

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

<b>MORGANTOWN CROSSING, L.P.,</b>	:	<b>CIVIL ACTION</b>
<b>Plaintiff</b>	:	
	:	
<b>v.</b>	:	<b>No. 03-CV-4707</b>
	:	
<b>MANUFACTURERS AND TRADERS</b>	:	
<b>TRUST COMPANY,</b>	:	
<b>Defendant.</b>	:	

**OPINION**

**STENGEL, J.**

**November 10, 2004**

Morgantown Crossing, L.P (“Plaintiff”), a Pennsylvania limited partnership, initiated this action for declaratory relief and damages for breach of contract in Berks County Court of Common Pleas. Within thirty days after service of the complaint, Manufacturers and Traders Trust Company (“Defendant”), a New York state banking and trust company, removed the case to this court. Defendant filed a Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure (“Fed. R. Civ. P.”), to which Plaintiff responded. For the reasons discussed in this opinion, I will grant Defendant’s Motion for Summary Judgment in its entirety.

**BACKGROUND**

The following facts are based upon the pleadings, documents of record, and counsel’s arguments at a hearing held on the motion, and are presented in the light most favorable to Plaintiff, as the non-moving party. On August 1, 2002, Wolfson-Verrichia Real Estate Investments, Inc. and AllFirst Bank entered into a twenty year “Shopping Center Ground Lease” for one of the “out parcels” at “Morgantown Crossings,” a shopping center located in Caernarvon Township, Berks County. Wolfson-Verrichia, as Landlord, was to arrange at its own expense for

construction of the site preparation and site improvements, and agreed to endeavor diligently to complete substantially such construction on or before April 15, 2003. (Lease § 3.1.1). AllFirst Bank, as Tenant, would then construct a building for use as a branch office in the shopping center. (Lease § 3.2.3).

As a Condition Precedent, the lease required Wolfson-Verrichia to obtain all necessary governmental permits, approvals and authorizations for the construction of the Landlord's work, and acquisition of the land for the shopping center by May 1, 2003. If this condition were not fully satisfied by that date, either party could terminate the lease, "without penalty or other liability or further obligation (except that all obligations of indemnity, defense and hold-harmless contained herein, including those relating to environmental contamination, shall survive termination), by written notice to the other party given before the actual satisfaction of the condition stated in this Section." (Lease § 13.27). The lease also provided that time was of the essence and performance of either party's obligations at the times stated were a part of the consideration for the lease. (Lease § 13.20).

The lease also contained a *force majeure* clause which provided that neither the Landlord nor the Tenant would be in default if their performance were delayed or prevented due to strikes, lockouts, inability to obtain labor or materials on the open market, war, riots, unusual weather conditions, acts of God, or other similar causes beyond their control. This clause further stated that in the event of a *force majeure*, the deadlines would be extended by the length of the delay caused by the *force majeure*, provided that within fifteen days of the commencement of the cause of delay the party unable to perform notifies the other party of the delay. (Lease § 13.32).

In September 2002, AllFirst was merged into Defendant, its parent corporation. A couple

of months later, AllFirst assigned its rights and obligations under the lease to Defendant. On May 1, 2003, Wolfson-Verrichia assigned its rights and obligations under the lease to Plaintiff.

The record contains a transcript of the deposition of Mr. Darren J. King, Defendant's senior vice president of network planning, who testified that shortly after the merger, his department conducted a review of AllFirst's existing and proposed branch locations. There were four proposed branch locations including the location at Morgantown Crossings. All of these locations were under lease but construction had not yet begun. Mr. King also testified that Defendant preferred not to build new branch locations, but preferred to grow by acquiring branches from other banks.<sup>1</sup> Mr. King testified that after his department's review, Defendant realized that the deposit levels in the Morgantown Crossings area were not sufficient or attractive enough, and that it would prefer not to go forward with the lease if such an opportunity arose.

On January 28, 2003, Mr. Daniel Bleznak, a representative of Wolfson-Verrichia, wrote to Mr. John Dillon, Defendant's vice president of construction and space planning, and provided him with a copy of "Landlord's Comments" to Defendant's drawings for its proposed branch. Mr. Bleznak also requested that Mr. Dillon contact him with any questions upon review of the comments. Scribbled on the top of this letter are the words, "Bob Williams<sup>2</sup> said do not respond. 2/03." At his deposition, Mr. Dillon testified that this was his shorthand way of memorializing a conversation he had had with Mr. Williams in which both men understood that no response to the letter was necessary and that they would wait and see what would happen as the project

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<sup>1</sup>This sentiment was confirmed at the deposition of Mr. Keith Bellanger, Defendant's senior vice president of corporate services, who testified that his bank did not have an "appetite for '*de novo*' branches. Branches that are, you know, fresh out of the ground."

<sup>2</sup>Mr. Robert Williams is Defendant's Manager of Corporate Real Estate.

progressed. Mr. Dillon insisted that these words did not reflect a command from Mr. Williams. Mr. Dillon further testified that he never responded to Mr. Bleznak's letter.

The record also contains the sworn affidavit of Mr. Thomas Verrichia, a principal of Wolfson-Verrichia, who stated that in February or March 2003, he received a telephone call from Mr. Williams who informed Mr. Verrichia that Defendant was attempting to minimize new branches in the marketplace and cut costs, and asked if Wolfson-Verrichia would agree to permit Defendant to "buy out" its obligations under the lease. Mr. Verrichia responded that Wolfson-Verrichia would not agree to such a proposal because it needed the lease in order to qualify for construction financing. A short time later, Mr. Williams telephoned Mr. Verrichia a second time and asked him to reconsider. Mr. Verrichia again refused. At his deposition, Mr. Williams denied asking if Defendant could "buy out" its obligations under the lease. He insisted that Defendant realized that it had a lease, and that it stood ready to build. He further claimed that he only asked Mr. Verrichia if Wolfson-Verrichia would allow Defendant to assign the lease to another bank.

In its response to the motion and at the hearing, Plaintiff instructed that generally the process to apply for a signal permit is routine and straightforward, and takes four to eight weeks. Wolfson-Verrichia submitted its applications to the Township for the signal permits on April 23, 2002. On October 3, 2002, over five months later, Wolfson-Verrichia requested telephonic status of the applications, but the Township's representative stated that he "could not recall completing the applications." That same day, Wolfson-Verrichia resubmitted the applications. Thereafter, according to Plaintiff, the Township made a "laundry list of demands" which the Township wanted Wolfson-Verrichia to satisfy before the Township would sign the permit

applications. Plaintiff contends that these demands were extortionate and illegal. The demands have not been reduced to writing in the record, but were enumerated at the deposition of Mr.

Steven Wolfson, a principal of Wolfson-Verrichia, and include the following:

- A \$75,000.00 “donation” toward playground equipment for an existing park in the Township.
- Wolfson-Verrichia had to agree to repair and maintain, in perpetuity, not only the traffic signals that Wolfson-Verrichia was installing, but also those that Wolfson-Verrichia was modifying and fixing because of existing traffic problems in the Township.
- Wolfson-Verrichia had to agree to be responsible, in perpetuity, for 100% of the costs of any “upgrades” that PennDOT or the Township may desire, in their sole discretion and at any time in the future, with respect to any of the traffic signals that were being installed or modified.

Wolfson-Verrichia claims that it experienced inordinate delays in the permit application process, citing the Township’s refusal to sign the applications until Wolfson-Verrichia satisfied these “extortionate” demands. In the middle of April 2003, Wolfson-Verrichia first realized that, because of these delays, it would not meet the May 1, 2003 deadline. By letter dated April 30, 2003, Wolfson-Verrichia informed Defendant that due to the delays of the Township, classified by Wolfson-Verrichia as *force majeure*, the deadline was extended until December 31, 2003. On May 2, 2003, Defendant acknowledged receipt of this letter and terminated the lease citing the Condition Precedent clause of the lease, i.e., Lease § 13.27.

### **LEGAL STANDARD**

The court has subject matter jurisdiction over this litigation due to the diverse citizenship of the parties and to the amount in controversy exceeding \$75,000, pursuant to 28 U.S.C. § 1332(a)(1). Summary Judgment is appropriate “if the pleadings, depositions, answers to

interrogatories, and admissions on file, together with 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). An issue is “genuine” if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A factual dispute is “material” if it might affect the outcome of the case under governing law. Id.

A party seeking summary judgment always bears the initial responsibility for informing the court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the movant’s initial Celotex burden can be met simply by “pointing out to the district court that there is an absence of evidence to support the non-moving party’s case.” Id. at 325. After the moving party has met its initial burden, “the adverse party’s response, by affidavits or otherwise as provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e). That is, summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing “sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” Celotex Corp. v. Catrett, 477 U.S. at 322. Under Rule 56, the court must view the evidence presented on the motion in the light most favorable to the opposing party. Anderson v. Liberty Lobby, Inc., 477 U.S. at 255. The court must decide not whether the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. Id. at 252. If the non-moving party has exceeded the

mere scintilla of evidence threshold and has offered a genuine issue of material fact, then the court cannot credit the movant's version of events against the opponent, even if the quantity of the movant's evidence far outweighs that of its opponent. Big Apple BMW, Inc. v. BMW of North America, Inc., 974 F.2d 1358, 1363 (3d Cir. 1992).

## **DISCUSSION**

Defendant argues that the terms of the lease are clear and unambiguous, and because of the time is of the essence provision, the May 1, 2003 deadline set forth in Lease § 13.27 was material and essential; and that because Plaintiff did not meet that deadline, Defendant was empowered to terminate the lease which it did in writing on May 2, 2003. Defendant insists that the Conditions Precedent clause controls and that the case can be decided solely on the unambiguous terms of the lease. I agree.

The goal of contract interpretation is to discover the parties' objective mutual intent. Under Pennsylvania law, it is firmly settled that the intent of the parties to a written contract is contained in the writing itself. Duquesne Light Co. v. Westinghouse Electric Corp., 66 F.3d 604, 613 (3d Cir. 1995)(quoting Samuel Rappaport Family Partnership v. Meridian Bank, 657 A.2d 17, 21 (Pa. Super. 1995); *see also* Kiewit Eastern Co., Inc. v. L & R Construction Co., Inc., 44 F.3d 1194, 1199 (3d Cir. 1995)(when a written contract is clear and unequivocal, its meaning must be determined by its contents alone; it speaks for itself and a meaning cannot be given to it other than that expressed).

Whether contract provisions are clear or ambiguous is a question of law. Id. A contract is ambiguous only if it is reasonably susceptible of different constructions and capable of being understood in more than one sense. 12th Street Gym, Inc. v. General Star Indemnity Co., 93 F.3d

1158, 1165 (3d Cir. 1996). A contract is not ambiguous if the court can determine its meaning without any guide other than a knowledge of the simple facts on which, from the nature of the language in general, its meaning depends; and a contract is not rendered ambiguous by the mere fact that the parties do not agree on the proper construction. Samuel Rappaport Family Partnership v. Meridian Bank, 657 A.2d at 21-22. If the terms of a contract are clear and unambiguous, the court interprets them as a matter of law. Western United Life Assurance Co. v. Hayden, 64 F.3d 833, 837 (3d Cir. 1995).

After a careful review of the entire record, including the submissions and oral arguments of the parties, I find that the Conditions Precedent clause of the contract is a clear and unambiguous expression of the intent of the parties to give both sides the ability to terminate the contract in the event the governmental permits and approvals were not obtained by May 1, 2003. Both parties to this contract are sophisticated business entities with experience in such transactions. They agreed in writing, as a condition precedent, that if Wolfson-Verrichia did not obtain all necessary governmental permits by May 1, 2003, either party could terminate the lease. Those permits were not obtained by that date, and Defendant exercised its right and terminated the contract. This finding is especially appropriate because of the time is of the essence provision in the lease. *See* United States v. 29.16 Acres, etc., et al., 496 F.Supp. 924, 929 (E.D. Pa. 1980) (time is of the essence of a contract if it is specifically so provided).

In addition, I am not persuaded by Plaintiff's argument that the delay in obtaining the necessary permits is excusable because it constitutes a *force majeure* event. To determine whether a certain event excuses performance, a court should look to the language that the parties specifically bargained for in the contract to determinate the parties' intent. R.& H. Falcon

Drilling Co. v. American Exploration Co., 154 F.Supp.2d 969, 973 (S.D. Tex. 2000). When the parties have themselves defined the contours of *force majeure* in their agreement, those contours dictate the application, effect, and scope of *force majeure*. Id. Ordinarily, only if the *force majeure* clause specifically includes the event that actually prevents a party's performance will that party be excused. URI Cogeneration Partners, L.P., et al. v. Board of Governors for Higher Education, et al., 915 F.Supp. 1267 (D.R.I. 1996).

Here, it is undisputed that a governmental delay in obtaining the required permits was not specifically included in the list of *force majeure* events. However, Plaintiff invokes the "catchall" segment of the *force majeure* clause which reads "other *similar* causes beyond the control" of the parties. Plaintiff's reliance on this segment is misplaced. A "catchall" provision in a *force majeure* clause is limited to things of the same kind and nature as the particular events mentioned. Id. at 1287. A delay attributed to a governmental entity is not of the same kind or nature as those enumerated in the lease, i.e., strikes, lockouts, an inability to obtain labor or materials on the open market, war, riots, unusual weather conditions, and acts of God. (Lease § 13.32). These specified events are unforeseeable. Thus, an event covered by the catchall provision must also be unforeseeable.

In commercial real estate development, a governmental delay in the permit application process is foreseeable. In fact, delay in the permit process is common. Plaintiff concedes that there is no question that such delays occur. (Pl. Response at 20). If governmental approval is required for a party's performance, the party may be taken to assume the risk should difficulty arise in obtaining that approval if there is no provision excusing the party in that event. URI Cogeneration Partners, L.P., et al. v. Board of Governors for Higher Education, et al., 915

F.Supp. at 1287. Plaintiff, a sophisticated business entity with experience in developing several shopping centers, contracted as a condition precedent to obtain the necessary governmental permits. Thus, Plaintiff bore the risk that the Township would delay that process.

Further, in order to use a *force majeure* clause as an excuse for non-performance, the event alleged as an excuse must have been beyond the party's control and not due to any fault or negligence by the non-performing party. Gulf Oil Corp. v. Federal Energy Regulatory Commission, 706 F.2d 444 (3d Cir. 1983), *cert. denied*, 464 U.S. 1038 (1984). The non-performing party has the burden of proof as well as a duty to show what action was taken to perform the contract, regardless of the occurrence of the excuse. Id.

Here, Plaintiff insists that it had no control over the decision-making process of the governmental entities, their review of the plans, or issuance of the required permits. It contends that despite making "active and diligent efforts" to secure the necessary permits, it was prevented from satisfying the condition precedent by the deadline as a result of the unwarranted delay in issuing the permits. However, the record reflects otherwise. Plaintiff submitted its application to the Township for the signal permits on April 23, 2002. Notwithstanding its knowledge that the process to apply for a signal permit is routine and takes four to eight weeks, Plaintiff waited over five months to make a telephone call regarding the status of the application. Because the Township representative could not remember completing the applications, Plaintiff resubmitted them on October 3, 2002. Plaintiff claims that shortly thereafter the Township engaged in making extortionate and illegal demands upon the Plaintiff as described above. These demands are not in writing in the record. However, the Township signed the signal permit applications almost two weeks after the bargained-for deadline, and after Plaintiff agreed to contribute

\$115,000 to the Township for traffic improvements. With a multi-million dollar construction project such as this, it is not uncommon for the local government to request the developer to contribute to the support and maintenance of the town's infrastructure. Plaintiff, a business entity experienced in large construction projects, cannot characterize this practice as extortion and attempt to use it as justification for ceasing negotiations with the Township for several months. Thus, Plaintiff's failure to satisfy the condition precedent cannot be excused by invoking the *force majeure* clause of the contract.

### **CONCLUSION**

The Conditions Precedent clause of this lease is a clear and unambiguous expression of the intent of the parties to give both sides the ability to terminate the contract in the event the governmental permits and approvals were not obtained by May 1, 2003. The lease also provided that neither party would be in default if their performance were delayed or prevented by a number of specified events or similar causes known as *force majeure*. A delay attributable to a governmental entity, especially where not specified as a *force majeure* event and not of the same kind or nature as those specified, does not excuse performance as provided in that clause. When such a delay caused Plaintiff to miss the deadline, Defendant was within its right to terminate the contract on May 2, 2003. Therefore, Defendant's motion for summary judgment shall be granted in its entirety.

An appropriate order follows.

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

<b>MORGANTOWN CROSSING, L.P.,</b>	:	<b>CIVIL ACTION</b>
<b>Plaintiff</b>	:	
	:	
<b>v.</b>	:	<b>No. 03-CV-4707</b>
	:	
<b>MANUFACTURERS AND TRADERS</b>	:	
<b>TRUST COMPANY,</b>	:	
<b>Defendant.</b>	:	

**ORDER**

**AND NOW**, this 10th day of November, 2004, upon consideration of Defendant's Motion for Summary Judgment (Document No. 9), Plaintiff's response thereto (Document No. 13), and all related submissions,

**IT IS HEREBY ORDERED** that Defendant's Motion is **GRANTED**. In the event that Defendant seeks fees and costs under Section 13.28 of the Lease Agreement, Defendant shall file a motion for attorney's fees and costs within ten (10) days, to which Plaintiff shall respond within seven (7) days of service of the motion. Upon consideration of these documents, the court shall determine the necessity of a hearing.

BY THE COURT:

          /s/ Lawrence F. Stengel            
LAWRENCE F. STENGEL, J.

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<b>v.</b>	:	<b>No. 03-CV-4707</b>
	:	
<b>MANUFACTURERS AND TRADERS</b>	:	
<b>TRUST COMPANY,</b>	:	
<b>Defendant.</b>	:	

**ORDER OF JUDGMENT**

**AND NOW**, this            day of November, 2004, in accordance with my order granting Defendant's motion for summary judgment, and in accordance with Federal Rule of Civil Procedure 58, judgment is hereby entered in favor of Defendant and against Plaintiff.

BY THE COURT:

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LAWRENCE F. STENGEL, J.