

Disclosure of Wetlands/Real Estate Contract: Ohio Appellate Court Addresses Closing Date Extension Issue



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The Court of Appeals of Ohio (Seventh District – Carroll County) (“Court”) addressed in a September 24th Opinion whether the closing date for a real estate contract had been extended. See *Linda M. Fiscus, Successor Trustee of the Morvatz Family Revocable Living Trust dated July 27, 1999, v. Thomas Nordquist*, 2020 WL 5843901.

The presence of wetlands in the subject property played a role in the dispute between the parties.

Linda Fiscus, Successor Trustee of the Morvatz Family Revocable Living Trust dated July 27, 1999, (“Seller”) entered into a Real Estate Purchase Agreement (“Purchase Agreement”) on March 13, 2015, with Thomas D. Nordquist (“Purchaser”). The property was described as 51.79 acres of undeveloped land located in Carroll County, Ohio.

The Purchase Agreement read in pertinent part:

Agreement to Purchase and Sell. Seller agrees to sell to Purchaser, and the Purchaser agrees to purchase from Seller, the Property in two phases upon the terms set forth in this Agreement. The Phase I Property shall consist of approximately 17 acres, subject to survey, as depicted on “Exhibit B” attached hereto. The Phase II Property shall consist of the balance of the Seller’s acreage, approximately 34.79 acres, after the conveyance of the Phase I Property.

A section of the real estate contract described the Closing, stating:

Closing. The closing of the sale of the Phase I Property to Purchaser (the “Phase I Closing” or “Phase I Closing Date”) will occur within thirty (30) days following the expiration of the Inspection Period as set forth in Paragraph 8 hereof *** . The closing of the sale of the Phase II Property to Purchaser (the “Phase II Closing” or “Phase II Closing Date”) shall occur no later than twelve (12) months following the “Phase I Closing”, provided however, that at Purchaser’s option, he may extend the “Phase II Closing” an additional twelve (12) months by giving Seller written notice thereof prior to May 1, 2016 and placing an additional Ten Thousand and 00/100 Dollars (\$10,000.00) on deposit with Escrow Agent ***

The Purchase Agreement in Section 5 addressed “Evidence of Title and Zoning” and in Section 8 “Inspection Period.”

Section 5 describes the process for obtaining a survey to identify encroachments, etc. Section 8 provides the Purchaser the ability to conduct environmental, engineering, and other studies, etc.

The Purchaser had absolute discretion to terminate the transaction on or before the expiration of the inspection period. Written notice must be provided to the Seller on or before the expiration date of the

inspection period. No amendments, waivers, etc., are deemed to have been made unless in writing and executed by both parties.

The Phase I closing date was eventually extended to September 1, 2015. Language associated with this extension acknowledged the inspection period ended as of July 15, 2015. Other terms remained in full force and effect.

The Purchase Agreement also references the Purchaser's ability to conduct an "Environmental Audit" and states:

To the best knowledge of Seller, the Property does not contain any wetlands.

Section 10 provides the Purchaser's Conditions to Closing. They are contingent upon the Seller's representations and warranties being true and correct and that any conditions set forth in Section 10 are satisfied and/or waived on the closing date unless the Purchaser notifies Seller in writing that it has not been satisfied or waived.

Section 12 provides that termination must be completed by the date of closing.

The Court describes Seller's response to the Purchaser's counsel regarding potential awareness of wetlands on the property. This included an indication by Seller she did not know what the definition of a wetland included.

The closing for Phase II of the property was required to occur or before September 1, 2016, unless the parties' modified the contract pursuant to a signed, written agreement. There is discussion in the Opinion to the effect that the Purchaser may not have had the funds to close on Phase II and that the property was not buildable for the intended purpose. Subsequently, Purchaser engaged counsel who asserted there was a:

. . . defect in the Phase II property, due to the presence of wetlands.

The Purchaser subsequently informed Seller that the Purchase Agreement was terminated. A reference was made to the identification of two streams and multiple wetland areas. The Purchaser stated that they were identified by an ALTA survey.

The Purchaser referenced Paragraph 5 of the Purchase Agreement. It states that if the survey indicates an encroachment, lien, encumbrance or other defect in title to the property which will materially interfere with the proposed use of the property (in Purchaser's reasonable discretion) then within 10 days after the date on which the survey is delivered to Purchaser, a notice can be given specifying the alleged defect. Purchaser cited the wetlands and streams as encumbrances, etc. Further, the warranty regarding absence of wetlands was alleged to have been violated.

The Purchaser had environmental testing performed prior to the termination date. Further, the Purchaser is stated to have been informed of the presence of wetlands. An environmental study containing sections on "Wetlands Investigation," "Wetlands Delineation Plan", and "Wetlands Data Sheets" is referenced.

The trial court found that the Purchaser breached the Purchase Agreement when it failed to close on Phase II and pay the purchase price by the closing date of September 1, 2016. It rejected the Purchaser's attempt to prolong the closing date at what it described as a "last-minute excuse of undisclosed wetlands."

The trial court stated that if the Purchaser wanted to use Sections 10 and 12 to terminate the Purchase Agreement, he should have done so no later than the required date. Because the Purchaser waited to have an ALTA survey performed was held to not excuse the obligation to close by September 1, 2016.

The Court upholds the trial court noting that Section 20 of the Purchase Agreement prohibits the oral amendment or modification of the terms of the agreement "unless in writing and executed by both the Seller and Purchaser." It acknowledged that the Seller extended a written offer to extend the closing date

to October 28, 2016. However, this did not fulfill the Section 20 requirement that an amendment or modification to the Purchase Agreement be reduced to writing and signed by both parties. Neither party had the authority to unilaterally amend the Purchase Agreement. The deadline remained September 1, 2016.

A copy of the Opinion can be downloaded [here](#).