

the Township. The parties agree that the outstanding letters of credit to be cancelled were five "performance" letters of credit with a total face amount of \$1,690,480.39.²

All of the letters of credit involved in this case were issued by Chemical in connection with a private subdivision development project in the Township known as "Village Green". The developer for the Village Green project was Village Green Pennsylvania Associates Limited (VGPAL). In December, 1993, at the same time that Chemical agreed to issue the \$100,000 maintenance letter of credit, VGPAL agreed to issue to the Township a separate and additional letter of credit in the face amount of \$10,000, "as security for completion of certain public improvements" referenced in the agreement. VGPAL is not a party to this action. According to the Township, VGPAL failed to provide the additional \$10,000 letter of credit, as security for completion of the improvements.

The controlling agreement is memorialized in a letter dated December 22, 1993, written by counsel for the Township, Darrell M. Zaslow, Esq., and addressed to counsel for VGPAL, William Benner, Esq. Chase and the Township agree that Mr. Zaslow's December 22, 1993, letter sets forth the terms of the contract, and that the terms of that contract control the resolution of this dispute. See Defendant's Opposition to Motion for Summary Judgment, p.3. The dispute in this case is over how

2. The five performance letters of credit are Nos. P-372008, P-372011, P-372013, P-372016, and P-372018.

that contract should be interpreted. The contract (Mr. Zaslow's December 22, 1993, letter) states:

Dear Bill:

As you are aware from your attendance at the Bensalem Township Council public session of December 20, 1993, the Township Council has agreed to accept dedication of public improvements contingent upon satisfaction of outstanding requirements relative to deeds, title insurance, and financial security.

The Township has agreed to accept financial security in the nature of a letter of credit from Chemical Bank in the amount of \$100,000.00, to be effective for a period of 18 months from the date of execution of the Resolution formalizing acceptance of the dedication. We have agreed that this \$100,000.00 security maintenance may occur by cancellation of all outstanding letters of credit relative to the construction escrow, and replacement with a new letter of credit of \$100,000.00. In the alternative, you may feel free to arrange for reduction of the existing credit to the sum of \$100,000.00 with appropriate amendment indicating the 18 month term and referencing such maintenance requirements as the Township may impose.

The letter of credit for maintenance shall be separate and in addition to the letter of credit in the amount of \$10,000.00, which shall be supplied by your client as security for completion of certain remaining public improvements as outlined in correspondence of the Township Engineer dated December 20, 1993, as augmented before the Township Council at the December 20, 1993 Council meeting. In addition, please be reminded that the issue of required additional maintenance, if any, relative to the water and sanitary sewage facilities, and to that end I understand that you have arranged to speak directly with the Township and Water Department consulting engineers.

See Motion for Summary Judgment, Exhibit A.

On October 21, 1994, Chemical issued to the Township the \$100,000 maintenance letter of credit. In December, 1994 the Township accepted dedication of the public improvements within

the subdivision. Amended Complaint ¶ 9 and defendant's answer ¶9 (Admitted). By letter to the Township dated February 15, 1995, Chemical Vice President Dennis Dillingham asked the Township to return the five performance letters of credit for cancellation. In addition, Dillingham notified the Township in the same letter that Chemical would "freeze" the five performance letters of credit.

On September 21, 1995, the Township presented Chemical a sight draft for the full amount of the \$100,000 maintenance letter of credit. Chemical honored that draft and paid the Township \$100,000. The Township, however, failed to cancel the five performance letters of credit. The Township contends that it is entitled to retain and utilize those letters of credit. On November 16, 1995, the Township presented for payment by Chemical a sight draft for \$50,000 under one of the five performance letters of credit (No. P-372013). On November 29, 1995, Chemical informed the Township that it would not honor the \$50,000 sight draft because, among other things, Chemical contended that the five performance letters of credit were to be cancelled upon Chemical issuing and the Township accepting and receiving the full face amount of the \$100,000 maintenance letter of credit.

On October 4, 1996, Chase filed this suit seeking a declaration that (1) the Township must cancel and return the five performance letters of credit, and (2) that the Township's attempt to draw \$50,000 under one of the five performance letters of credit is null and void. See Amended Complaint, p.5. Chase

also seeks compensatory damages, interest, attorney's fees, and costs. The Township filed a counterclaim contending that it was still owed approximately \$39,000 for the costs of improvements required to bring the development into compliance with Township ordinances. The Township alleges in the counterclaim that it is entitled to recoup the \$39,000 from the \$50,000 sight draft upon which it sought to obtain payment.

Based on the Township's Opposition to Plaintiff's Motion for Summary Judgment, it is clear that there are only two issues in dispute: (1) whether Chemical failed to issue the \$100,000 maintenance letter of credit within a "reasonable" amount time under the contract, thereby nullifying the Township's obligation to cancel and/or return the five performance letters of credit, and (2) whether VGPAL's obligation to issue the additional \$10,000 letter of credit was a condition precedent to the Township's obligation to cancel Chemical's five performance letters of credit. The Township does not contend that the contract, as embodied in the letter of dated December 22, 1993 is ambiguous or unclear in any other respect. Interpretation of the contract, and the present dispute, may be decided as a matter of law.

II. Analysis

This court has jurisdiction pursuant to 28 U.S.C. § 1332(a)(1). The parties agree that Pennsylvania law governs this dispute. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file,

together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). There is a "genuine" issue if the evidence is such that a reasonable jury could return a verdict in favor of the nonmoving party. Anderson, 477 U.S. at 248. The evidence, and any inferences drawn from it, must be considered in a light most favorable to the nonmoving party. Tigg Corp. v. Dow Corning Corp., 822 F.2d 358, 361 (3d Cir. 1987). If conflicting evidence is presented, I must accept as true the allegations of the nonmoving party. Anderson, 477 U.S. at 255.

The Township presents two arguments in support of its position that it is not obligated to cancel the five performance letters of credit: (1) the contract memorialized by Mr. Zaslow's December 22, 1993 letter is null and void because Chemical waited an "unreasonable" amount of time after execution of the contract (10 months) to issue the \$100,000 maintenance letter of credit; and (2) VGPAL's failure to issue the additional \$10,000 letter of credit "as security for completion of certain remaining public improvements" relieved the Township of its obligation to Chemical because VGPAL's performance was a condition precedent to the Township's duty to cancel Chemical's five performance letters of credit. See Defendant's Brief in Opposition to the Motion for Summary Judgment, p.3.

(1) Unreasonable delay in performance

As to the Township's first argument, I do not agree that the contract failed to provide any time for performance on the part of Chemical. The contract required Chemical to provide "security in the nature of a letter of credit in the amount of \$100,000, to be effective for a period of 18 months from the date of execution of the Resolution [by the Township] formalizing acceptance of the dedication" of public improvements for the Village Green subdivision. Based on this clear language, Chemical was required to issue the \$100,000 letter of credit (i.e., perform) in time for the letter of credit to be effective at the beginning of the 18-month period following execution of the Township resolution. In other words, Chemical had to provide the letter of credit effective as of the date that the Township formally accepted the dedication of the public improvements from the developer. Significantly, the Township does not contend that Chemical failed to issue a \$100,000 maintenance letter of credit that was effective as of the beginning of the 18-month period following acceptance of the dedication.

The admitted pleadings of record establish that the \$100,00 letter of credit issued on October 21, 1994 and that the acceptance of the dedication by the Township occurred in December, 1994. The Township accepted the letter of credit, and on September 21, 1995 presented it for payment and received from Chemical the full \$100,000, without ever suggesting that Chemical had in any way failed to timely provide the letter of credit, or

that somehow the Township's concomitant duty to cancel the previously issued five letters of credit was nullified. It is clear that Chemical issued the \$100,00 letter of credit in accordance with the terms of the agreement. The Township's recently concocted assertion that Chemical, by late delivery of the letter of credit, breached the agreement thereby relieving the Township of all obligations to Chemical is without legal or factual support.

It should be noted, moreover, that the Township has produced no evidence that members of its Council or its solicitors ever considered raising or ever expressed to Chemical, at anytime prior to this lawsuit, any objection to the timing of Chemical's performance. Nor has the Township produced any evidence that it ever considered rejecting Chemical's letter of credit on timeliness grounds or for any other reason. To the contrary, the Township's actions establish that it had no objection to the timing of Chemical's performance: it accepted the maintenance letter of credit, and then, 11 months later, it submitted a sight draft for the full \$100,000 value, for which it received full payment.

This lawsuit was filed by Chase almost two years after Chemical informed the Township that it would "freeze" the five performance letters of credit. The Township had ample time to express to Chemical and/or Chase its view that Chemical's performance was unsatisfactory. In sum, I find that Chemical timely issued the maintenance letter of credit in accordance with

the terms of the contract, and that the Township has adduced no legal or factual support for its current objection to the timeliness of Chemical's performance.

Assuming the contract could be read as failing to specify a precise time for performance, it is clear that Chemical performed within a reasonable time. The Township argues that the maintenance letter of credit was not issued within a reasonable time after the date on which the contract was memorialized by Mr. Zaslow's letter dated December 22, 1993. The general rule in Pennsylvania is that where no time for performance is specified in the written agreement, the law implies that performance will occur "within a reasonable time depending upon the nature of the business." See Field v. Golden Triangle Broadcasting, 305 A.2d 689, 694 (Pa. 1973) (punctuation marks and citations omitted). Contrary to the Township's position, however, any "reasonable" time period during which Chemical was to perform must run from the date on which the Township executed its resolution accepting dedication of the public improvements, not the date on which the contract was memorialized. The date on which the contract was memorialized would provide an artificial starting point for measuring Chemical's reasonable time for performance. Chemical's letter of credit was needed as security to protect the Township from costs that might be incurred in maintaining the public improvements during the first 18 months following the Township's acceptance of the public improvements from the developer. Thus, the date on which the parties formed their contract is irrelevant

to the issue of a reasonable time for Chemical's performance. Chemical's performance was contingent upon the Township's execution of a formal resolution accepting the improvements from the developer. The maintenance letter of credit was to protect the Township from maintenance costs after it accepted the public improvements in the development. For these reasons, the "reasonable time" must be judged from the date the Township adopted the resolution of acceptance of the public improvements. Chemical issued the maintenance letter of credit on October 21, 1994, which, as a matter of law, was within a reasonable time.

If the Township had any concern about not receiving the letter of credit immediately after December 22, 1993 and if receiving it in October, 1994 was not acceptable, as presently contended by the Township (See Zaslow deposition, page 21, Exhibit C to the Township's Brief), it should never have accepted the letter of credit, nor should it have demanded and received payment on the letter of credit. Whatever possible objection or claim of breach of contract it might have been able to raise as to the timeliness of receipt of the letter of credit was waived by its acceptance and receipt of payment. The Township cannot accept the benefit of the bargain with Chase and then declare that the agreement is null and void and unenforceable as to the Township's reciprocal obligations to Chase.

(2) Condition precedent

The Township's other argument in opposition to the motion for summary judgment is that VGPAL's failure to issue the

\$10,000 maintenance letter of credit relieved the Township of its obligation to Chemical, because VGPAL's performance was a "condition precedent" to the Township's duty to cancel the five performance letters of credit. A condition precedent is a condition that "must occur before a duty to perform under a contract arises." Acme Markets v. Federal Armored Exp., 648 A.2d 1218, 1220 (Pa. Super. Ct. 1994). As the Superior Court has explained:

While the parties to a contract need not utilize any particular words to create a condition precedent, an act or event designated in a contract will not be construed as constituting one unless that clearly appears to have been the parties' intention.

Id. (emphasis in original and citations omitted). Whether there is a condition precedent in the contract is a question of law to be decided by the court. See id., at 1220 & n.4.

The following terms in the contract set forth Chemical and the Township's obligations to one another:

The Township has agreed to accept financial security in the nature of a letter of credit from Chemical Bank in the amount of \$100,000.00, to be effective for a period of 18 months from the date of execution of the Resolution formalizing acceptance of the dedication. We have agreed that this \$100,000.00 security maintenance may occur by cancellation of all outstanding letters of credit relative to the construction escrow, and replacement with a new letter of credit of \$100,000.00.

This language does not state or even imply that VGPAL's issuance of a letter of credit was a condition that "must occur" before the Township's duty to cancel the performance letters of credit arose, see Acme Markets, 648 A.2d at 1220, and the Township fails

to point to any other language in the contract that even arguably supports its position.

The requirement that the developer provide a \$10,000 letter of credit as security for completing certain remaining public improvements is contained in a separate paragraph and specifically states that the \$100,000 letter of credit for maintenance to be provided by Chemical "shall be separate and in addition to the \$10,000 letter of credit". VGPAL's performance (providing a \$10,000 letter of credit for completion of certain improvements) cannot be deemed a condition precedent to the Township's duty to cancel the five Chemical letters of credit upon Chemical delivering a \$100,000 "security maintenance" letter of credit. Such a condition of the contract does not "clearly appear[] to have been the parties' intention." Id.

The Township seeks to oppose the motion for summary judgment by relying on the deposition testimony of its past and present solicitors. See Opposition to Motion for Summary Judgment, Exhibits B & C, including the deposition testimony of Mr. Zaslow, the contract's drafter, who claims that VGPAL's duty to perform was a condition precedent. This deposition testimony may not be considered. The parties' contract was reduced to writing and the terms of the contract unambiguously show that VGPAL's duty to perform was not included as a condition precedent. See Duquense Light Co. v. Westinghouse Elec. Corp., 66 F.3d 604, 613 (3d Cir. 1995) ("[W]here, as here, the parties have reduced their agreement to writing, Pennsylvania courts

presume that the parties' mutual intent can be ascertained by examining the writing. Only where the writing is ambiguous may the factfinder examine all relevant extrinsic evidence.") (citation omitted). If Mr. Zaslow believed that VGPAL's duty to perform was a condition precedent, he could and should have stated that in the letter he wrote dated December 22, 1993 (the letter containing all of the terms of the contract). His present interpretation of the contract is immaterial.

In sum, Chemical upheld its end of the parties' bargain by issuing the \$100,000 maintenance letter of credit. The Township has reaped the benefit of this bargain by cashing that letter of credit. There is no evidence to suggest that Chemical or Chase did anything other than fully comply with the terms of the contract. Accordingly, the Township will now be required to comply with its part of the bargain; namely, cancel the previously issued letters of credit.

The Township filed a counterclaim alleging that the failure of Chase to honor the \$50,000 letter of credit that the Township sought to cash, resulted in a loss to the Township of \$39,531.86, presumedly the amount of money that the Township expended in completing (not maintaining) the public improvements. The \$50,000 letter of credit that Chase refused to honor was one of the five letters of credit that should have been cancelled and returned to Chase upon Chase providing the \$100,000 maintenance letter of credit. The Township is not entitled to recover any

sum on its counterclaim. Chase is entitled to summary judgment on the counterclaim.

An appropriate Order follows.³

3. While Chase's amended complaint seeks compensatory damages in addition to a declaratory judgment, it is clear that a declaratory judgment alone will adequately remedy the Township's breach of the parties' contract. In addition, Chase seeks a declaratory judgment that would require the Township to "return" the five performance letters of credit, but the parties' contract only called for the Township to "cancel" those letters of credit. Thus, the declaratory judgment that will be entered will not require that the letters of credit be returned to Chase; it will only cancel and void the effectiveness of those letters of credit.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THE CHASE MANHATTAN BANK,	:	CIVIL ACTION
Plaintiff	:	
	:	
v.	:	
	:	
TOWNSHIP OF BENSALEM,	:	
Defendant	:	No. 96-6804

O R D E R

For the reasons set forth in the accompanying Memorandum, it is ORDERED that the plaintiff The Chase Manhattan BANK's Motion for Summary Judgment (docket entry #10) is GRANTED, and the following DECLARATORY JUDGMENT is entered:

(1) Letters of credit Nos. P-372008, P-372011, P-372013, P-372016, and P-372018, which were issued by plaintiff Chemical Bank of New Jersey, N.A. (the predecessor in-interest to Chase Manhattan Bank) to defendant Township of Bensalem, Pennsylvania, prior to October 21, 1994, are hereby declared to be cancelled, void, and of no effect; and

(2) Defendant Township of Bensalem's attempt to draw \$50,000 on letter of credit No. P-372013 is hereby declared to be void and of no effect.

It is FURTHER ORDERED that JUDGMENT is entered in favor of plaintiff The Chase Manhattan Bank and against

defendant Township of Bensalem on plaintiff's complaint, and judgment is entered in favor of plaintiff The Chase Manhattan Bank and against the defendant Township of Bensalem on the defendant's counterclaim.

BY THE COURT:

Donald W. VanArtsdalen, S.J.

July 31, 2003