cannon.

Definitely in Law, once there was a condition stated that gave the Seller's Attorney the right to veto the entire deal, specification of that being one condition which had to be met, that was the Seller's Attorney "...legal okay re collateral for security.." meant that the Seller could veto it for those matters relating to collateral for security, but he couldn't veto it for anyother reason. Expression of the one condition is the denial of a right to the other conditions. We claim our evidences and cited cases should have caused the Trial Judge to limit the Seller's right to veto for collateral security. The Seller's Attorney could not veto for anyother reason. No other reason has been given so therefore, the Seller, in Truth and by Law, did not have any veto. The Trial Judge erroneously gave the Seller the right to veto, without any cause whatsoever.

THE PRINCIPLE "EXPRESSION UNIUS EST.
EXCLUSION ALTERIUS" MEANS THAT THE
EXPRESSION IN A CONTRACT OF ONE OR
MORE THINGS OF A CLASS IMPLIES THE
EXCLUSION OF ALL OTHERS NOT EXPRESSED.

Holding the above principle of Law, and making such Law and principle clear is Arnoff v. Williams, 94 O.S 145 (1916) where the Plaintiff owners sought to enjoin Defendants from erecting a "four suite apartment house" on the lot, for which the deed referred to deeds in the chain of title which had the restrictive covenant provided in the party here controlling in 94 O.S. at Page 150:

"..and for the benefit thereof and for the benefit of each other, the heirs, executors, administrators and assigns severally bind ourselves, our heirs, executors, administrators, and assigns that for the period of fifty (50) years from the date hereof the property now owned by the undersigned fronting as aforesaid and for a depth of one hundred and seventy-five (175) feet shall be used for residence purposes only, that the same or any part thereof shall not be used for factories, manufacturing, store, mercantile or business purposes; that no more than one residence building shall be located upon a lot or tract of land of fifty (50) feet in frontage and said depth;" (Underscoring Counsel's).

That the words restricting what could be built on the lots, were limited to the words used, the Ohio Supreme Court thus held in 94 O.S. at Page 152:

"But it is urged that the language "no more than one residence building shall be located upon a lot or tract of land of fifty (50) feet in frontage and said depth" does not permit the erection of any building other than a one-family residence. In Hunt v. Held, supra, in the opinion, it is said: "If it had been intended that the building was to be for the use of one family only, words indicating such an intention would have been used, as is frequently done, such as a single residence, a private residence, a single dwelling house."

In a more recent Montgomery County Court of Appeals Opinion, the Court held that in a Class Action Settlement for over

\$10,000,000.00 that the CSX Railroad gave up its claims to the total settlement paid, and that the Class Action members were entitled to claims for non-economic damages, and on this the Opinion "In Re Miamisburg Train Derailment Litigation", (1993), 92 Ohio App.3d 304, the Court of Appeals held at Page 308:

"CSX established the settlement fund, and all claims against CSX were dismissed. CSX acknowledges that the settlement agreement provides that CSX would play no role, advisory or otherwise, in the development of the protocol or the distribution of settlement funds unless required by the court. The record indicates that at a hearing on the propriety of the settlement agreement, CSX stated that it "retains no right or expectation for the return of the funds placed on deposit." (Emphasis added.) This is a contemporaneous statement of the parties' intent not to reserve to CSX any right to a return of the funds.

[1] The phrase expressio unius est exclusio alterius means that the expression of one thing implies the exclusion of the other. Anthony Carlin Co. v. Hines (1923), 107 Ohio St. 328, 338, 140 N.E. 99, 102; Cincinnati v. Cincinnati Reds (1984), 19 Ohio App.3d 227, 230, 19 OBR 378, 381-382, 483 N.E.2d 1181, 1184. The settlement agreement provides for a reversion of the settlement funds to CSX upon the occurrence of two events: (i) failure by the trial court to certify the class; or (ii) failure to approve the reasonableness of the settlement agreement. Both of these conditions would frustrate the underlying purpose of settling CSX's liability to the plaintiff class. This shows an intent of the parties not to permit reversion of any future remaining funds to CSX once the class has been certified and the settlement has been approved. The specification of two events permitting reversion of the fund without specifying any other events permitting reversion shows an intent to exclude reversion of the fund upon the happening of other occurrences, such as the existence of undistributed funds after the claims are paid. Therefore, we conclude that CSX has no legal right to the return of the money in the settlement fund." (Underscoring Counsel's).

Any missing essential parts of the Contract, could be supplied at a Hearing on Reformation Of Contract.

By a Plea for Oral Reformation, of Contract, if there were any gaps in the Proof, or Pleadings, then all that could be proved at the Hearing on Reformation Of Contract. Thus, in Mason v. Swartz, 70 Ohio App.3d, decided by this Court Of Appeals, believed to be sitting in Ottawa County, this Court held at page 50:

"...Thus, in an aciton for reformation, the intention of the parties can be discovered through parol evidence. Clayton v. Freet (1860), 10 Ohio St. 545, 546; Kevern v. Kevern (1917), 11 Ohio App. 391, 394."

ASSIGNMENT OF ERROR NO. II.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING THE MOTION FOR ORAL HEARING ON DEFENDANT CANNON'S MOTION FOR SUMMARY JUDGMENT, SO MOVED BY PLAINTIFF'S COUNSEL; AND ALL TRIAL COURTS SHOULD BE SO ORDERED, ON AN IMPORTANT CASE, AS THIS IS, BEFORE THE COURT MAKES A FIRM OR FINAL RULING TO GIVE DUE PROCESS TO EACH PARTY.

The Record in this cna prove the above. For a Court to rely on cases not briefed nor cited by the Rule 56 Party moved against, and not to give any Notice, in to Deny Mr. Howard's Due process, and this Counsel's Due Process Rights and the rights given by Rule 1.

Judicial Economy principles are good, have been well enunciated by this Court, and are truly related to the highest principles of the Jidiciary and the Bar. Judge Sherck, Counsel believes, it was in Mason v. Swartz, 70 Ohio App.3d at P. 50 so held.

CONCLUSION

Plaintiff-Appellant and his Counsel respectfully ask this Court to take Jurisdiction and then to Remand the case for Trial on all Causes for Action, and to order this case set down for Trial on Specific performance, and Attorney Fees, and any Second Cause Of Action, either pleaded now or to be pleaded later, for Damages and Attorney Fees.

Mr. Howard entered into an agreement with Mr. Cannon to get a home in Ottawa Hills for his Son, Thomas, and family, and continues to fight for that honorable goal.

Respectfully submitted,



John G. Rust,
Plaintiff-Appellant Howard's Attorne

FILED
COURT OF APPEALS
2006 SEP 29 A 8:05
COMMON PLEAS COURT
BERNIE QUILTER
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Herbert A. Howard
Appellant

Court of Appeals No. L-05-1421
Trial Court No: CI-2001-4356

v.

William D. Cannon, et al.
Appellees

v.

The Four Howards, Ltd., etc., et al.
Defendants

DECISION AND JUDGMENT ENTRY
Decided: SEP 29 2006

John G. Rust, for appellant.

JOURNALIZED
SEP 29 2006
Cassette 253
PG. 97

MANDATED
SEP 29 2006
CASSETTE 158
PAGE 162

PIETRYKOWSKI, J.

{¶1} This case is before the court on appeal from the November 28, 2005 judgment of the Lucas County Court of Common Pleas which denied appellant Herbert A. Howard's motion for reconsideration following the trial court's decision granting appellee William D. Cannon's¹ motion for summary judgment. For the reasons that follow, we affirm the trial court's decision.

{¶2} The relevant facts of this case are as follows. In 2001, appellee, William Cannon, was the owner of real property located at 4258 Bonnie Brook Road, in the village of Ottawa Hills, Lucas County, Ohio ("the property".) In August 2001, appellant and appellee had discussions regarding a possible sale of the property to appellant. On August 18, 2001, appellant tendered a \$5,000 check to appellee as earnest money toward the purchase of the property. After receiving the check, appellee wrote the following on the back of the check above his signature:

{¶3} "Basic Terms-

{¶4} "1. Price \$175,000

{¶5} "2. Rent- \$1,000 mo. for 18 mos.

{¶6} "3. balance - \$150,000

{¶7} "Subject to legal

{¶8} "okays re collateral

¹Appellee was incorrectly named on the complaint; his proper name is "D. William Cannon."

{¶9} "for security.

{¶10} "Sale to Thomas Howard

{¶11} "Deal to close within

{¶12} "30 days."

{¶13} As directed by appellant, appellee then went to a business operated by Thomas Howard, appellant's son, and received \$5,000 cash for the check. On August 20, 2001, appellee gave appellant a receipt for the check which read:

{¶14} "Received from Herbert Howard

{¶15} "\$5,000 deposit on purchase of

{¶16} "4258 Bonnie Brook.

{¶17} "D. William Cannon"

{¶18} On that same day, appellee met with his attorney to discuss the transaction. According to appellee, his attorney "reviewed the proposed transaction and would not approve it as written." Also that day, appellant met with appellee and his attorney to discuss the purchase of the property. At that time, appellee's attorney indicated that he had some objections to the manner of payment and to the collateral. Appellant then offered to pay the full purchase price of \$175,000 in cash. Appellee's attorney then prepared a Residential Real Estate Purchase Agreement which appellee signed; appellant requested that the agreement be sent to his attorney. Thereafter, the agreement was returned to appellee with multiple changes; each change was accompanied by the initials

"T.H." The purchaser was listed as "The Four Howards, Ltd." and signed by Thomas Howard. However, in Thomas Howard's affidavit he denies any involvement in the negotiations personally or on behalf of The Four Howards. Appellee stated that after receiving the modified agreement, he refused to consent to the changes.

{¶19} On September 12, 2001, appellant received confirmation that his \$170,000 bank loan to purchase the property had been approved; however, appellee refused to proceed with the sale. Appellant then commenced this case.

{¶20} In his September 18, 2001 complaint, appellant requested specific performance and "mental anguish" damages. On February 10, 2003, appellant filed an amended complaint which included a claim for reformation of contract.

{¶21} In the interim, on October 22, 2001, appellee filed his answer and a counterclaim against appellant. The counterclaim alleged that appellant filed the lawsuit in order to prevent appellee from selling the property to a third party who had submitted a written offer; appellee alleged that he sustained damages as a result of losing the sale. Appellee also instituted a third party complaint against defendants, The Four Howards, Ltd. and Thomas Howard, alleging that they were vicariously liable for the acts of appellant, who was acting as their agent.

{¶22} On January 16, 2002, appellee filed a motion for summary judgment as to appellant's complaint.² Appellee argued that the alleged agreement failed to comply with

²The motion was refiled on February 12, 2003, following the filing of appellant's amended complaint.

the statute of frauds in that all of the essential terms were not in writing. Appellee further argued that he was never bound by the proposed agreement because it was contingent upon legal approval. On January 31, 2002, appellant filed a motion for summary judgment as to appellee's counterclaim.

{¶23} On May 22, 2002, third-party defendants, Howard and The Four Howards, filed a motion for summary judgment arguing that because they never signed a written agreement and they never authorized the instant lawsuit they could not be liable for the claims alleged by appellee.

{¶24} On May 28, 2003, the trial court granted appellee's motion for summary judgment, denied appellant's motion for summary judgment, dismissed appellant's claim for specific performance, and denied the third-party defendants' motion for summary judgment. The court found that although together the check and receipt formed a valid contract, the contract was not enforceable due to the failure of the condition precedent, i.e. approval by appellee's attorney.

{¶25} Thereafter, appellant filed a motion for reconsideration because the court's decision was not a final order. Appellee filed a motion for summary judgment as to his counterclaim against appellant and his claims against the third-party defendants. Specifically, appellee sought summary judgment on two of his three claims: malicious prosecution and abuse of legal process. Appellant and third party-defendants filed a motion for summary judgment as to all three of appellee's claims (the third claim being

tortious interference with contract). Appellant then filed an additional motion for summary judgment against appellee as to his "supplemental complaint."³

{¶26} On December 27, 2004, the trial court denied appellee's motion for summary judgment, granted, in part, and denied, in part, appellant and third-party defendants' motion for summary judgment, and denied appellant's motion for summary judgment on his supplemental complaint. Further, the court denied appellant's motion for reconsideration regarding the court's prior decision granting summary judgment.

{¶27} Appellant again filed a motion for reconsideration of the trial court's judgment granting summary judgment to appellee. The essence of appellant's arguments was that the agreement was subject to appellee's attorney's approval regarding only the collateral. In other words, the attorney did not have the ability to "veto the entire deal or sale." Appellant also requested an oral hearing on the motion. In its final order of November 28, 2005, the trial court denied appellant's motion. This appeal followed.

{¶28} Appellant now raises the following two assignments of error:

{¶29} "I. The trial court committed reversible error in granting defendant Cannon's motion for summary judgment on May 22, 2003, and also denying plaintiff Howard's motion for reconsideration, filed on March 19, 2004, by trial court judgment entry of December 20, 2004, and also by the trial court's final judgment of November 28,

³Appellant's supplemental complaint, filed March 29, 2004, alleged conversion based upon appellee's alleged refusal to refund appellant's \$5,000 earnest money.

2005, which denied plaintiff's motion for reconsideration filed February 2, 2005, asking all summary judgments against Mr. Howard be reversed; and lastly from the trial court's opinion and judgment entry upon reconsideration was journalized on November 28, 2005.

{¶30} "2. The trial court committed reversible error in denying the motion for oral hearing on defendant Cannon's motion for summary judgment, so moved by plaintiff's counsel; and all trial courts should be so ordered, on an important case, as this is, before the court makes a firm or final ruling to give due process to each party."

{¶31} In appellant's first assignment of error he contends that the court erroneously granted summary judgment in appellee's favor and erroneously refused to reconsider the decision. Appellant appealed from the November 28, 2005 judgment because the court's prior orders were not "final and appealable" as required under Civ.R. 54(B).

{¶32} We first note that appellate review of a trial court's grant of summary judgment is de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336. Accordingly, we review the trial court's grant of summary judgment independently and without deference to the trial court's determination. *Brown v. Scioto Cty. Bd. Of Commrs.* (1993), 87 Ohio App.3d 704, 711. Summary judgment will be granted only when there remains no genuine issue of material fact and, when construing the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that

the moving party is entitled to judgment as a matter of law. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66; Civ.R. 56(C). The burden of showing that no genuine issue of material fact exists falls upon the party who moves for summary judgment. *Dresher v. Burt*, 75 Ohio St.3d 280, 294, 1996-Ohio-107. However, once the movant supports his or her motion with appropriate evidentiary materials, the nonmoving party "may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E).

{¶33} Appellant argues that the trial court erroneously determined that the provision in the contract which provided that the agreement was subject to approval regarding the collateral permitted the attorney to void the sale entirely. Appellant further contends that the trial court's determination that the approval of collateral was a condition precedent improperly exceeded the arguments of the parties. Finally, appellant argues that the trial court erred by not ordering a reformation of the contract to reflect appellant's subsequent oral offer of \$170,000 in cash.

{¶34} In an action based on contract, "[t]he cardinal purpose for judicial examination of any written instrument is to ascertain and give effect to the intent of the parties." *Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth.*, 78 Ohio St.3d 353, 361, 1997-Ohio-202, citing *Aultman Hosp. Assn v. Community Mut. Ins. Co.* (1989), 46 Ohio St.3d 51, 53. "The intent of the parties to a contract is

presumed to reside in the language they chose to employ in the agreement.'" *Id.*, quoting *Kelly v. Med. Life Ins. Co.* (1987), 31 Ohio St.3d 130, paragraph one of the syllabus. It is a tenant of contract interpretation that "[c]ommon words appearing in a written instrument will be given their ordinary meaning unless manifest absurdity results, or unless some other meaning is clearly evidenced from the face or overall contents of the instrument." *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, paragraph two of the syllabus.

{¶35} Contract language is ambiguous "if it is unclear, indefinite, and reasonably subject to dual interpretations * * *." *Beverly v. Parilla*, 165 Ohio App.3d 802, 2006-Ohio-1286, at ¶ 24. When a court finds an ambiguity in the contract language, the intent of the parties becomes a question of fact; in order to ascertain such intent, the trier of fact may rely on extrinsic evidence. *Id.* at ¶ 26.

{¶36} In the present case, the trial court determined that the "subject to" provision regarding the approval of collateral unambiguously conditioned the entire agreement on appellee's attorney's approval of the collateral. The court determined that the agreement as unenforceable because the collateral was never approved. In other words, the court found that a condition precedent had not been fulfilled.⁴

⁴Appellant argues that the issue of a condition precedent was never presented between appellant and appellee. We disagree. In appellee's January 16, 2002 motion for summary judgment appellee argues, in addition to his statute of frauds argument, that the agreement was conditioned on legal approval of the collateral. After discussing the collateral with his attorney, appellee decided to "exercise his right not to proceed with said transaction." Although appellee did not explicitly term the condition as a "condition precedent" clearly, that was what was being argued.

{¶37} "A condition precedent is a condition which must be performed before the obligations in the contract become effective." *Troha v. Troha* (1995), 105 Ohio App.3d 327, 334, citing *Mumaw v. W. & S. Life Ins. Co.* (1917), 97 Ohio St. 1. "Whether a provision in a contract is a condition precedent is a question of the parties' intent. Intent is ascertained by considering not only the language of a particular provision, but also the language of the entire agreement and its subject matter." *Id.* Upon review of the check at issue and the subsequent receipt, we agree with the trial court's conclusion that the language "subject to" contained on the \$5,000 earnest money check evidenced an intent to condition the sale upon the approval of collateral.

{¶38} Appellant further argues that assuming that there were "any gaps in the proof, or pleadings," the court erred in failing to permit reformation of the check agreement. Appellant cites *Mason v. Swartz* (1991), 76 Ohio App.3d 43, to support his contention. In *Mason*, this court noted that "[r]eformation of an instrument is an equitable remedy whereby a court modifies the instrument which, due to mutual mistake on the part of the original parties to the instrument, does not evince the actual intention of those parties." *Id.* at 50. Thus, in order for a court to modify a contract there must have been a mutual mistake by the parties. Here, there is no evidence of mistake. Appellee's attorney simply rejected the proposed collateral and the agreement became unenforceable.

{¶39} Based on the foregoing, we find that reasonable minds could only conclude that because the collateral was not approved by appellee's attorney, the contract was not

enforceable. Further, the contract was not subject to reformation. Accordingly, appellant's first assignment of error is not well-taken.

{¶40} In appellant's second assignment of error he argues that the trial court erred when it denied appellant's motion for an oral hearing on appellee's motion for summary judgment. In *Hooten v. Safe Auto Ins. Co.*, 100 Ohio St.3d 8, 2003-Ohio-4829, the Supreme Court of Ohio acknowledged that "Ohio's appellate courts uniformly agree that a trial court is not required to schedule an oral hearing on every motion for summary judgment." (Citations omitted.) Id. at ¶ 14. The court further stated that "[w]hether to grant a party's request for oral hearing is a decision within the trial court's discretion." (Citations omitted.) Id.

{¶41} Upon review of appellant's argument and the record in this case we cannot say that the trial court erred when it denied appellant's request for an oral hearing. Accordingly, appellant's second assignment of error is not well-taken.

{¶42} On consideration whereof, we find that substantial justice was done the party complaining and the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24. Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Lucas County.

JUDGMENT AFFIRMED.

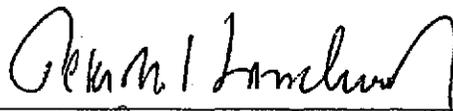
HOWARD V. CANNON, ET AL. V.
THE FOUR HOWARDS, LTD., ETC.,
ET AL.
L-05-1421

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27.
See, also, 6th Dist.Loc.App.R. 4.

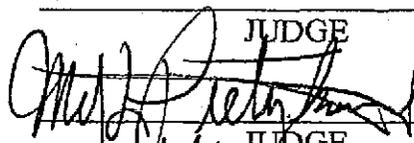
Peter M. Handwork, J.

Mark L. Pietrykowski, J.

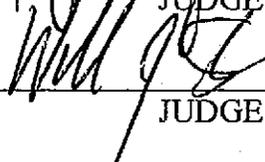
William J. Skow, J.
CONCUR.



JUDGE



JUDGE



JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.

the motion in support of earnest money refund filed Mr. Howard.² Upon review of the pleadings, evidence, memoranda of counsel, and applicable law, the Court finds that it should: 1) deny Mr. Howard's motion for reconsideration; 2) grant in part and deny in part Mr. Cannon's motion for sanctions; and 3) grant in part and deny in part Mr. Howard's motion for refund.

I. INTRODUCTION

The Court has set forth the factual background in an opinion and judgment entry filed May 27, 2003 and in an opinion and judgment entry filed on December 20, 2004 (the latter addressing Mr. Howard's first motion for reconsideration of the summary judgment granted on the complaint to Mr. Cannon in the May 27, 2003 opinion and judgment entry). The Court will address any additional relevant facts in the discussion that follows. In ruling on the instant motions, the Court has construed the allegations and evidence in a light most favorable to the nonmovants. The Court will address first Mr. Howard's motion for reconsideration, second the motion for sanctions, and third the motion for refund.

II. MOTION FOR RECONSIDERATION

A. RECONSIDERATION STANDARD

A trial court may reconsider any decision rendered in a case if no final appealable order has been entered. Civ.R. 54(B); Falcon Painting, Inc. v. Trustcorp Bank, Ohio (Nov. 8, 1991), 6 Dist. No. L-90-285, 1991 WL 253907, *5-6. See, also, D'Agastino v. Uniroyal-Goodrich Tire Co.

²The third-party defendants are, The Four Howards, Ltd. ("the Four Howards") and Thomas Howard ("Thomas Howard"). The Four Howards and Thomas Howard are not parties to the instant motions.

(1998), 129 Ohio App.3d 281, 288, 717 N.E.2d 781. The legal standard governing the issues in a case upon reconsideration of a summary judgment ruling is the same standard to be employed by a court when initially ruling on a motion for summary judgment. Id.; Fid. & Guar. Ins. Underwriters, Inc. v. Aetna Cas. & Sur. Co. (June 30, 1993), 6 Dist. No. L-92-024, 1993 WL 241583.

B. DISCUSSION

In his motion for reconsideration, Mr. Howard raises four primary arguments to support his claim against Mr. Cannon: 1) the Court erroneously construed the Check Agreement in favor of its drafter, Mr. Cannon; 2) the Court failed to apply the proper legal standard to Attorney Gottlieb's determination that the collateral was inadequate; 3) the Court failed to permit reformation of the parties' agreement to convey the Bonnie Brook parcel; and 4) the parties have an enforceable agreement.

1. Construction of the Check Agreement

Mr. Howard argues that the Court erroneously construed certain terms of the Check Agreement³ in favor of its drafter, Mr. Cannon, rather than in favor of Mr. Howard. Specifically,

³As discussed in the May 27, 2003 opinion and judgment entry, the Check Agreement was made up of two documents: 1) the terms written on the back of the "Howard Check" by Mr. Cannon; 2) and the terms contained in a "Receipt" given by Mr. Cannon to Mr. Howard in part to memorialize the \$5,000 in "Earnest Money" deposited by Mr. Howard with Mr. Cannon for the purchase of the "Bonnie Brook parcel." (See May 27, 2003 opinion and judgment entry, pp.7-12.)

The terms on the back of the Howard Check read as follows:

- "[a] Basic Terms -
- "(1) price \$175,000
- "(2) rent - \$1,000 mo
for 18 mos.
- "(3) balance - \$150,000
- "[b] Subject to legal
okays re collateral
for security
- "[c] Sale to Thomas Howard

App. 5

Mr. Howard argues that the Court improperly construed the language, "Subject to legal okays re collateral for security," to mean that Attorney Gottlieb's objection to the collateral would thwart the entire Check Agreement. There is no dispute that Attorney Gottlieb objected to the "collateral." (See Howard May 8, 2002 Affid. para.6; Howard Jan.31, 2002 Affid. para.4.) Mr. Howard contends that Attorney Gottlieb had the power only to disapprove the "Basic Terms" portion of the Check Agreement, in which case Mr. Howard would then be able to remedy any disapproval by offering more favorable financing terms. Indeed, after Attorney Gottlieb objected to the collateral, Mr. Howard immediately made an oral offer to pay the \$170,000 balance in cash, and Mr. Cannon and Attorney Gottlieb orally accepted.⁴

It is well-established that the interpretation of a written contract is a matter of law for the court. Latina v. Woodpath Dev. Co. (1991), 57 Ohio St.3d 212, 214, 567 N.E.2d 262. A court's primary focus is to give effect to the intentions of the parties as expressed in the plain language of

"[d] Deal to close within
30 days.

"[e] [/s/ D. William Cannon]" (Emphasis added.)

The Receipt reads as follows:

"8-20-01

"Received from Herbert Howard
\$5,000 deposit on purchase of
[f] 4258 Bonnie Brook.

"[/S/ D. William Cannon]"

⁴Mr. Howard does not dispute that the "subject to" language does permit Attorney Gottlieb to disapprove at least a portion of the Check agreement. Of course, the Court found earlier found that this language conditioned enforcement of the whole contract on Attorney Gottlieb's approval of the collateral. "Subject" is defined in relevant part as follows: "likely to be conditioned, affected, or modified in some indicated way: having a contingent relation to something and usu. dependent on such relations for final form, validity, or significance." (Emphasis added.) Webster's Third New Internatl. Dictionary (1993) 2275.

App. 15

the contract. Aultman Hosp. Assn. v. Community Mut. Ins. Co. (1989), 46 Ohio St.3d 51, 53, 544 N.E.2d 920. There is a presumption that the intent of the parties is contained in the language of the contract. Kelly v. Med. Life Ins. Co. (1987), 31 Ohio St.3d 130, 132, 509 N.E.2d 411. As a general rule, where contract language is clear and unambiguous, a court should not resort to rules of construction or look beyond the plain meaning of the contract's terms to determine the rights and obligations of the parties. Seringetti Constr. Co. v. Cincinnati (1988), 51 Ohio App.3d 1, 4, 553 N.E.2d 1371. When the contract language is clear, the court will employ the ordinary meaning of the words used in the contract. Alexander v. Buckeye Pipeline Co. (1978), 53 Ohio St.2d 241; 374 N.E.2d 146, paragraph two of the syllabus. Thus, in such a situation, the court "cannot in effect create a new contract by finding an intent not expressed in the clear language employed by the parties." Id. at 246. See, also, Long Beach Assn., Inc. v. Jones, 82 Ohio St.3d 574, 577, 1998-Ohio-186, 697 N.E.2d 208. However, a court must construe any ambiguous provisions in a contract against its drafter. Crane Hollow, Inc. v. Marathon Ashland Pipe Line LLC (2000), 138 Ohio App.3d 57, 73-74, 740 N.E.2d 328. Additionally, if "a contract is ambiguous, parol evidence may be employed to resolve the ambiguity and ascertain the intention of the parties." Illinois Controls, Inc. v. Langham, 70 Ohio St.3d 512, 521, 1994-Ohio-99, 639 N.E.2d 771. "The decision as to whether a contract is ambiguous and thus requires extrinsic evidence to ascertain its meaning is one of law." Ohio Historical Society v. General Maintenance & Engineering Co. (1989), 65 Ohio App.3d 139, 146, 583 N.E.2d 340.

In this case, the Court finds that the language of the Check Agreement establishes a contract that is not ambiguous, so there is no reason to construe the agreement against Mr. Cannon. The plain language of the agreement sets forth the terms memorializing a mutual obligation that

would be enforceable under the Statute of Frauds. In the following order, the Check Agreement for the sale of the Bonnie Brook parcel separately recites: (a) the "Basic Terms" (a price, installment payments, and then a final balloon payment); (b) a provision conditioning the sale on approval of the collateral by "legal" counsel (Attorney Gottlieb) of the seller; (c) the identity of the ultimate purchaser (Thomas Howard); (d) a deadline for closing (30 days); (e) the identity and signature of the seller (Mr. Cannon); and (f) the identity of the Bonnie Brooke parcel by its address. The Court finds that the Check Agreement distinctly separates and clearly states: the basic terms for the proposed sale; that the proposed sale is "subject to" legal approval of the collateral by Mr. Gottlieb; to whom the proposed sale is being made; a time-is-of-the-essence feature for the proposed sale; the person offering the proposed sale; and the object of the proposed sale. (Thus, reading the "subject to" provision as one provision of the whole Check Agreement, the Court finds that performance under the whole Check Agreement is contingent on Attorney Gottlieb's approval of the "collateral." In Bilang v. Benson (1978), 62 Ohio App. 2d 134, 405 NE 2d 311, the Sixth Appellate District concluded that identical "subject to" language in a land-sale agreement conditioned enforcement of the agreement on approval of a mortgage by a lender and approval of the sale by the Lucas County Probate Court. Id. at 135-136.) Because approval was never given in that case, the sale was unenforceable. Id. at 136. In the case sub judice, there is no dispute that Attorney Gottlieb objected to the "collateral".⁵ Thus, Mr. Howard was not entitled to enforce the Check Agreement against Mr. Cannon.

Accordingly, the Court finds Mr. Howard's construction argument without merit.

⁵See Howard May 8, 2002 Affid. para.6; Howard Jan.31, 2002 Affid. para.4.

AGB 8/7

2. Proper Legal Standard

Mr. Howard argues that the Court failed to apply the proper legal standard to determine whether Attorney Gottlieb acted permissibly in objecting to the collateral. Mr. Howard contends that the Court determined that Attorney Gottlieb's approval was a condition precedent to Mr. Cannon's performance on the Check Agreement,⁶ and the Court erred in finding that Mr. Cannon's disapproval was reasonable. In the May 27, 2002 opinion and judgment entry, the Court cited Kandel v. Gran (June 17, 1981), 5th Dist. No. 5475, 1981 WL 6324, for the proposition that a condition precedent is a condition that must be performed before the agreement of the parties becomes a binding contract, or is a condition that must be fulfilled before the duty to perform an existing contract arises. *Id.* at *4. The Kandel court held that, "a contract, the fulfillment of which by express or implied agreement is made to depend upon the act or consent of a third party over whom neither party has any control, cannot be enforced unless the act is performed or the consent given." (Emphasis added.) Based on Kandel, this Court concluded that Attorney Gottlieb's objections precluded enforcement of the Check Agreement, and Attorney Gottlieb's objections were reasonable. (May 27, 2002 opinion and judgment entry, pp.10-11.)

In his motion, Mr. Howard quotes the full text of 18 Ohio Jurisprudence 3d Contracts (2003), Section 190, Condition precedent to payment ("Section 190"),⁷ to support his position that

⁶Mr. Howard asserts that the Court improperly raised the "condition precedent" issue on its own initiative rather than on the prompting of the parties. The Court notes, however, Mr. Cannon's motion for summary judgment plainly implicated this issue. However, even if not, the Court finds that Mr. Howard has fully argued his position on this issue in his motion for reconsideration.

⁷The entire Section 190 reads as follows:

"A provision in a contract requiring performance to the satisfaction of a third party may be regarded as a condition precedent to payment, * * * in the absence of fraud, bad faith, failure to exercise honest judgment, or a waiver on the part of the contractee. * * * Under building contracts

a third-party's approval or disapproval must be reasonable. Mr. Howard further asserts that, pursuant to Section 190, the determination of whether a third-party's approval was reasonable is a question for the trier of fact.

While what constitutes "reasonableness" generally is a fact issue,⁸ in this matter the Court finds that reasonable minds could only conclude that Attorney Gottlieb reasonably withheld his consent. The Court finds, as Mr. Howard concedes, that neither party had control over Attorney Gottlieb's decision. (See Motion for Reconsideration, p.8.) Unlike the impartial architects referred to in Section 190, in this case Attorney Gottlieb has an ethical duty as legal counsel to Mr. Cannon to be a vigorous advocate for Mr. Cannon.⁹ It is uncontroverted that Attorney Gottlieb objected to

that provide that the work shall be done to the satisfaction of the architect * * * or that payment shall be made only upon the architect's certificate that the work is satisfactory, or, in case of partial payments, that certain amounts of materials and labor have been furnished, * * * the architect's approval is a condition precedent to the employer's liability for payment. * * *. In the case of provisions requiring the certificate of the architect in writing, the certificate is a condition precedent to the right to recover. * * *.

"The condition must be performed unless its performance is excused. * * *. Payment, however, may be recovered without the performance of the condition if performance of the condition is waived * * * or prevented by the employer. * * *. Performance of the condition is excused if the withholding of approval by the engineer or architect is fraudulent or unreasonable * * * and may be excused if the withholding is capricious or arbitrary, * * * although several cases have held that a refusal must be fraudulent or in bad faith, and that arbitrariness, capriciousness, and unreasonableness are not enough to allow a contractor to recover. * * *. Whether a certificate is capriciously, arbitrarily, or unreasonably withheld is a question for the jury. * * *.

"Where a building contract contains a provision that the decision of the architect or engineer is to be final or conclusive, the contractor cannot recover without the certificate of the architect or engineer unless he or she proves that the certificate is withheld through fraud or manifest mistake. * * *." (Footnotes omitted; emphasis added.)

⁸See Elwing v. City of Columbus (July 17, 1997), 10th Dist. No. 96APE10-1424, 1997 Ohio App. LEXIS 3080, *17 (addressing reasonable time).

⁹EC 7-1 states in pertinent part as follows: "the duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law." (Emphasis added.)

By *19*

the "collateral" proposed in the Check Agreement. (Howard May 9, 2002 Affid. para.6;Howard Jan. 31, 2002 Affid. para.4.) Upon hearing Attorney Gottlieb's objections, Mr. Howard immediately offered to obtain a bank loan and pay cash for the \$170,000 balance which Mr. Cannon and Attorney Gottlieb orally accepted. (Howard Jan. 31, 2002 Affid. para.4.) The Court finds reasonable minds could only conclude that Attorney Gottlieb reasonably preferred a cash deal over a land-sale contract; under a cash deal Mr. Cannon would have the entire \$170,000 immediately rather than having to wait for twenty months or more. See In re Mondie Forge, Inc. (N.D.Oh.1992), 148 B.R. 499, 502 (noting the benefit of immediately-available cash).>

Accordingly, the Court finds Mr. Howard's legal-standard argument without merit.

3. Reformation of the Check Agreement

Mr. Howard asserts that the Court erred in not reforming the Check Agreement to encompass Mr. Howard's subsequent oral offer of \$170,000 in cash. First, he contends that the parties mistakenly failed to advise Attorney Gottlieb about the \$5,000 earnest money paid to Mr. Cannon until Attorney Gottlieb had already rejected the collateral. The Court finds this contention not well-taken. Mr. Howard fails to articulate how Attorney Gottlieb's alleged unawareness of the deposit affected his objection to the collateral; indeed, the subsequent oral cash offer was for the same amount as the amount to be "financed" under the Check Agreement (\$170,000).

Second, Mr. Howard argues that reformation is proper to supply the "requisite elements" of an agreement that are "not already in writing." (Motion for Reconsideration, p.17.) In support, he cites Mason v. Swartz (1991), 76 Ohio App.3d 43, 600 N.E.2d 1121 and Galehouse

Id., cited in Columbus Bar Assn. v. Finneran, 80 Ohio St. 3d 428, 430, 1997-Ohio-286, 687 N.E.2d 405.

Byg 20

Constr. Co. v. Winkler (1998), 128 Ohio App.3d 300, 303, 714 N.E.2d 954. This Court discussed and applied both cases in the May 27, 2003 opinion and judgment entry. These cases stand for the proposition that when a properly formed contract is missing a material term, an equity court may reform the contract to conform to the intentions of the parties. However, both cases are properly distinguishable. (After the Check Agreement became unenforceable upon Attorney Gottlieb's objection to the "collateral" and upon Mr. Howard's immediate oral offer of cash, there was no enforceable written contract remaining for the sale of the Bonnie Brook parcel. Thus, more than seeking to reform an agreement by supplying missing "requisite elements," Mr. Howard seeks to form a new enforceable agreement based on oral representations.)

Accordingly, the Court finds Mr. Howard's reformation argument without merit.

4. Parties Have An Enforceable Agreement

Mr. Howard also asserts that his oral offer to pay \$170,000 in cash (orally accepted by Mr. Cannon), after Attorney Gottlieb's objection to the installment and balloons payments contemplated under the Check Agreement, is merely a "change" in the agreement which is enforceable in equity. Mr Howard offers no relevant authority to support his assertion. As discussed in the May 27, 2003 opinion and judgment entry, any enforceable land-sale agreement in this case must comply with Ohio's Statute of Frauds. The Statute of Frauds is embodied in R.C. Chapter 1335. Ed Schory & Sons, Inc. v. Francis (1996), 75 Ohio St.3d 433, 438, 1996-Ohio-194, 662 N.E.2d 1074. "R.C. 1335.05 clearly requires that 'no action shall be brought' regarding ['a contract or sale of lands * * * or] interest in or concerning' land unless the agreement upon which the action

Agg 21

is based is in writing and signed by the defendant." Id. at 438-439.¹⁰ (Thus, because no written contract remained after Attorney Gottlieb objected to the Check Agreement, the Court finds that Mr. Howard's oral offer to pay \$170,000 in cash does not cause reformation of the agreement.)

Accordingly, the Court finds Mr. Howard's equity argument without merit.

III. SANCTIONS

Mr. Cannon seeks sanctions in the form of attorneys fees against Mr. Howard for time spent by counsel pursuing motions against Mr. Howard to compel discovery and for sanctions. The Court granted the motions but also granted a protective order for confidentiality. Civ.R. 37(A)(4) permits a party to secure reasonable expenses incurred in obtaining an order compelling discovery. An oral hearing on the motion is not required if evidentiary materials are submitted and no oral hearing is requested. King v. Cantrell (Mar. 9, 1976), 10th Dist. No. 75AP-404, 1976 WL 41402, *2 Here, the parties requested no oral hearing.

Attached to the most recent motion for sanctions, counsel for Mr. Cannon attached an affidavit outlining hours spent pursuing discovery. The Court notes, however, that a portion of counsel's time was spent addressing arguments relating to and reviewing the Court's decisions on a

10

R.C. 1335.05 reads as follows:

"No action shall be brought whereby to charge the defendant, upon a special promise, to answer for the debt, default, or miscarriage of another person; nor to charge an executor or administrator upon a special promise to answer damages out of his own estate; nor to charge a person upon an agreement made upon consideration of marriage, or upon a contract or sale of lands, tenements, or hereditaments, or interest in or concerning them, or upon an agreement that is not to be performed within one year from the making thereof; unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person there unto by him or her lawfully authorized." (Emphasis added.)

confidentiality order that the Court deemed necessary. Accordingly, the Court finds that counsel is entitled to compensation for only 2.9 of the 5.7 hours claimed: $2.9 \times \$150 = \435.00 , plus interest of 10 percent from the date of this judgment entry.

IV. REFUND OF EARNEST MONEY

Mr. Howard has requested the return of his \$5,000 in earnest money. Because reasonable minds could only conclude that Mr. Howard is entitled to the return of the earnest money, the Court will order the immediate return of that money. However, because this entry will only now terminate this litigation as a final judgment, following Mr. Howard's motion for reconsideration, the Court will grant interest on the \$5,000 only from the date of this judgment entry.

JUDGMENT ENTRY UPON RECONSIDERATION

Upon RECONSIDERATION it is ORDERED that the motion for summary judgment filed by defendant D. William Cannon ("Mr. Cannon") on the complaint is granted, and the motion for summary judgment filed by the plaintiff, Herbert Howard ("Mr. Howard"), on the complaint is denied. It is further ORDERED that the complaint is dismissed with prejudice.

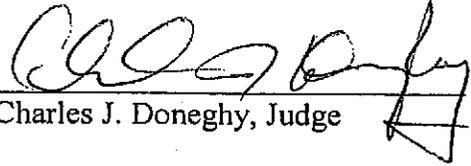
It is further ORDERED that the motion for sanctions of Mr. Cannon is granted in part and denied in part. It is further ORDERED that Mr. Howard pay Mr. Cannon \$435 on the motion for sanctions with interest of 10 percent from the date of the filing of this entry.

It is further ORDERED that the claim and motion of Mr. Howard for the return of the \$5,000 earnest money are granted in part and denied in part. It is further ORDERED that Mr. Cannon return to Mr. Howard the \$5,000 earnest money with interest of 10 percent from the date of the filing of this entry.

The Court finds no just reason for delay.

Nov. 17, 2005

pc. John G. Bull Dog Rust
John F. Potts
Arnold N. Gottlieb


Charles J. Doneghy, Judge