IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

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| WESTWOOD DEVELOPMENT PARTNERS, LLC, a Delaware Limited Liability Company, | : | C.A. No: K10C-08-018 RBY |
| Plaintiff, | : | |
| v. | : | |
| STEPHEN G. DRAPER, individually and as Trustee under the Revocable Trust Agreement of Stephen G. Draper dated January 29, 1997 and as Trustee under the Revocable Trust Agreement of Clara Emily Draper date January 29, 1997, and CLARA EMILY DRAPER and MICHELE E. GARDNER, | : | |
| Defendants. | : | |

*Submitted: December 2, 2011*
*Decided: March 29, 2012*
*Upon Consideration of Defendants'*
*Motion for Summary Judgment*
**DENIED**
**OPINION AND ORDER**

Richard A. Forsten, Esq., James D. Taylor, Esq., and Michael J. Farnan, Esq., Saul, Ewing, LLP, Wilmington, Delaware for Plaintiffs.

Kathi A. Karsnitz, Esq., Georgetown, Delaware for Defendants Stephen G. Draper, individually and as Trustee and Clara Emily Draper.

Michael A. Arrington, Esq., Parkowski, Guerke & Swayze, P.A., Wilmington, Delaware for Defendant Michele E. Gardner.

Young, J.

## SUMMARY

Westwood Development Partners, LLC (Plaintiff) instituted this action seeking return of a security deposit pursuant to contract. Stephen and Emily Draper (Defendants) filed the instant motion for summary judgment, arguing that Plaintiff is not so entitled. Because a factual dispute exists relative to Defendants' having satisfied their contractual burden through the Geo-Technology Associations Inc. (GTA) reports, Defendants' motion for summary judgment is **DENIED**.

## FACTS

The first three paragraphs hereof reiterate the first three paragraphs in the decision on Plaintiff's Motion for Summary Judgment.

Plaintiff entered into an agreement of sale with(Defendants on October 17, 2005. The agreement was for the sale of 137 acres of land, previously used as a mobile home park, from Defendant to Plaintiff for a purchase price of $6,000,000. Subject to certain exceptions within the agreement and described, in pertinent part, herein, the property was to be sold "as-is." Pursuant to paragraph two of the agreement, upon execution thereof, Plaintiff provided Defendants with a $1,000,000 security deposit. The deposit was agreed to be, generally, non-refundable.

Paragraph nine of the agreement affords Plaintiff the right to terminate the agreement, and demand return of the deposit, if Defendants fail to supply "satisfactory Phase I and Phase II environmental audit reports prior to final settlement." Phase I and Phase II environmental audit reports identify and address certain environmental concerns existing on a subject property. Often times, the reports are prepared in connection to sale of property. Phase I reports are more

cursory in nature, identifying potential concerns and directing further investigation if necessary. Phase II reports delve deeper into concerns raised by a Phase I report. In regard to these reports, paragraph nine of the agreement states:

> "Seller shall supply to Purchaser satisfactory Phase I and Phase II environmental audit reports prior to final settlement; and if Seller shall fail to do so, Purchaser may accept the Property in its condition as reported or it may elect to terminate this Agreement, in which case the said deposit shall be refunded promptly to Purchaser."

Paragraph nine, however, is not the only provision in the agreement that addresses environmental concerns. Paragraph sixteen prohibits Defendants from creating a condition on the property, after execution of the agreement, that could give rise to a lien under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). Specifically, paragraph sixteen states:

> "This Agreement is further conditioned upon Seller not suffering to be introduced onto the Property at all times after execution of this Agreement by all parties and prior to final settlement all hazardous and toxic substances and all conditions (including but not limited to underground storage tanks and buried debris and wastes):
>
> (a) that would expose the Property to the risk of a lien under the Comprehensive Environmental Response, Compensation and Liability Act, 42 *U.S.C.* § 9601 *et seq.*, commonly known as "CERCLA" or "the Superfund Act" or under any other Federal or State environmental protection statute or regulation or
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> (b) that would require substantial expenditures of time, effort or money to avert or negate the risk of any such lien.

> In the event that this condition is not satisfied, Purchaser may elect to go forward with final settlement or may elect to terminate this Agreement, in which case Purchaser's deposit shall promptly be refunded."

Notwithstanding Defendants' burden to procure both Phase I and Phase II assessments, Plaintiff, by and through Mr. W. Zachary Crouch of Davis Bowen & Friedel, Inc., retained John D. Hynes & Associates, Inc. (Hynes) to provide a Phase I report independently. The Hynes report was issued on October 17, 2005, the same day that the agreement of sale was executed.

The Hynes report identified a series of environmental concerns on the property. Specifically, the report identified: the presence, and subsequent removal, of five fuel tanks, the presence of a ten gallon container of suspected used oil, and an empty fifty-five gallon drum, several areas of partially buried debris; partially buried tires; stating the presence of one electrical transformer. The Hynes report suggested that removal of the items was necessary and that further investigation should be conducted to address potential environmental problems.

In accordance with paragraph nine of the agreement, Defendants procured Phase I and Phase II reports from GTA. Those reports, issued together on March 12, 2008, reported no evidence of recognized environmental conditions in connection with the property. The report did, however, raise concerns regarding areas of surface debris on the property. Additionally, the GTA report indicated that, because the property was, at one time, a mobile home park, a potential for buried wastes and containment media on the property existed. GTA recommended that any septic systems be removed should they exist.

On September 23, 2008 and October 20, 2008, Plaintiff's counsel wrote Defendants' counsel expressing the intent to terminate the agreement, in part, under paragraph nine. Specifically, Plaintiff indicated that the GTA reports did not examine and evaluate appropriately the risks posed by certain concentrations of barium or the environmental conditions identified by the Hynes report. Defendant refused to return the security deposit, contending that Plaintiff terminated the agreement wrongfully.

Plaintiff instituted this action seeking return of the deposit pursuant to paragraph nine of the agreement. During the course of the litigation that followed, Plaintiff retained Duffield Associates, Inc.(Duffield) to evaluate the GTA reports. On August 25, 2011, Duffield issued a report indicating that the GTA reports were not satisfactory. The Duffield report contemplated the nature of the GTA reports in the context of paragraph nine of the agreement. In doing so, Duffield suggested that the term "satisfactory," in regard to Phase I and Phase II reports, could speak to whether or not the reports were prepared in accord with standards of professional practice; whether the reports assess adequately the environmental conditions on the property; whether the property itself has any impairment; or whether the reports meet the expectations of the buyer in the context of the report's intended use. The Duffield report concluded that the GTA reports were not satisfactory in accordance with any of the four definitions that it established.

## STANDARD OF REVIEW

Summary judgment is appropriate where the record exhibits no genuine issue

of material fact so that the movant is entitled to judgment as a matter of law.[1] The movant bears the initial burden of establishing that no genuine issue of material fact exists.[2] Upon making that showing, the burden shifts to the non-movant to show evidence to the contrary.[3] When considering a motion for summary judgment, the Court considers the facts in the light most favorable to the non-movant.[4]

## DISCUSSION

Defendants' motion for summary judgment argues that the phrase "satisfactory Phase I and Phase II environmental audit reports," included in paragraph nine of the agreement, is ambiguous. Defendants urge the Court to interpret the phrase to mean that the Phase I and Phase II reports must indicate only that conditions that could give rise to a lien under CERCLA do not exist on the property.

Defendants argue further that they provided satisfactory Phase I and Phase II reports, because the GTA reports did not indicate that conditions giving rise to a CERCLA lien existed. From there, Defendants suggest that neither the Hynes report nor the Duffield report justifies rejection of the GTA reports. Because, they complied with the terms of paragraph nine, Defendants contend that there is no genuine issue of material fact and that they are entitled to summary judgment.

In response, Plaintiff argues that the phrase "satisfactory Phase I and Phase II

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[1] *Tedesco v. Harris*, 2006 WL 1817086 (Del. Super. June 15, 2006).

[2] *Ebersole v. Lowengrub*, 54 Del. 463 (Del. 1962).

[3] *Id.*

[4] *Tedesco*, 2006 WL 1817086 at *1.

environmental audit reports" should be given what Plaintiff contends is its plain and ordinary meaning. In that vein, while the issue of contract interpretation is a question of law, Plaintiff contends that a question of fact exists as to whether or not the reports were satisfactory. Additionally, Plaintiff asserts that the Hynes report and the Duffield report do, in fact, serve to rebut Defendants' GTA reports.

"Under settled principles, 'if the relevant contract language is clear and unambiguous, courts must give the language its plain meaning.'"[5] "If the contract is clear on its face, the court will rely solely on the clear, literal meaning of those words."[6] "If a contract is unambiguous, extrinsic evidence may not be used to interpret the intent of the parties, to vary the terms of the contract, or to create an ambiguity."[7] "Creating an ambiguity where none exists could, in effect, create a new contract with rights, liabilities and duties to which the parties had not assented."[8] On the other hand, when contract language is ambiguous, the Court will consider extrinsic evidence to interpret the agreement.[9] A contract is ambiguous "when the provisions in controversy are reasonably or fairly susceptible of different

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[5] *Westfield Ins. Group v. J.P.'s Wharf, Ltd.*, 859 A.2d 74, 76 (Del. 2004) (quoting *Phillips Home Builders, Inc. v. Travelers Ins. Co.*, 700 A.2d 127, 129 (Del. 1997)).

[6] *Interactive Corp. v. Vivendi Universal, S.A.*, 2004 WL 1572932 (Del. Ch. June 30, 2004).

[7] *Eagle Industries, Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228 (Del. 1997).

[8] *Rossi v. Ricks*, 2008 WL 3021033 (Del. Ch. Aug. 1, 2008) (quoting *Lorillard Tobacco Co. v. Am. Legacy Foundation*, 903 A.2d 728, 739 (Del. 2006)).

[9] *West-Willow-Bay Court, LLC v. Robino Bay Court Plaza, LLC*, 2007 WL 3317551 (Del. Ch. Nov. 2, 2007).

interpretations."[10]

As a threshold matter, the Court must determine if the word "satisfactory" is ambiguous. The Court is of the opinion that it is. Webster's Dictionary defines "satisfactory" as "giving satisfaction" and "adequate." The phrase "satisfactory Phase I and Phase II environmental audit reports" fails to specify to whom the reports must "give satisfaction," or by what standard the reports are "adequate." Without those specifications, the phrase is reasonably susceptible to different interpretations. Thus, it is appropriate to look to extrinsic evidence to interpret the agreement.

Defendants maintain that the phrase "satisfactory Phase I and Phase II environmental audit reports," as included in paragraph nine of the agreement, should be interpreted to mean only that Defendants are to provide Plaintiff with environmental audit reports that indicate an absence of any condition on the property that may give rise to CERCLA liability. They draw that conclusion because, according to their understanding, "Phase I and Phase II site assessments are used to measure the environmental quality of property under regulations promulgated under CERCLA." Moreover, because paragraph sixteen contemplates CERCLA liability in a slightly different context, Defendants impute CERCLA concerns unto paragraph nine.

The fact that CERCLA is implicated in paragraph sixteen does not indicate, with any degree of certainty, that the parties intended CERCLA liability to be the absolute standard in paragraph nine. CERCLA was, obviously, taken under

[10] *Rhone-Poulenc Basic Chemicals Co. v. American Motorist Ins. Co.*, 616 A.2d 1192 (Del. 1992).

consideration upon drafting the agreement. If they wanted to include CERCLA under paragraph nine, the parties could have do so expressly. As a corollary, if they wanted to contemplate Phase I and Phase II reports under paragraph sixteen, that would have been an option as well.

Moreover, paragraph sixteen is not limited to CERCLA concerns. Although paragraph sixteen does address CERCLA liens, it also prohibits Defendants from introducing conditions that would create liability under other environmental statutes. If that paragraph contemplates liability under statutes other than CERCLA, it cannot be read to limit paragraph nine's concerns to those regarding CERCLA only.

Plaintiff has presented two reports that indicate that the GTA reports were not satisfactory. Neither of those reports indicates that CERCLA liability is the sole concern of a Phase I or Phase II report. In fact, the Duffield report suggested four possible ways in which an environmental audit report may be not satisfactory. Those suggestions did not mention CERCLA.

The foregoing analysis still leaves the parties disputing what paragraph nine does require. Other jurisdictions have addressed this issue where transactions have been contingent upon the satisfaction of a promisor. In California, the Supreme Court and the Court of Appeals have held that satisfaction clauses are measured according to the reasonably prudent person.[11] Where the condition involves satisfaction concerning commercial value or quality, operative fitness or mechanical utility, promisor satisfaction or dissatisfaction has been tested against a reasonable person

[11] *See Mattei v. Hopper*, 330 P.2d 625 (Cal. 1958); *see also PMC, Inc. v. Porthole Yachts, Ltd.*, 65 Cal. App. 4th 882 (Cal. Ct. App. 1998).

standard.[12]

That standard is appropriate here. Considering the fact that environmental concerns are implicated throughout the agreement, it is clear that the parties were concerned with the environmental conditions on the property, not merely with the nature of the Phase I and Phase II reports themselves. The Phase I and II reports were intended to measure the environmental quality of the land. Therefore, because paragraph nine implicates a satisfaction clause, the standard by which "satisfactory" must be measured is that of the reasonably prudent person under the circumstances.

Because the reasonably prudent person standard applies to the satisfaction clause of paragraph nine, a factual dispute exists as to whether or not the GTA reports satisfied Defendants' burden under the contract. Because the Hynes report and the Duffield report present credible evidence that the GTA reports were not satisfactory, a genuine issue of material fact exists.

## CONCLUSION

Defendants' motion for summary judgment is **DENIED**.

**SO ORDERED** this 29th day of March, 2012.

/s/ Robert B. Young
J.

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[12] *See PMC, Inc.*, 65 Cal. App. 4th at 890; *see also Hutton v. Monograms Plus, Inc.*, 604 N.E.2d 200 (Ohio Ct. App. 1992).