STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

CHESTER ASTEMBORSKI,

Plaintiff,

vs. Case No. 2013-2348-CK

BRIAN J. KEAN, KEAN ESTATES PROPERTIES CORP., a Michigan Corporation, and TITLE SOURCE INC., a Michigan corporation,

Defendants.
_____/

OPINION AND ORDER

Plaintiff and Defendants have filed cross motions for summary disposition pursuant to MCR 2.116(C)(10).

Factual and Procedural History

Plaintiff is the sole owner of property located at 38190 Van Dyke, Sterling Heights, MI ("Subject Property"). Defendant Brian Kean ("Defendant Kean") is the sole owner and shareholder of Defendant Kean Estates Properties Corp. ("Defendant KEPC"). In January 2013, Defendant Kean and Plaintiff entered into a purchase agreement for the Subject Property ("Purchase Agreement"). The Purchase Agreement was for a cash sale of the Subject Property, with Defendant KEPC providing 10% of the purchase price down. Pursuant to the Purchase Agreement, Defendant KEPC had until April 1, 2013 to cancel the sale in writing and recover the 10% deposit.

The instant litigation arises out of the parties' dispute as to whether Defendant KEPC properly terminated the Purchase Agreement on or before April 1, 2013. The parties have filed cross motions for summary disposition pursuant to MCR 2.116(C)(10).

Standard of Review

A motion under MCR 2.116(C)(10) tests the factual support of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In reviewing such a motion, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* The Court must only consider the substantively admissible evidence actually proffered in opposition to the motion, and may not rely on the mere possibility that the claim might be supported by evidence produced at trial. *Id.*, at 121.

Arguments and Analysis

In support of their motion, and in response to Plaintiff's motion, Defendants aver that their obligation to close the Purchase Agreement was contingent on the successful completion of a physical and municipal inspection of the Subject Property, that they were unable to complete the inspections, and that they cancelled the Purchase Agreement.

In response, Plaintiff contends that Defendants failed to provide him with a written termination as required by the Purchase Agreement and that as a result Defendants are not entitled to recover the 10% deposit. Section 16 of the Purchase Agreement governs the right to the inspections and the notice required for termination. Specifically, section 16 provides:

> 16. [Defendant KEPC] shall have thirty (30) days after receipt of fully accepted Offer ("the contingency period") to inspect and obtain the following items, at [Defendant KEPC's] sole and absolute discretion:

> a) Physical Inspection of all aspects of the [Subject Property].
>
> b) [Defendant KEPC's] satisfaction with the results of a toxic waste investigation of the [Subject Property], to be completed by [Defendant KEPC] at his sole cost and expense.
>
> c) [Defendant KEPC's] satisfaction that the governing municipalities will allow the [Subject Property] to be utilized to permit [Defendant KEPC's] proposed development and use of the [Subject Property].
>
> d) [Plaintiff] to provide [Defendant KEPC] with copies of any environmental reports, surveys, drawings, warranties, and/or other information regarding the property is [sic] has in its possession.
>
> If [Defendant KEPC] is unable to satisfy himself of the contingencies, at [Defendant KEPC's] sole discretion outlined in subparagraph's (a) through (d) inclusive, he shall notify [Plaintiff] in writing within the time limits set forth and this Purchase Agreement shall be terminated and no longer in effect, all deposit monies shall be refunded to [Defendant KEPC] forthwith, and the parties hereto shall have no further obligation or liabilities to the other.
>
> Further, section 12 governs notices, and provides:
>
> All notices, deliveries or tenders given or made in connection herewith shall be deemed completed and legally sufficient if mailed or delivered to the perspective party for whom the same is intended at his address herein set forth.

Defendants contend that Plaintiff did not turn on the utilities to the Subject Property, which prevented them from properly inspecting the Subject Property. After requesting the contingency period be extended and the utilities turned on, the parties executed a first amendment to the Purchase Agreement ("Amended Agreement"). Pursuant to the Amended Agreement, the contingency period was extended to April 1, 2013. After Plaintiff continued to fail to turn on the utilities, on April 1, 2013, Defendant KEPC sent an email to Plaintiff's son-in-law providing that it was unsatisfied with the physical condition of the Subject Property and that it could not purchase the Subject Property for cash pursuant to the terms of the Purchase Agreement. Defendants aver that their email terminated the Purchase Agreement and required Plaintiff to return the deposit. However, the language in the Purchase Agreement is clear and

unambiguous. The explicit terms of the Purchase Agreement provide for written notice of termination sent to Plaintiff's address in Florida. Further, the Purchase Agreement does not state that actual notice or knowledge will supersede the written notice and mailing requirement. "One who signs a contract will not be heard to say when enforcement is sought, that he did not read it, or that he supposed it was different in its terms." *Farm Bureau Mutual Ins Co of Michigan v Nikkel*, 460 Mich 558, 567-568; 596 NW2d 915 (1999). In this case, the Purchase Agreement clearly sets forth the required method of termination. Defendants failed to avail themselves of that procedure and as a result their attempt to terminate the Purchase Agreement on April 1, 2013 was ineffective.

Defendants also contend that the Amended Agreement required Plaintiff to turn on the utilities, that he failed to do so, and that his failure to do so was a breach that relieved them of their duty to terminate the Purchase Agreement by providing written notice to Plaintiff's address. The Amended Agreement provides, in pertinent part:

> Per section 16 of the Purchase Agreement dated January 11, 2013, we are requesting an extension until [April 1, 2013] of the Due Diligence period of City Inspection and Environment; Utilities to the property will need to be turned on in order to complete the City Inspection Approval.

Even assuming that the utilities were not turned on, at best that failure would constitute grounds for Defendants being unable to satisfy themselves of the contingencies set forth in section 16 of the Purchase Agreement. Section 16 provides that if Defendants are unable to satisfy themselves of the contingencies they are authorized to terminate the Purchase Agreement by providing the requisite notice. However, as discussed above, Defendants failed to provide the required notice prior to April 1, 2013. Accordingly, they are not entitled to recover the 10% deposit they provided at the time the Purchase Agreement was executed.

Conclusion

For the reasons set forth above, Plaintiff's motion for summary disposition is GRANTED. Further, Defendants' motion for summary disposition is DENIED. Plaintiff may retain the $38,000 deposit as liquidated damages pursuant to section 3 of the Purchase Agreement. Pursuant to MCR 2.602(A)(3), this Opinion and Order resolves the last pending claim and closes this case.

IT IS SO ORDERED.

/s/ John C. Foster
JOHN C. FOSTER, Circuit Judge

Dated: December 16, 2013

JCF/sr

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