

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

MULTI-STATE TITLE AGENCY, LLC,)
an Ohio Limited Liability Company,)

Plaintiff,)

VS.)

BENTLEYFORBES, LLC, a Delaware)
Limited Liability Company, and)
NORTHSTAR STUDIOS, INC., a)
Delaware Corporation,)

Defendants.)

NF
NO. 15-544-BC
JURY DEMAND

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**MEMORANDUM AND ORDERS: (1) GRANTING
MOTION TO DISMISS IN PART; (2) REFERRING CASE TO
6 HOURS OF MEDIATION TO BE COMPLETED BY 12/11/15; AND
(3) SETTING 12/17/15 CASE LITIGATION PLAN CONFERENCE**

This case is before the Court on a Tennessee Civil Procedure Rule 12.02(6) motion of Cross-defendant BentleyForbes to dismiss the Breach of Contract Crossclaim of NorthStar Studios, Inc.

After considering the pleadings, the law and analyzing the parties' Contract, the Court concludes that Section 8 of that Contract is not ambiguous and may be construed as a matter of law, but that factual allegations of BentleyForbes' actions and statements to NorthStar predominately about financing with little, if any, alleged actions and statements regarding Feasibility Items require granting the motion in part, and denying the motion in part.

In particular, it is ORDERED that the Court concludes as a matter of law:

1. Section 8 of the Crossclaimants' Contract is not ambiguous and may be construed from the face of the document.

2. The Court's construction of Section 8 of the Crossclaimants' Contract is that for the Purchaser/BentleyForbes to obtain a refund of the \$200,000 earnest money, Section 8 required performance by BentleyForbes of:

- a — A determination by BentleyForbes that the Property is unacceptable for any reason relating to the Feasibility Items;
- b — Written notification of termination of the Contract; and
- c — Written notification before the end of 30 days from the date of execution of the January 28, 2015 Contract (the "Feasibility Period").

3. Section 8 performance does not require that BentleyForbes' written notification of termination identify or explain the unacceptability of Feasibility Items.

4. Section 8 performance does not require that BentleyForbes conduct feasibility studies, inspections or tests as a condition to termination. These are permissive, not required.

5. Section 8 performance of a determination by BentleyForbes that the Property is unacceptable for any reason relating to the Feasibility Items does not require BentleyForbes to explain, justify or demonstrate to the sufficiency or satisfaction of NorthStar that BentleyForbes' judgment regarding Feasibility Items was valid, correct or appropriate. The use of "any" reason and use of the word "related" to the Feasibility Items

in Section 8 provide wider latitude to the Purchaser/BentleyForbes in making a good faith determination that the Property is unacceptable. The termination does not have to be because of a Feasibility Item but, instead, any reason related to a Feasibility Item. Further indication of the breadth of Section 8 is that the Feasibility Period is not an exclusive option period. Section 16(d) allows the Seller to continue to market and solicit backup offers during the pendency of the Contract.

Section 8 does require, though, that if BentleyForbes' makes a determination of unacceptability, that determination must be related to the Feasibility Items for BentleyForbes to be refunded the earnest money.

Applying the foregoing construction to the averments and allegations of NorthStar's Crossclaim, it is ORDERED that:

6. Paragraph 26 of the Crossclaim fails to state a claim for breach of contract because the Feasibility Period ended, by the plain terms of section 8, on February 27, 2015. The factual averments of the Crossclaim are that Paragraph 28 states that a written notice of termination was provided by BentleyForbes on February 27, 2015; paragraph 30 states that the Feasibility Period was extended to March 3, 2015; and paragraph 32 states that notice of termination was provided on March 3, 2015. With these averments in the Crossclaim, as a matter of law notice of termination was timely.

7. Paragraphs 28 and 32 of the Crossclaim fail to state a claim for breach of contract because section 8 termination on the face of the section 8 text does not require specification of Feasibility Items unacceptable to the Purchaser.

8. Paragraph 36 of the Crossclaim fails to state a claim for breach of contract in light of the Court's conclusion that the prior termination letters were timely and constitute notice in compliance with section 8.

9. Paragraphs 37-40 of the Crossclaim fail to state a claim for breach of contract because the plain text of section 8 does not require the Purchaser to conduct its own engineering studies or find grounds, independent from those told it by Seller, to terminate based upon Feasibility Items.

10. Paragraphs 42 and 43 of the Crossclaim, along with the facts and circumstances alleged in paragraphs 3-14, 16-25, 27, 30, 31, 35-41 of the Crossclaim, state a claim that Bentley Forbes breached the Contract by not making the determination (*see* paragraph 2(a) of the above Order of construction) that its termination related to the Feasibility Items.

In so concluding, the Court's analysis focuses upon the provision in section 8:

In the event Purchaser determines that the Property is unacceptable for any reason relating to the Feasibility Items, Purchaser may elect to terminate this Agreement by so notifying Seller

The performance this provision required of Purchaser BentleyForbes was that it make a determination that the Property was unacceptable for any reason relating to the Feasibility Items. This performance did not occur, NorthStar alleges, with its assertion in paragraphs

42 and 43 of the Crossclaim that the determination BentleyForbes made that the Property was unacceptable was inability to obtain financing. That financing, not Feasibility Items, was the determination is demonstrated, NorthStar's Complaint alleges, by the facts, circumstantial evidence and inferences drawn from paragraphs 3-14, 16-25, 27, last sentence of paragraph 30, and paragraphs 31, 35-41 of the Crossclaim.

While the Court's construction of Section 8 is that BentleyForbes' reason for termination does not have to meet the satisfaction or sufficiency of NorthStar (*see* paragraph 5 of above Order), nevertheless BentleyForbes does have to demonstrate facts and circumstances that its decision to terminate was related to the Feasibility Items.

BentleyForbes placed itself in the position of creating factual ambiguity under the terms of the Contract with its alleged actions and statements to NorthStar predominantly about financing with little, if any, alleged actions and statements regarding Feasibility Items.

It may be that BentleyForbes has proof, not provided during the parties' contracting and, therefore, not known yet to NorthStar, that in this "as is" sale, there existed undisputed Feasibility Items that required capital expenditures, that by their very nature, capital expenditures implicate financing, and these circumstances are grounds for refund of the earnest money to BentleyForbes upon termination. That proof and those competing inferences, however, can not be considered under Tennessee law on a preliminary Rule 12.02(6) motion. The Court must stick to the pleadings.

The result of the foregoing is that:

— The Court has disposed of some claims. A part of NorthStar's Crossclaim remains pending; BentleyForbes' Crossclaim is pending.

— Left at stake is \$200,000 of earnest money, attorneys' fees and potentially additional damages if proven.

— Going forward, either side recovering depends ultimately on circumstantial evidence, the drawing of inferences and perhaps credibility. Obtaining these is uncertain and is likely to require detailed discovery which increases attorneys fees and makes the stakes higher.

— This case cannot be disposed of on the pleadings.

— Nevertheless, a number of important facts and documents are presently known by and are available to each side.

Under these circumstances, the Court's impression is that limited mediation before litigation costs escalate may be productive.

It is therefore ORDERED that pursuant to Rule 31(b) of the Tennessee Supreme Court Rules, the case is referred to six hours (excluding lunch) of mediation, unless the parties mutually agree to extend the time. Further, pursuant to Tennessee Supreme Court Rule 31, § 3(c) this Order is subject to review on motion by any party. Pursuant to Tennessee Supreme Court Rule 31, §§ 4-8, selection of neutrals and the mediation shall be completed on or before December 11, 2015. The cost of mediation shall be split between the parties.

If the case is not settled at mediation, it is ORDERED that on December 17, 2015, at 9:30 a.m. counsel shall appear for a Case Litigation Plan conference.

The context of the Court's above orders and decisions is provided as follows.

This lawsuit was filed by an escrow agent to plead \$200,000 of disputed funds into the registry of the Court and be dismissed from the lawsuit. That relief has been granted, leaving determination of the Crossclaims of the Defendants analyzed above.

The pleadings establish that in issue on the Crossclaims is which Defendant is entitled to recover \$200,000 in earnest money being held in the registry of the Court. The pleadings establish that the dispute as to the funds arises out of paragraph 8 of a *Contract for Sale of Personal Real Estate and Personal Property* the Defendants entered into January 28, 2015, with respect to a 125,000 square foot broadcast and production campus being sold by NorthStar. Under certain conditions, paragraph 8 authorized the Purchaser, BentleyForbes, to immediate return of its earnest money upon its election to terminate the Agreement.

The undisputed facts are that BentleyForbes did terminate the Agreement. In dispute is whether the conditions prescribed by paragraph 8 for return of the earnest money were fulfilled. They were, BentleyForbes asserts. The conditions were not fulfilled, NorthStar asserts.

In its Crossclaim, NorthStar's cause of action is breach of contract, and it seeks to be awarded the \$200,000 in earnest money, \$50,000 or more in damages and attorneys fees.

In its motion to dismiss, BentleyForbes asserts that the "facial validity of Seller's breach claim turns on the interpretation" of section 8 which is a matter of law, not fact, and therefore is appropriate for Tennessee Civil Procedure 12.02(6) examination.

Section 8 provides as follows. The bolded portion below is particularly pertinent:

8. **FEASIBILITY STUDY AND INSPECTIONS:** Purchaser, at Purchaser's sole expense, shall have the right to conduct feasibility studies of **title to the Property, survey, soil tests, utility availability, environmental site assessments and related studies, engineering studies (collectively the "Feasibility Items) for a period of thirty (30) days from the date the execution of this contract (Feasibility Period")**. Purchaser and its duly authorized agents or representatives shall be entitled to enter upon the Property at reasonable times during the Feasibility Period in order to conduct such studies, tests, and inspections related to the Feasibility Items that Purchaser may deem necessary or advisable and shall restore the Property to its previous condition promptly thereafter. All visits and inspections shall be at the sole risk of Purchaser, and Purchaser agrees to indemnify Seller from any cost, claims or liabilities arising from such studies, tests and inspections. This indemnity obligations shall survive termination of this Contract. Promptly after the start of the Feasibility Period Seller will provide Purchaser with the following documents and information.

- A current title report with the copies of underlying documents
- Any existing survey in Seller's possession
- Plans and specifications of utility improvements
- Copy of any appraisal in Seller's possession
- Copy of any environmental reports, soil samples or core boring results, utility capacity or any other reports in Seller's possession

In the event Purchaser determines that the Property is unacceptable for any reason relating to the Feasibility Items, Purchaser may elect to terminate this Agreement by so notifying Seller in writing before the end of the Feasibility Period, which shall be Purchaser's sole remedy. In the event of such termination the Earnest Money shall be immediately returned to the Purchaser and thereafter neither Seller nor Purchaser shall have any continuing obligation one unto the other, except for the indemnity obligations in this Contract which expressly survive

termination, and except further that Purchaser shall return to Seller all information and material provided to it with regard to the Property, including its operations and activities, and shall retain no copies thereof. **If the Purchaser elects not to terminate this Agreement by the end of the Feasibility Period, then the Earnest Money Deposit shall be non-refundable except as otherwise expressly provided in this Agreement and delivered to Seller.**

Turning to NorthStar's Crossclaim, the Court sees from BentleyForbes' motion that it characterizes the Crossclaim as asserting two breaches:

1. BentleyForbes' termination as untimely; and
2. BentleyForbes' termination, by failing to specify the Feasibility Items it found unacceptable, failed to comply with the conditions for termination and therefore was ineffective.

BentleyForbes cites to paragraphs 13-15, 26-28, 30, 32 of NorthStar's Crossclaim for the allegations pertinent to untimeliness and cites to paragraphs 5-12, 28, 35, 37, 40-41, 49 in connection with the noncompliance breach.

Additional context is that from the face of NorthStar's Crossclaim there is no dispute that there existed the following Feasibility Items:


¶ 6—Warehouse HVAC was not operational and would cost \$80,000 to replace.

¶ 7—Roof warranty set to expire; cost of new one \$275,000.

¶ 8—Sale was "as-is."

¶ 11—Financial budgets, break-even analysis and revenue modeling were provided by NorthStar.

¶ 25—After BentleyForbes deposited the earnest money, it listed in a February 25, 2015 memo certain “discoveries” it had made. Items A(3) (4) and (6) refer to “challenges” BentleyForbes had discovered.



ELLEN HOBBS LYLE
BUSINESS COURT JUDGE

cc: Jeffrey Yarbro
William Campbell, Jr.
N. Adam Dietrich II

 **MAILED**
9-21-15