IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

NEW RIVER CITY, G.P., LLC	:	November Term, 2006
	:	
Plaintiff	:	
	:	
v.	:	No. 821
	:	
PINE PROJECTS, LLC *et al*.	:	COMMERCE PROGRAM
	:	
	:	Motion Control Nos. 11215, 11217, 12242,
Defendants	:	121888.

ORDER

AND NOW, this 13th day of July, 2007, in consideration of the preliminary objections filed by defendants RCDGP, LLC, Michael M. Vegh, Commonwealth Title Land Insurance Company, and Pine Projects, LLC, the responses filed by Plaintiff New River City, G.P., LLC, the memoranda of law in support and opposition, and the surreply memoranda filed by Defendants Michael M. Vegh and Commonwealth Tile Insurance Company, it is **ORDERED** that:

1. the preliminary objection filed by Defendant RCDGP, LLC is **OVERRULED**;

2. the preliminary objection filed by Defendant Commonwealth Land Title Insurance Company is **SUSTAINED** in that Plaintiff's demand for attorney's fees is stricken from Count II of the Complaint, and otherwise **OVERRULED**;

3. the preliminary objection filed by Defendant Michael M. Vegh is **OVERRULED**;

4. the preliminary objection filed by Defendant Pine Projects, LLC is **OVERRULED**.

BY THE COURT,

MARK I. BERNSTEIN, J.

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MEMORANDUM OPINION

Defendants RDCGP, LLC, Commonwealth Land Title Insurance Company, Michael M. Vegh, and Pine Projects LLC, filed preliminary objections to the Complaint. For the reasons below, the preliminary objection filed by defendant Commonwealth Land Title Insurance Company is sustained in part and overruled in part. All other preliminary objections are overruled.

Plaintiff New River City GP, LLC ("Seller"), a Pennsylvania limited liability company, owns real property in Philadelphia, Pennsylvania. Defendant RCDGP, LLC, a Delaware limited liability company, is the general partner of Defendant Richmond Crest Development, L.P., a Pennsylvania company. Defendants RCDGP, LLC and Richmond Crest Development, L.P. (collectively "Buyer"), agreed to acquire Seller's property in settlement of a legal dispute.[1] Individual Defendant Michael Vegh ("Vegh"), is a limited partner of Richmond Crest, and was a managing member of RCDGP, LLC, when Buyer

[1] Agreement for the Sale of Partnership Interests, Exhibit A to Plaintiff's Complaint.

agreed to acquire Seller's property. Pursuant to the Sale Agreement between Seller and Buyer, Defendant Commonwealth Title Insurance Company ("Commonwealth"), a Nebraska corporation, would hold in escrow Buyer's good faith deposit of $200,000, plus all costs associated with the transaction. Pursuant to the Sale Agreement, Buyer agreed to indemnify Seller if Buyer breached.

Seller, Buyer, and Defendant Robert Chalpin Associates, Inc. ("Chalpin"), a Pennsylvania corporation, entered into a related Escrow Agreement. Pursuant to that Escrow Agreement, Chalpin, as local agent of Commonwealth, agreed to hold in escrow Buyer's good faith deposit and transaction costs. If Buyer exercised its option to postpone the closing date, Chalpin was obligated to remit all matured transaction costs to seller. The Escrow Agreement had no provision concerning attorney's fees.

The Complaint alleges that Buyer breached the Sale Agreement by failing to sufficiently fund the escrow account, and by refusing to close the deal. The Complaint alleges that Chalpin and its principal, Commonwealth, breached the Escrow Agreement by failing to escrow Buyer's funds, by improperly obeying Buyer's instructions to withhold funds, and by failing to inform the Seller that the escrow account had been insufficiently funded.

The Complaint claims breach of contract against Buyer and Michael Vegh individually in Count I, breach of contract against escrow agents Chalpin and Commonwealth in Count II, breach of fiduciary duty against Chalpin and Commonwealth in Count III, civil conspiracy against Buyer, Michael Vegh, Chalpin, and Commonwealth, in Count IV, and fraud against Buyer, Michael Vegh and Pine Projects in Count V.

The standard for preliminary objections is settled: "[a]ll material facts set forth in the complaint as well as all inferences reasonably deducible therefrom are admitted as true. The question presented by the demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible. Where a doubt exists as to whether a demurrer should be sustained, this doubt should be resolved in favor of overruling it."[2]

I. Seller may not demand attorney's fees under Count II of the Complaint.

Count II of the Complaint contains a demand for attorney's fees. Seller alleges that Chalpin and Commonwealth breached the Escrow Agreement, and that this breach entitles Seller to recover attorney's fees. In Pennsylvania, "a litigant cannot recover counsel fees from an adverse party unless there is express statutory authorization, a clear agreement of the parties or some other established exception."[3] Chalpin, on behalf of its principal, Commonwealth, executed an Escrow Agreement which does not provide for attorney's fees. Seller is not entitled to recover such fees under any statute or other established rule. Commonwealth's preliminary objection is granted, and Seller's demand for attorney's fees is stricken from Count II of the Complaint.

II. Seller may maintain a breach of contract claim against Michael Vegh.

Seller asserts a breach of contract claim against Buyer's limited partner, Defendant Michael Vegh, and relies on a provision of the Sale Agreement which states that limited partners are jointly and severally individually liable for Buyer's breaches. That provision states:

> Indemnity by Richmond and RCDGP (Buyers)
>
> (a) Richmond and RCDGP [Buyers], and the limited partners of Richmond, jointly and severally, agree to indemnify and defend [Seller] … and to

[2] Emplrs. Ins. of Wausau v. DOT, 865 A.2d 825, 830 (Pa. 2005).
[3] Mosaica Acad. Charter Sch. v. Commonwealth, 813 A.2d 813, 822 (Pa. 2002).

> hold [Seller] harmless from and against any loss … cost or expense, including attorney's fees … incurred by … [Seller] arising out of, in connection with, or incident to … the non-fulfillment by [Buyers] of any material covenant, obligation or agreement of [Buyers] to be performed under this Agreement….[4]

Until 2001, a limited partner in Pennsylvania could be liable to persons transacting business with a limited partnership "if the limited partner participate[d] in the control of the business."[5] However, on June 22, 2001, the Pennsylvania Legislature exempted limited partners from the obligations of the limited partnership. The statute on limited partners was amended to say: "[a] limited partner is not liable, solely by reason of being a limited partner … for a debt, obligation or liability of the limited partnership … or for the acts of any partner, agent or employee of the limited partnership."[6] There is no relevant legislative history explaining this decision.[7] The statute's Amended Committee Comment states:

> The Committee concluded that, if the test of participating in the control of the business were eliminated, any abuses of the full limited liability that would be conferred upon limited partners could be addressed under 15 PA. C.S. § 110, the same as is done with corporation and other forms of associations.[8]

This Comment suggests that any limited partners who abuse this protection may be held liable under 15 PA. C.S. § 110, the Association Code, which in pertinent part states:

> Supplementary general principles of law applicable
>
> … the principles of law and equity, including, but not limited to, the law relating to principal and agent, estoppel, waiver, fraud, misrepresentation, duress, coercion, mistake, bankruptcy or other

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[4] Agreement for the Sale of Partnership Interests, Exhibit A to Plaintiff's Complaint, ¶ 10.
[5] 15 PA. C.S. § 8523(a) (amended 2001).
[6] 15 PA. C.S. § 8523(a).
[7] Pa. H. J., 1268 (June 21, 2001)
[8] Amended Committee Comment (2001) to 15 PA. C.S. § 8523.

> validating or invalidating cause, shall supplement [the] provisions [of this title].

The limited partners statute and 15 PA. C.S. § 110 are irrelevant to the facts in this case. Michael Vegh, as a managing member of the general partnership, presumably knew and approved the clause whose explicit terms bind him as a limited partner. In this case, the limited partner not only participated in the control of the business when Seller and Buyer entered into contract, but also specifically and explicitly agreed to be liable for the obligations of the limited partnership. Nothing in the statute precludes a manager who is a limited partner from explicitly providing additional security in a contract. Vegh is not claimed to be liable "solely by being a limited partner"; instead, he is claimed to be liable by the explicit terms of the contract which he presumably approved.[9] Accordingly, Defendant Vegh's preliminary objection is overruled.

BY THE COURT,

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MARK I. BERNSTEIN, J.

[9] The court does not decide whether John Does 1—5 agreed to be bound because there are no allegations that they were managing members empowered to bind themselves as limited partners.