

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

HAL J. SHAFFER : CIVIL ACTION  
 :  
 :  
 v. :  
 : No. 04-2668  
 :  
 PSB BANCORP, INC. :

**MEMORANDUM**

Ludwig, J.

November 15, 2006

This action involves a dispute as to the validity of options to purchase 342,800 shares of PSB common stock. Complaint, ¶ 1; certification of Lee M. Herman, Esquire, in support of plaintiff's motion to escrow settlement funds, at ¶ 3. The following facts are undisputed. Fed. R. Civ. P. 12(b); Fed. R. Civ. P. 56.<sup>1</sup> On February 2, 1995, plaintiff Hal J. Shaffer, then

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<sup>1</sup> "If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given a reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Fed. R. Civ. P. 12(b).

On July 21, 2006, PSB filed its motion to dismiss as moot the complaints of plaintiff Shaffer and intervenor-plaintiff U.S. Claims. On August 24, 2006, Shaffer and U.S. Claims were ordered to "file responses to the pending motions to dismiss (no further continuances). The responses shall specify any matters that would be submitted if this were a motion for summary judgment under Rule 56. By Wednesday, September 6, 2006, PSB may file a reply brief." August 24, 2006 Order. On August 25, 2006, Shaffer and U.S. Claims filed a joint response to the pending motion to dismiss that included the following footnote: "The Court's Order of August 24, 2006 changed the scope of the present response from opposition to a Motion to Dismiss to the equivalent of opposition to a Summary Judgment motion, and required Plaintiff's response by August 25, 2006. This submission is made to satisfy the Court's deadline; however, it is anticipated that additional submissions will be made which were not available as of August 25, 2006." Memorandum, at 7 n.1. The response did not specify any Rule 56 matters, and to date, no further submissions have been made by Shaffer or U.S. Claims. On September 6, 2006, PSB filed a reply brief supported by Rule 56 matter, including the Declaration of David Hanrahan, Executive Vice-President of The Bank (formerly The Bank of Gloucester County), previously submitted in opposition to PSB's motion for summary judgment on claims asserted by

Chairman of the Board of Directors of First Bank of Philadelphia, purchased FBP stock options under a “Standby Purchase Agreement” entered into as part of its efforts to increase its capital. Complaint, ¶¶ 6-8, 10-12. In 1999, when FBP merged with PSB, its options were converted into PSB options. Id., ¶ 22. On June 29, 2001, Shaffer assigned all of his options to intervenor - plaintiff The Bank (formerly The Bank of Gloucester County) to secure loans to him in excess of \$850,000. Declaration of David Hanrahan, Exhibit “B” to PSB’s reply memorandum, at ¶¶ 3-4. Shaffer executed a security agreement, a pledge agreement, and a stock power in favor of The Bank in conjunction with his assignment of the options. Id. The Bank received possession of Shaffer’s options certificate, which it retained as collateral throughout the pendency of this action until May 30, 2006, when it sold and transferred the certificate to PSB. Id., ¶ 8.<sup>2</sup>

On December 1, 2004, Shaffer also assigned a secondary interest in options to purchase 120,000 shares of PSB stock to intervenor-plaintiff U.S. Claims, a Delaware corporation, to secure payments due that lender. Certification of Darryl Levine, Exhibit “A” to U.S. Claims’ response, ¶ 3. U.S. Claims concedes that the interest it obtained in the options was subordinate to that of The Bank. Id. at ¶¶ 3-4.<sup>3</sup>

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U.S. Claims and The Bank.

<sup>2</sup> Shaffer commenced this action on June 17, 2004, at which time The Bank held the options certificate.

<sup>3</sup> Shaffer also assigned secondary interests in the options as follows: On December 18, 2001, interest in 171, 400 shares to the “Hal J. Shaffer Trust” under a “Judgment of Divorce and Property Settlement Agreement”; on October 29, 2004, interest in 34,280 shares to Richard Toll.

Thereafter, Shaffer defaulted on his obligations to both The Bank and U.S. Claims. On May 30, 2006, The Bank conducted a UCC collateral liquidation sale of the options, following notice to Shaffer, U.S. Claims, PSB, and this court, Exhibit “B” to motion to stay sale of options. PSB purchased the options, and by order dated May 25, 2006, the proceeds of the sale and the options certificate were placed in escrow. On June 16, 2006, the escrow was dissolved and the options certificate turned over to PSB. In consequence of the sale, neither Shaffer nor U.S. Claims had any residual interest in the options represented by the certificate. Intervenor-plaintiff The Bank was made whole by the sale.

Count I of plaintiff Shaffer’s complaint and the intervenor complaint of U.S. Claims request a declaration that the PSB options at issue in this case are valid. This issue is moot.<sup>4</sup> Count II of the intervenor complaint of U.S. Claims’ also requests an award of “Attorneys’ Fees, Costs and Disbursements.” This relief is ancillary to U.S. Claims’ declaratory judgment claim and, therefore, must also be denied as moot.

Additionally, Shaffer’s complaint sets forth three substantive claims - breach of contract (Count II), promissory estoppel (Count III), and equitable estoppel (Count IV).

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Certification of Lee M. Herman, Esquire, ¶¶ 4, 5; affidavit of Richard J. Toll, submitted in support of motion to intervene of Arthur A. DiPadova and Richard J. Toll. These interests were also subordinate to the interest of The Bank. Certification of Lee M. Herman, Esquire, ¶ 5. So was Shaffer’s interest in 17,000 shares that he had not secondarily assigned. *Id.*, ¶ 6.

<sup>4</sup> Shaffer and U.S. Claims seem to concede that these claims are moot in their response to PSB’s motion - “Although perhaps PSB’s purchase of the option [sic] from The Bank may render the sought after declaratory relief moot. . . .” Response, at 3. Further, the response does not include any argument or authority opposing PSB’s motion as to the mootness of the requested declaratory relief.

Under Pennsylvania law, applicable here, a breach of contract plaintiff must show “(1) the existence of a contract, including its essential terms, (2) a breach of the duty imposed by the contract, and (3) resultant damages.” Ware v. Rodale Press, Inc., 322 F.3d 218, 226 (3d Cir. 2003), quoting CoreStates Bank, N.A. v. Cutillo, 723 A.2d 1053, 1058 (Pa. Super.1999). Shaffer has not made or identified any Rule 56 submission that establishes the elements of this cause of action.<sup>5</sup> In particular, he has not provided or referred to any Rule 56 matter evincing that he was “ready, willing and able to perform” his obligations under the

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<sup>5</sup> “When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party’s pleading, but the adverse party’s response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.” Fed. R. Civ. P. 56(e) (emphasis added).

A party having the burden of proof at trial must, in response to a properly supported summary judgment motion “go beyond the pleadings and by . . . affidavits, or by the ‘depositions, answers to interrogatories, and admissions on file,’ designate ‘specific facts showing that there is a genuine issue for trial.’” Celotex Corp v. Catret, 477 U.S. 317, 324 (1986). Otherwise, the motion, if self-supported, will be granted.

In response to PSB’s motion, Shaffer cites to the award of summary judgment to the plaintiffs in Lingle v. PSB Bancorp, Inc., U.S.D.C., E.D. Pa., Civ. A. No. 02-1165, in support of his argument that PSB’s disavowal of the options constituted a breach of the option certificates both in that case and in this one. Response, at 6. Initially, as Shaffer recognizes, the Lingle judgment technically cannot provide authority or precedent because it is a legal nullity, the Court of Appeals having remanded the case for dismissal on jurisdictional grounds. However, the facts and legal issues surrounding Shaffer’s initial acquisition of the FBP options and PSB’s later disavowal of the PSB options into which the FBP options were converted are identical with the corresponding facts and legal issues in Lingle. It does not necessarily follow, however, that, having prevailed on the declaratory judgment portion of his complaint, Shaffer would have prevailed on his breach of contract and estoppel claims. Other circumstances, such as the expiration of the Shaffer options without any attempt to exercise them or to stay the expiration date, the assignment of the options and collateralization of the certificate, and PSB’s purchase of the options certificate at public auction, are seemingly insurmountable hurdles, described more fully, infra.

options certificate. Empire Properties, Inc. v. Equireal, Inc., 674 A.2d 297, 305 (Pa. Super. 1996). See also Richard A. Lord, *Williston on Contracts* § 63:44 (4<sup>th</sup> ed. 2002) (“the breaching party is discharged of the duty to pay damages where it appears, after the breach, that the nonbreaching party would likely have totally failed to perform, or where it appears, after the breach, that the breaching party’s duties would have been discharged by impracticability or frustration before the time of the repudiator’s performance”).

It is undisputed that The Bank had possession of the options certificate from the beginning of June 2001 until it foreclosed on the collateralized certificate on May 30, 2006. Declaration of David Hanrahan, ¶ 8. Even if PSB’s disavowal of the options constituted a breach, Shaffer’s inability to satisfy his obligation - namely, to transfer the options certificate to PSB upon exercise - discharges PSB’s obligation to pay him damages.<sup>6</sup>

Under Pennsylvania law, a plaintiff asserting a claim for promissory estoppel must prove “(1) the promisor made a promise that he should have reasonably expected to induce action or forbearance on the part of the promisee; (2) the promisee actually took action or refrained from taking action in reliance on the promise; and (3) injustice can be avoided only by enforcing the promise.” Edwards v. Wyatt, 335 F.3d 261, 277 (3d Cir. 2003). Shaffer has

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<sup>6</sup> PSB’s disavowal of the options does not discharge Shaffer’s duty to perform under the contract, or to prove that he could have performed. “While one party’s breach of a contract may render the other party’s tender of performance a futile act, it does not relieve the other party of the burden of proving its ability to perform under the contract.” Empire Properties, 674 A.2d 297, 305 n.5 (Pa. Super. 1996). Additionally, Shaffer offers no evidence that he attempted to mitigate his damages, for example, by repaying his obligation to The Bank, obtaining possession of the options certificate and continuing to litigate the merits of his breach of contract claim, or by purchasing the certificate at its auction as collateral security.

not made any Rule 56 proffer to demonstrate the elements of this cause of action.

Pennsylvania law does not recognize an affirmative claim of equitable estoppel. Jodek Charitable Trust, R.A. v. VerticalNet, Inc., 412 F.Supp.2d 469, 477 (E.D. Pa. 2006), citing Carlson v. Arnot-Ogden Memorial Hosp., 918 F.2d 411, 416 (3d Cir. 1990) (“[T]here is no independent cause of action for ‘equitable estoppel’ under Pennsylvania law - it may only be asserted as a defense.”).

Accordingly, judgment must be entered in favor of PSB on Shaffer’s breach of contract and estoppel claims, and the complaint of intervenor-plaintiff U.S. Claims must be dismissed.

BY THE COURT:

/s/ Edmund V. Ludwig  
Edmund V. Ludwig, J.

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**ORDER**

AND NOW, this 15<sup>th</sup> day of November, 2006, the “Motion of PSB Bancorp, Inc. to Dismiss as Moot the Claims of Hal J. Shaffer and U.S. Claims, Inc.” is granted and the complaint of intervenor-plaintiff U.S. Claims is dismissed in its entirety; Count I of the complaint of plaintiff Hal. J. Shaffer is dismissed, and judgment is entered in favor of defendant PSB Bancorp, Inc. and against plaintiff Shaffer on Counts II, III, and IV of the complaint.

BY THE COURT:

/s/ Edmund V. Ludwig  
Edmund V. Ludwig, J.