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IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, CHANCERY DIVISION

JUDGE MARY ANNE MASON
FEB 17 2005
Circuit Court - 1810

SUMMIT REAL ESTATE GROUP, LLC, Plaintiff,	)	
vs.	)	No. 04 CH 16593
LAKESIDE BANK, et al., Defendants.	)	

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MEMORANDUM OPINION AND ORDER

This action was commenced by plaintiff, Summit Real Estate Group, LLC, ("Summit") on October 7, 2004. In its Amended Complaint, Summit seeks specific performance of a contract to purchase certain real estate entered into with defendant, Hickory Properties, Inc. ("Hickory") on March 12, 2004. The property that is the subject of this dispute is a 12.5 acre parcel of farmland located at 161st Street and La Grange Road in Orland Park, Illinois. In addition to Hickory, the defendants are Steven P. Gianakas ("Gianakas"), Hickory's sole shareholder, and Lakeside Bank as Trustee, holder of the legal title to the property. Trial was held on February 7-9, 2005.

Summit was formed in 2003 to develop commercial real estate. Summit's members are Darryl Schulte ("Schulte") and Timothy Tynan ("Tynan"). Schulte, a Kentucky resident, is Summit's Chairman and CEO. Tynan, a licensed real estate broker and resident of Orland Park, serves as Summit's Director of Real Estate.

Gianakas has been involved in investing in and developing commercial real estate for close to 50 years. He has developed numerous projects including retail malls, restaurants and office buildings. On nearly every project he has been involved in, he has also acted as the developer, handling all phases of construction, leasing and the like.

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Gianakas also owns the Hickory Hills Country Club ("HHCC") where he maintains his office.

Summit is currently involved, along with a related entity, Summit Development Group, in the development of "Main Street Village", a "lifestyle center" in Orland Park, consisting of retail establishments, restaurants, a hotel and a conference center. Phases I and II, which are in various stages of completion, are located on the east side of La Grange Road; Summit intends to develop Phase III, comprised of the subject property, on the west side of La Grange Road. Main Street Village is the largest commercial project in which Summit has been involved to date.

Tynan first approached Gianakas in the summer of 2003. At the time negotiations commenced, there was a "For Sale" sign on the property. During discussions of the transaction, Gianakas explained to Tynan that he was in the process of liquidating certain of his real estate investments to provide a stream of income for his family in the future.

The real estate contract was executed on March 12, 2004. The contract provides that "time is of the essence" and calls for a purchase price of $9,000,000.00 and a closing on or before January 25, 2005. The contract gives Summit the right to elect to purchase the property in installments, in which case it must close on no less than 3 acres by January 25, 2005, a second parcel by January 25, 2006, and the remainder by January 25, 2007. Summit is required to give Hickory 90 days' notice of its intent to close and notice of its intent to elect to close in installments not later than 30 days prior to closing, specifying which portion of the property it intends to purchase. With respect to earnest money, the contract provides:

> Buyer has paid to Seller simultaneously with the execution hereof, the sum of **TEN THOUSAND ($10,000.00) DOLLARS**, and on July 1, 2004, Buyer

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> shall pay to Seller, the additional sum of **NINETY THOUSAND ($90,000.00) DOLLARS**, as and for earnest money hereunder, **to be applied on the purchase price at the final closing only,** should Buyer elect to purchase the subject property on installments, … and which, pending the final closing, shall be paid to the seller which shall be deemed **NONREFUNDABLE** and the sole and exclusive property of the Seller. If the additional Ninety Thousand ($90,000.00) Dollar sum is not paid by Buyer to Seller by July 1, 2004, this Contract shall be deemed automatically terminated upon written notice by Seller to Buyer.

(Emphasis in the original). The contract is silent as to whom the earnest money should be paid. Finally, the contract contains the following provision regarding a "like-kind" exchange pursuant to Section 1031 of the Internal Revenue Code:

> It is further understood and agreed that Seller intends to and shall have the right to effect a tax-free exchange in connection with all or any portion of this transaction, pursuant to Section 1031 and/or other applicable IRS Code provisions in effect at the time of Closing hereunder, and Buyer hereby agrees to fully cooperate with Seller in such regard, so long as Seller's election to effect such tax-free exchange shall not delay the Closing hereunder ….

Prior to this transaction, Gianakas had never been involved in a Section 1031 exchange. Neither had his attorney, William Rackos ("Rackos"). Gianakas testified that prior to entering into the March 12th contract, he attended several seminars regarding tax-free exchanges. Neither Schulte nor Tynan had any prior experience with 1031 transactions. Gianakas purchased the property in 1996 for $1,380,000.00. A straight sale at a price of $9,000,000.00 would generate a significant tax liability.

Rackos has been Gianakas' attorney for 18 years. He has handled many commercial real estate transactions for Gianakas. He characterized Gianakas as a "sophisticated" real estate investor. Gianakas testified that in every transaction in which he was involved, he would never agree to anything without first discussing it in detail with Rackos and going over everything with him "with a fine tooth comb."

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On March 12, 2004, the parties and their respective counsel met to finalize the real estate contract. Schulte traveled to Chicago for the meeting, but did not bring his checkbook inasmuch as he believed the final version of the contract would not be ready for execution that day. The contract was, in fact, executed on the 12th. Schulte and Tynan both testified that during the meeting Gianakas told them to make the initial $10,000.00 earnest money check payable to him personally, stating that he could use it for "belly dancers", "Las Vegas" or anything else he chose to. Gianakas denied making the foregoing statement or saying anything at the meeting regarding who the payee of the earnest money check should be. Rackos, who was also in attendance, did not recall his client saying anything on this subject during the meeting. On March 18, 2004, a check in the amount of $10,000.00 drawn on the account of Schulte Hospitality Group, Inc. and payable to "Steven P. Ginakas(sic)" was forwarded by overnight mail to Gianakas at HHCC.

Sometime thereafter, in a meeting with Tynan, Gianakas returned the check to him. Tynan testified that Gianakas requested that the replacement check be made payable to Hickory. Gianakas testified that he told Tynan to make the check payable to Chicago Deferred Exchange, a clearing house for Section 1031 transactions. On April 16, 2004, Summit issued a $10,000.00 check payable to Hickory.

At a meeting following delivery of the second check to Gianakas, Tynan testified that Gianakas thanked him for reissuing the check, but that he had been advised by Rackos that the check should be made payable to Chicago Deferred Exchange. According to Tynan, Gianakas wrote "VOID" on the check payable to Hickory and returned it to him. Gianakas, on the other hand, testified that when he returned the check to Tynan, he

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told him make it payable to Chicago Deferred Exchange and "stop playing games." Rackos testified that he happened to be at Gianakas' office at HHCC in "late May' and overheard a conversation in which Gianakas informed Tynan that the check had been improperly issued. Ultimately, Summit issued a check payable to Chicago Deferred Exchange on May 28, 2004.

On June 1, 2004, Rackos faxed a copy of a title insurance commitment to Dennis Mondero, who was then Summit's counsel. The cover page for the transmission stated:

> Please also note that the earnest money check was prepared improperly and returned to the broker. The check is to be made payable to Chicago Deferred Exchange Corporation for IRS 1031 purposes. The check was supposed to have been reissued but it has yet (sic) been received. Also the Seller expects the additional earnest money ($90,000.00) be payable in the same manner and paid in timely fashion.

Rackos acknowledged that prior to this transmission, he had never personally advised Summit to have the check made payable to Chicago Deferred Exchange. Tynan testified that he personally delivered Summit's check payable to Chicago Deferred Exchange to Gianakas. At no time prior to the delivery of the third check to Gianakas did Hickory advise Summit either orally or in writing that Summit was in default for failure to pay the initial earnest money deposit. The check payable to Chicago Deferred Exchange has never been negotiated by Hickory.

Even prior to execution of the contract and throughout the summer of 2004, Tynan assisted Gianakas in locating potential properties for the 1031 exchange. Although they looked at several prospects, no replacement property was found. Tynan testified that on several occasions, Gianakas expressed concern about maintaining the tax-free status of the transaction and requested that Summit refrain from giving the 90-day notice of closing until the replacement property had been identified. Gianakas

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testified that although he wanted to ensure Section 1031 treatment for the sale, he was confident that he could locate property to do the exchange within the time limits imposed under the Internal Revenue Code.

During June of 2004, Tynan met with Gianakas on a number of occasions. According to Tynan, Gianakas repeatedly assured him that he did not want Summit's money and did not want or expect Summit to tender the second earnest money deposit on July 1, 2004. At one point, during a meeting at HHCC, Gianakas pulled the $10,000.00 check from his desk drawer and stated to Tynan, "I haven't even cashed your first check. Don't you trust me?" Gianakas' desk is in the "Great Room" at HHCC. Tynan testified that Gianakas' secretary, Dorothy, was present when Gianakas made this statement. Gianakas denied that this conversation took place.

Later in June, Tynan again met with Gianakas at Gianakas' office in HHCC. Dorothy was also present in the room. Tynan testified that as the July 1, 2004 deadline for the second earnest money deposit approached, he and Schulte were concerned about getting something in writing from Gianakas regarding Hickory's desire not to have the payment made. However, they were also concerned about not offending Gianakas by pressing the issue. During the meeting, when the subject came up, Gianakas again told Tynan that he did not want the $90,000.00. Gianakas then told Dorothy to make out two $50,000 checks to demonstrate that he did not want Summit's money. According to Tynan, Gianakas told him that he just wanted Summit to work with him on the Section 1031 exchange and stated, "Tell your friend in Kentucky I don't want his money." Tynan assured Gianakas that Summit did not want Hickory's checks and that he and Schulte just wanted some assurance that the second earnest money deposit would not be

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required on July 1, 2004. Gianakas denied that this exchange ever took place. Gianakas did admit, however, that he was willing to give Summit an extension for the second deposit to September 1st.

Also during one of their meetings in June, Tynan testified that he provided Gianakas with a marketing brochure depicting Main Street Village, including Phase III. According to Tynan, Gianakas was very impressed with the plans. Tynan further testified that Gianakas also began discussing with him the possibility of alternative structures for the transaction, such as a long-term ground lease, that would allow the deal to go forward, but avoid the potential tax liability.

A meeting was held on June 28, 2004, at Champp's restaurant located in Phase I of Main Street Village. In attendance were Tynan, Schulte, Gianakas and Gianakas' son, George. Schulte testified that Gianakas expressed concern about the fact that he did not yet have replacement property for the tax-free exchange and brought up possible alternative structures for the transaction that would avoid the tax consequences. During the meeting, Schulte asked Gianakas about getting something in writing about the second earnest money deposit. According to both Schulte and Tynan, Gianakas pulled an envelope from his jacket, informed them that there were two $50,000 checks in the envelope and said that he did not want their money. Schulte testified that he saw the two checks; Tynan recalled seeing only the envelope. Schulte responded that he did not want Gianakas' money and that he just wanted something in writing about the $90,000.00 earnest money deposit due on July 1st. Schulte testified that Gianakas commented that he didn't want to take the second earnest money deposit because he was afraid it would trigger tax consequences. According to both Schulte and Tynan, Gianakas asked them to

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talk to their attorney regarding whether the alternatives they were discussing would qualify for tax-free treatment.

The following day, June 29, 2004, Tynan accompanied Gianakas to an auction of a shopping center in Oak Lawn, which Gianakas was considering purchasing as the 1031 exchange property. Gianakas brought with him a check for $100,000.00, which was required for bidders at the auction. Gianakas was not the successful bidder. In the car on the way back from the auction, Tynan testified that he gave Gianakas a copy of an extension agreement regarding the $90,000.00 that had been drafted by Summit's new counsel, Joseph Brocato, and signed by Brocato on Schulte's behalf. Gianakas responded that the font on the agreement was too small, that he would give it to Rackos and get it back to Tynan the next day. Gianakas admitted seeing the agreement, but testified that he told Tynan to send it to Rackos and denied that Tynan gave him a copy.

On June 30, 2004, when he had not yet received the extension agreement regarding the second earnest money deposit, Schulte sent a $90,000.00 check via UPS to Tynan with instructions to deliver it to Gianakas on July 1st. Tynan called Gianakas on the 1st and informed him that Schulte had sent him the check by overnight mail. According to Tynan, Gianakas told him not to come in that day as he was leaving the office. Tynan testified that on the 1st, before he had received the check, he prepared a fax cover sheet to Gianakas indicating that he had received the check and was enclosing a copy of it with the fax. In fact, the check did not arrive on the 1st because UPS had mistakenly re-routed it to Rockford. Later that afternoon, Tynan sent the fax to Gianakas with a copy of the check that Schulte had faxed to him. Tynan admitted that the representation in the fax that he had received the check was not true. The confirmation

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sheet indicates that the fax was successfully transmitted to Gianakas' fax number at 5:08 p.m.

The $90,000.00 check arrived on morning of July 2, 2004, and Tynan went to HHCC to deliver it to Gianakas. When he arrived, Gianakas was standing behind his desk, and his son, George, his secretary, Dorothy, and his accountant were also in the room. Tynan informed Gianakas that they had never received an executed extension agreement and handed him the $90,000.00 check. Tynan testified that Gianakas responded, "Don't you trust me? I don't want your money." When Tynan asked Gianakas to at least put some mark on the check to show it had been tendered, Gianakas brushed him off and said that he'd see him again at a dinner they had set for July 6th when the Phase III project was next on the Orland Park Village Board's meeting agenda.[1] After Gianakas refused the tender of the check on the 2nd, Schulte and Tynan testified that they were comfortable that Gianakas did not, in fact, want the earnest money at that time and they considered the issue closed. Gianakas denied that the check was tendered on July 2nd and he did not recall Tynan coming to his office on that day. Gianakas testified that the first time he saw the $90,000.00 check was when it was shown to him during his deposition.

Following July 2, 2004, the parties conducted themselves as though the contract remained in full force and effect. Tynan continued to attend Orland Park Village Board meetings regarding Phase III (which was ultimately approved) and continued to engage in negotiations with prospective tenants and investors in the project. Tynan's sign advertising the availability of space in Phase III remains on the property to this day.

[1] Ultimately, Tynan was informed that the Phase III project was on the Board's consent agenda, which meant that it would be approved without discussion, so the dinner scheduled for the 6th was cancelled.

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Summit has entered into letters of intent with California Pizza Kitchen, P.F. Chang's Restaurant, Saltgrass Steakhouse and investors interested in buying portions of the project, but no leases or other contracts have been executed. Summit has incurred expenses for architectural work, attorneys' fees for real estate and zoning matters and expenses related to marketing the property.

According to Tynan, after July, 2, 2004, the parties continued to discuss possible alternative deals. As Gianakas would throw out ideas, he would ask Tynan to put them in writing. Tynan would then reduce the proposal to writing and send it back to Gianakas. Rackos testified that he never saw any of these proposals until his deposition. Gianakas denied that he ever proposed alternative arrangements and testified that such proposals always emanated from Summit, which Gianakas suspected was having trouble funding the purchase.

Tynan and Schulte testified that although the proposals altered the structure of the deal, they were willing to continue to work with Gianakas to see if they could accommodate his concerns. In mid-August, Tynan testified that he gave Gianakas an outline of Gianakas' most recent proposal. Pursuant to this proposal, the land would be divided into nine separate lots, Summit would enter into separate ground leases with Hickory for six of the lots, Hickory would fund the construction of the improvements on those lots through construction loans to Summit, and the remaining three lots would be deeded to Summit in exchange for Summit's agreement to act as the leasing agent for the leased lots. In a letter from Brocato to Rackos dated September 17, 2004, Brocato stated that it was his understanding that the parties had agreed to modify the structure of the deal and outlined the terms of the transaction. Brocato's letter was sent directly from

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Brocato to Tynan. Around 7:30 a.m. on September 21, 2004, Tynan faxed the letter to Gianakas with the notation: "Steve, Please forward to Bill Rackos. See you at 8:30 a.m."

Tynan arrived at HHCC to see Gianakas shortly thereafter. As they discussed Brocato's letter, Gianakas made X's through certain paragraphs indicating that he did not agree to those terms. Tynan testified that he told Gianakas that his unwillingness to agree on the alternative structure was "not going to go over too well" with Schulte, that he was sure Schulte would be unhappy and would probably serve the 90-day notice to close under the contract. According to Tynan, Gianakas then pounded his desk and said, "I'm the king, you're the queen. We'll close when I say." According to Gianakas, when they could not reach an agreement during the meeting on what he characterized as Summit's latest proposal, Tynan threatened that Summit would just serve notice to close and pay the full $9,000,000.00. After the meeting, Gianakas directed Rackos to send the termination letter. Later that day, Rackos faxed a letter to Brocato purporting to terminate the contract for failure to make the $90,000.00 earnest money deposit on July 1, 2004.

Tynan testified that he was "more heartbroken than angry" when he received a copy of Rackos' letter because he had spent so much time with Gianakas and had gotten to know him and his family. When he called Gianakas to ask why he sent the letter, Gianakas told him not to worry, that the letter was sent to get Summit's attention and that now they would be able to sit down and negotiate. Gianakas testified that ultimately he did not want to do the deal with Summit because he did not think they had the funds necessary to close.

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While this action was pending, Summit served notice of its intention to close the transaction. Within 30 days of the close that would have taken place had it gone forward, Summit served notice of its election to purchase the property in installments and designated the portion that would be the subject of the first closing. Summit has deposited a total of $500,000 in a "sole direction" escrow, meaning that the funds are not "at risk" and can be withdrawn at any time. Summit has secured a commitment letter from Harris Bank and has available through an individual investor, Jeffrey Pelock, sufficient funds to close the first portion of the transaction even without bank financing. Pelock testified that he has sufficient funds on hand in his solely-owned corporation's bank account to satisfy the balance of the purchase price under the first closing, that those funds are unrestricted and that he is willing to advance them to Summit to complete the close. He testified that he intends to enter into an agreement with Summit that will give him an ownership interest in the project in exchange for his investment, but that the agreement has not been finalized.

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LEGAL STANDARDS

Specific performance may be granted only where there is a valid and enforceable contract. Schwinder v. Austin Bank of Chicago, 348 Ill. App. 3d 461, 473, 809 N.E.2d 180, 192 (1st Dist. 2004); Omni Partners v. Down, 246 Ill. App. 3d 57, 62, 614 N.E.2d 1342, 1345 (2nd Dist. 1993). It is well-established law in Illinois that where the parties have fairly and understandingly entered into a valid contract for the sale of real property, specific performance of the contract is a matter of right and equity will enforce it, absent circumstances of oppression and fraud. Schwinder, 348 Ill. App. 3d at 477, 809 N.E.2d at 195; Gianni v. First National Bank of Des Plaines, 136 Ill. App. 3d 971, 981, 483

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N.E.2d 924, 933 (1st Dist. 1985). Specific performance is a matter of sound judicial discretion controlled by established principles of equity and exercised upon a consideration of all the facts and circumstances of the case. Schwinder, 348 Ill. App. 3d at 477, 809 N.E.2d at 196; Omni Partners, 246 Ill. App. 3d at 62, 614 N.E.2d at 1345 (2nd Dist. 1993). A party seeking specific performance must prove by clear and convincing evidence that he has been always ready, willing, and able to perform the contract. Montes v. Hawkins, 126 Ill. App. 3d 419, 426, 466 N.E.2d 1271, 1275 (1st Dist. 1984).

Integral to Summit's specific performance claim is its assertion that Hickory waived the $90,000.00 earnest money deposit called for under the contract. Waiver consists of either an express or implied voluntary and intentional relinquishment of a known right. Chatham Corp. v. Dana Inc., 351 Ill. App. 3d 353, 365, 812 N.E.2d 483, 494 (1st Dist. 2004); Wolfram Partnership, Ltd. v. LaSalle Bank, 328 Ill. App. 3d 207, 223 (1st Dist. 2002). Parties to a contract may waive provisions contained in the contract for their benefit and such waiver may be established by conduct indicating that strict compliance with those contractual provisions will not be required. Wolfram Partnership, 328 Ill. App. 3d at 223-24; Whalen v. K-Mart Corp., 166 Ill. App. 3d 339, 343, 519 N.E.2d 991, 994 (1st Dist. 1988). The doctrine serves to prevent the waiving party from lulling another into a false belief that strict compliance with a contractual obligation will not be required and then suing for noncompliance. Wolfram Partnership, 328 Ill. App. 3d at 224; Lake County Grading Co. v. Advance Mechanical Contractors, Inc., 275 Ill. App. 3d 452, 463, 654 N.E.2d 1109, 1118 (2nd Dist. 1995).

Important to the Court's determination of the issues in this case is its assessment of the credibility of the various witnesses called to testify and, in particular, Schulte,

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Tynan and Gianakas. From the outset, the Court has advised the parties that, given the irreconcilable versions of the facts outlined by Summit and Hickory, credibility determinations would likely guide the outcome of the trial. The Court's determination regarding the credibility of witnesses will not be disturbed on appeal unless the trial court's findings of fact are against the manifest weight of the evidence. Eychaner v. Gross, 202 Ill. 2d 228, 251, 779 N.E.2d 1115 (2002); Chicago Investment Corp. v. Dolins, 107 Ill. 2d 120, 124, 481 N.E.2d 712 (1985).

FINDINGS AND CONCLUSIONS

The Court finds that Summit has established by clear and convincing evidence its entitlement to specific performance of the contract. Specifically, the Court finds that Hickory, through Gianakas, waived its right to terminate the contract for Summit's failure to make the second earnest money deposit on July 1, 2004. Schulte and Tynan testified credibly and in detail regarding their dealings with Gianakas, including the numerous occasions on which he affirmatively indicated that he did not want Summit to pay the $90,000.00 on July 1st. Defendants' evidence, on the other hand, consisted mainly of uncorroborated denials by Gianakas that the meetings and conversations took place. Importantly, defendants failed to call any witnesses, readily available to them, who could have backed up Gianakas' version of events. Neither Gianakas' son, George, nor his secretary, Dorothy, was called to testify. While defense counsel criticized Summit for failing to call these witnesses, this lack of evidence clearly bears on the Court's assessment of Gianakas' credibility. See IPI Civil 2d No. 5.01.

Several other factors lead this Court to conclude that Summit's version of events is more credible. First, in his trial testimony, Gianakas never denied that he received the

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July 1, 2004 fax attaching a copy of the $90,000.00 check. The confirmation report indicates that the fax was received, which creates a rebuttable presumption of receipt. See Stevens Shipping and Terminal Co. v. Japan Rainbow II MV, 334 F.2d 439, 444 (5th Cir. 2003). Since Summit forwarded a copy of the check to Gianakas on July 1st, it stands to reason that Tynan would have followed up by delivering the actual check to him on the 2nd. Gianakas' general denial that the check was ever tendered and his inability to recall meeting with Tynan on the 2nd are insufficient to refute Tynan's detailed testimony on this point. This is particularly true given Gianakas' failure to call his son, his secretary or his accountant, who Tynan testified were also present when this exchange took place. Second, although Gianakas testified that he expressed concern to Rackos during July and August regarding Summit's failure to make the $90,000.00 earnest money deposit, he also testified that he was willing to extend the due date for the deposit at least until September 1, 2004. If he was amenable to extending the due date for the deposit, the basis for his purported "concern" is unclear. In any event, Gianakas' proclaimed concern regarding Summit's ability to make the second deposit is undermined by his failure to negotiate the first deposit of $10,000.00, which was made, after all, to protect Hickory as the Seller. Finally, it is significant that neither Gianakas nor Rackos communicated their belief that Summit was in default for failing to make the second deposit until September 21, 2004.

The identification of exchange property was uniquely Hickory's and Gianakas' problem. It is undisputed that prior to September 21, 2004, Gianakas had not located property for the Section 1031 exchange. Given this fact, the Court concludes and finds as a fact that the alternative proposals under discussion during the summer of 2004

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emanated from Gianakas and not from Tynan.[2] Further, although the contract obligated Summit to "fully cooperate" with Hickory's desire to structure a tax-free transaction, it is obvious that Summit fulfilled that obligation by assisting Gianakas in locating potential exchange properties and entertaining alternative structures that would have avoided the tax implications of a sale. Whether the Court accepts Tynan's version of the meeting on September 21st (that he told Gianakas Schulte was likely to be "unhappy" and would probably serve the 90-day notice) or Gianakas' (that when Gianakas would not agree to the alternative structure, Tynan threatened that Summit would "cash out" Gianakas by paying the full $9,000,000.00 at the close), it would have been evident to Gianakas at that time that Summit intended to serve its 90-day notice to close the transaction, setting in motion the time limits for the tax-free exchange under the Internal Revenue Code. It is only then that Hickory sought to invoke the "automatic termination" provision in the contract based on Summit's failure to make the second earnest money deposit, a "default" that had occurred some 83 days earlier.

In a transaction of this size and involving sophisticated business people, it would certainly have been customary to put Hickory's agreement to waive the second earnest money deposit in writing and, under normal circumstances, the failure to do so would have been problematic for Summit. However, given Gianakas' repeated insistence that Tynan and Schulte did not "trust" him by asking for confirmation in writing, their failure to press this issue is understandable. See Bliss v. Rhodes, 66 Ill. App. 3d 895, 899, 384 N.E.2d 512 (2d Dist. 1978) ("It is well settled that a party to a written contract may by

[2] This conclusion is reinforced by other evidence in the record. As noted above, Gianakas testified that it was his custom to run everything past his attorney, Rackos, in connection with his real estate transactions. If these proposed alternatives were generated by Summit, the Court would have expected Gianakas to forward them to Rackos for his input, particularly in light of Gianakas' desire to preserve the tax-free nature of the transaction. Yet, Rackos testified that he never saw the proposals prior to his deposition.

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parol waive performance of a condition in the contract for his benefit and the waiver does not require a writing.")

It is true, as defendants strenuously argue, that plaintiff's discovery, which encompassed the corporate and personal bank accounts of Hickory and Gianakas, has not uncovered the two $50,000.00 checks purportedly tendered by Gianakas to show that he did not want the second earnest money deposit. But if, as the Court has concluded, Gianakas was intent upon keeping his options open by discouraging Summit from making the second earnest money deposit, the possibility that the "checks" were simply part of Gianakas' ruse cannot be discounted. Again, Gianakas has not called his secretary, Dorothy, to deny that he directed her to prepare the two checks. Perhaps not coincidentally, Hickory did draw a check on its account in the amount of $100,000.00 on June 28, 2004, payable to Gianakas. The memo field on the check reads: "Deposit for 1031 exchange for 162nd and La Grange Rd."[3] Although both Tynan and Gianakas testified that Gianakas needed to bring a $100,000.00 check with him in order to bid at the auction the following day, it is certainly plausible that the envelope Gianakas pulled from his jacket at the June 28th meeting at Champp's contained that check. Given the Court's view of the other evidence presented at trial, the absence of the two $50,000.00 checks is not determinative.

As noted above, a party seeking specific performance of a contract to purchase real estate must show that it is ready, willing and able to perform the contract. The evidence presented at trial overwhelmingly establishes Summit's ability to satisfy its

[3] The notation is somewhat curious given that the check was, according to Gianakas, a deposit for his bid on the Oak Lawn shopping center. When asked about the failure to reference the Oak Lawn property on the check, Gianakas responded that "you can't out everything" on a check. The language is certainly consistent with Summit's contention that Gianakas offered to satisfy the deposit for the subject property from his own funds.

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obligations under the contract. Summit has deposited the sum of $500,000.00 in an escrow account. Defendants' argument that this money is not "at risk" because it can be withdrawn at any time is specious in light of defendants' position that the contract has been validly terminated. Given that position, it would be foolhardy of Summit to place funds under Hickory's control prior to this Court's ruling. Further, Jeffrey Pelock testified unequivocally, and his company's bank statements demonstrate, that he has the financial wherewithal to advance funds to satisfy Summit's obligations at the first close. Summit has also produced a commitment letter from Harris Bank. Thus, whether it is through an advance from Pelock, bank financing or a combination of both, Summit has demonstrated by clear and convincing evidence its ability and willingness to consummate this transaction.

For the foregoing reasons,

IT IS HEREBY ORDERED that judgment is entered in favor of plaintiff and against defendants on Count II of plaintiff's Amended Complaint seeking specific performance of the March 12, 2004 contract. Count I, which seeks a declaration that Summit is entitled to specific performance, is dismissed as duplicative of the relief awarded under Count II.

IT IS FURTHER ORDERED that the "First Closing" as defined in the contract shall take place on or before April 4, 2005.

This is a final and appealable Order.

February 17, 2005

ENTER:

JUDGE MARY ANNE MASON

FEB 17 2005

Circuit Court - 1810

MARY ANNE MASON

Property of Cook County Clerk's Office

UNOFFICIAL COPY

LEGAL DESCRIPTION:

THAT PART OF THE SOUTHEAST 1/4 OF THE NORTHEAST 1/4 OF SECTION 21, TOWNSHIP 36 NORTH, RANGE 12, EAST OF THE THIRD PRINCIPAL MERIDIAN, DESCRIBED AS FOLLOWS:

COMMENCING AT THE NORTHEAST CORNER OF SAID SOUTHEAST 1/4 OF THE NORTHEAST 1/4 OF SECTION 21; THENCE NORTH 89 DEGREES, 53 MINUTES, 53 SECONDS WEST ALONG THE NORTH LINE OF SAID SOUTHEAST 1/4 OF THE NORTHEAST 1/4, A DISTANCE OF 51.95 FEET TO THE WEST LINE OF LAGRANGE ROAD, AS DEDICATED PER DOCUMENT 10155685 FOR THE POINT OF BEGINNING; THENCE NORTH 89 DEGREES, 53 MINUTES, 53 SECONDS WEST ALONG SAID NORTH LINE OF THE SOUTHEAST 1/4 OF THE NORTHEAST 1/4 OF SECTION 21, A DISTANCE OF 551.75 FEET TO A LINE, THAT IS 720.00 FEET EAST OF AND PARALLEL WITH THE WEST LINE OF THE SOUTHEAST 1/4 OF SAID NORTHEAST 1/4; THENCE SOUTH 00 DEGREE, 07 MINUTES, 00 SECOND WEST ALONG THE LAST DESCRIBED LINE, A DISTANCE OF 680.00 FEET; THENCE SOUTH 24 DEGREES, 58 MINUUTES, 04 SECONDS WEST, A DISTANCE OF 120.10 FEET TO A LINE, THAT IS 660.00 FEET WEST OF AND PARALLEL WITH THE EAST LINE OF SAID NORTHEAST 1/4; THENCE SOUTH 00 DEGREE, 00 MINUTE, 00 SECOND EAST ALONG THE LAST DESCRIBED LINE, A DISTANCE OF 167.00 FEET TO THE NORTH LINE OF THE SOUTH 363.00 FEET OF SAID SOUTHEAST 1/4 OF THE NORTHEAST 1/4 OF SECTION 21; THENCE SOUTH 89 DEGREES, 56 MINUTES, 14 SECONDS EAST ALONG THE LAST DESCRIBED LINE, A DISTANCE OF 606.63 FEET TO THE AFORESAID WEST LINE OF LAGRANGE ROAD; THENCE NORTH 00 DEGREE, 05 MINUTES, 03 SECONDS EAST ALONG THE LAST DESCRIBED LINE, A DISTANCE OF 964.62 FEET TO THE POINT OF BEGINNING, ALL IN IN COOK COUNTY, ILLINOIS.

P.I.N. 27-21-202-008-0000

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PLEASE RETURN TO:
Kelee Schwenn
Pedersen & Houpt
161 N. Clark St., Suite 3100
Chicago, IL 60601