[Cite as *Ohio Title Corp. v. Pingue*, 2012-Ohio-1370.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Ohio Title Corporation,	:	
Plaintiff-Appellee,	:	
v.	:	No. 10AP-1010 (C.P.C. No. 04CVC04-03825)
Joseph A. Pingue, Sr.,	:	
Defendant-Appellant/ Cross-Appellee,	:	(REGULAR CALENDAR)
v.	:	
Family Video Movie Club, Inc.,	:	
Defendant-Appellee/ Cross-Appellant.	:	

D E C I S I O N

Rendered on March 29, 2012

Zacks Law Group LLC, Benjamin S. Zacks, James R. Billings, Robin L. Jindra, and *Susan B. Gellman,* for Joseph A. Pingue, Sr.

John M. Spencer; Eric M. Sommer, for Family Video.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, P.J.

{¶ 1} This is an appeal by defendant-appellant/cross-appellee, Joseph A. Pingue, Sr. ("Pingue"), from decisions of the Franklin County Court of Common Pleas denying Pingue's motion to enforce settlement agreement and granting Pingue's motion for summary judgment. Defendant-appellee/cross-appellant, Family Video Movie Club, Inc.

("Family Video"), has filed a cross-appeal from the trial court's decision granting Pingue's motion for summary judgment.

{¶ 2} On July 7, 2003, Pingue, as seller, and Family Video, as purchaser, executed an "offer to purchase real estate" agreement (hereafter "the 2003 offer to purchase"), which contemplated that Family Video would purchase from Pingue a 1.015 acre lot for the sum of $450,000. The 2003 offer to purchase set forth several contingencies, and allowed for extension of the agreement upon the payment of fees. The 2003 offer to purchase also required Family Video to deposit the sum of $20,000 in escrow. On August 7, 2003, Family Video deposited $20,000 with Ohio Title Corporation ("Ohio Title").

{¶ 3} On January 8, 2004, Pingue sent a letter to Family Video, stating in part:

> Please be informed that the purchase contract for the above property dated 7/7/03 has expired, the attached letter was sent by fax to your agent [on] December 4, 2003[.] He informed me that you [were] interested in an extension, in which I am willing to grant, providing the proper fee is paid according to the contract.
>
> Unless I hear from you by January 15, 2004, I will request the Ohio Title Company to release the $20,000.00 deposit money to me as agreed in the contract, and this contract will be considered null and void.

{¶ 4} On January 21, 2004, Pingue sent a letter to Ohio Title requesting that the $20,000 held in escrow be released to him on the ground the offer had expired, and that Family Video had forfeited the deposit. In the letter, Pingue represented that "[t]he Purchaser and their agent have informed me that they have not done their part of the contract to remove the contingencies, therefore the contract has expired."

{¶ 5} On January 30, 2004, Family Video sent a letter to Ohio Title requesting the return of the $20,000 deposit being held in escrow. That letter stated in part:

> As you know, Family Video deposited $20,000 in earnest money to be held in escrow by your title company for the Worthington Woods Blvd. property owned by Mr. Pingue. Paragraph 17(b) of the Offer to Purchase Real Estate entered into by both parties provided that the deposited money be returned if "any contingency is not satisfied." Unfortunately,

> several contingencies related to site plan approval were not satisfied.
>
> As a result, Family Video is requesting return of the $20,000 being held in escrow by Ohio Title Company.

{¶ 6} On March 26, 2004, James R. Billings, counsel for Pingue, sent a letter to Ohio Title, which provided in part:

> With respect to [a] contingency [in the 2003 offer to purchase], Family Video was required to make prompt submission, and applications to the applicable agencies. However, Family Video failed to make any applications or submission and as you have * * * previously been advised, Mr. Pingue notified Family Video of their default pursuant to Section 5 of the agreement and the default was not cured within the ten (10) day period. Specifically, Family Video was notified on December 4, 2003 through their realtor and again directly on January 8, 2004. Despite these notices, Family Video admitted, by and through its agent, that no applications were ever filed. As such, Mr. Pingue is entitled to the $20,000.00 deposit, plus interest, as liquidated damages for Family Video's failure to comply with the contract.

{¶ 7} As a result of the competing claims asserted by Pingue and Family Video, Ohio Title filed an interpleader complaint against Pingue and Family Video on April 6, 2004. In its complaint, Ohio Title requested that the trial court determine which of the defendants was entitled to the amount held in escrow.

{¶ 8} On May 17, 2004, Family Video filed an answer to Ohio Title's interpleader complaint. In its answer to Ohio Title, Family Video averred in part: "The Defendant is entitled to the funds held in escrow by the Plaintiff by reason of the fact that several contingencies in the offer to purchase real estate were not satisfied."

{¶ 9} On June 2, 2004, Pingue filed an answer and counterclaim against Ohio Title, as well as a cross-claim against Family Video. In its cross-claim, Pingue alleged that "Family Video breached its Contract with Defendant Pingue by failing to perform the obligations required under the Contract, by, including without limitation, failing to apply for the necessary permits, approvals, consents, variances, acceptances or authorizations required for Family Video's contemplated construction * * * and by failing to permit the escrowed funds to be released to Mr. Pingue." On July 1, 2004, Family Video filed an

answer to Pingue's cross-claim. By judgment entry filed July 14, 2005, the trial court dismissed Ohio Title as a party, and Ohio Title deposited the $20,000 earnest money with the Franklin County Clerk of Courts.

{¶ 10} A trial date was set for April 27, 2005 but, during a pre-trial conference, the issue of a settlement arose. As a result, the trial court granted the parties a continuance, and counsel for Pingue and Family Video entered into discussions regarding a settlement. One of the issues addressed during these negotiations was Family Video's desire for a second access point, requiring a different site plan. The parties discussed a total purchase price of $480,000 (rather than the original price of $450,000 set forth in the 2003 offer to purchase); the increased amount represented an additional $20,000 for extension fees and $10,000 for the second access point. The parties also discussed a closing date in July 2005, but the closing was never consummated.

{¶ 11} On July 27, 2005, Pingue filed with the trial court a motion to enforce settlement agreement against Family Video. On August 19, 2005, Family Video filed a memorandum contra Pingue's motion to enforce. On February 24, 2006, the trial court conducted a hearing on the issue of enforcement of the purported settlement agreement. On October 25, 2007, the court filed an entry denying Pingue's motion to enforce settlement agreement. On November 26, 2007, Pingue filed a notice of appeal from the trial court's entry, which this court subsequently dismissed for lack of a final appealable order.

{¶ 12} On January 8, 2010, Family Video filed a motion to release funds. On January 25, 2010, Pingue filed a motion to disburse funds and a memorandum contra Family Video's motion to release funds. Pingue also filed a motion to reactivate the case. By entry filed January 27, 2010, the trial court granted Pingue's motion to reactivate the case.

{¶ 13} On August 13, 2010, Pingue filed a motion for summary judgment, asserting he had complied with the agreement, and that Family Video had breached the agreement by failing to perform certain contingencies. On September 9, 2010, Family Video filed a memorandum contra Pingue's motion for summary judgment, as well as a motion for summary judgment against Pingue. The trial court, by decision and entry filed on

September 23, 2010, granted Pingue's motion for summary judgment, finding that Pingue was entitled to the $20,000 deposit held in escrow, plus interest.

{¶ 14} On appeal, Pingue sets forth the following two assignments of error for this court's review:

> I. The Trial Court committed reversible error in determining the proper measure of damage in its Decision and Entry Granting Joseph A. Pingue, Sr.'s Motion for Summary Judgment.
>
> II. The Trial Court erred in denying Appellant's Motion to Enforce the Settlement Agreement.

{¶ 15} Family Video has filed a cross-appeal, raising the following single assignment of error:

> THE TRIAL COURT ERRED BY FAILING TO FIND THAT DEFENDANT JOSEPH A. PINGUE, SR. WAS NOT IN BREACH OF CONTRACT. THE TRIAL COURT FURTHER ERRED IN FINDING THAT FAMILY VIDEO BREACHED THE PURCHASE CONTRACT BY FAILING TO OBTAIN THE NECESSARY PERMITS AND APPROVALS AND AWARDING PINGUE THE $20,000.00 BEING HELD BY THE FRANKLIN COUNTY CLERK OF COURTS[.]

{¶ 16} Under the first assignment of error, Pingue argues that the trial court, in granting his motion for summary judgment, erred in determining that the proper measure of damages was limited to the $20,000 earnest money deposit provision under the 2003 offer to purchase. Pingue argues that, under Ohio law, a provision in a real estate contract which allows the seller to keep the earnest money in the event of a default by the buyer is enforceable only where it is reasonable. Pingue maintains that the actual damages amount in the instant case far exceeds $20,000.

{¶ 17} Paragraph 17 of the 2003 offer to purchase states in part:

> Within 10 days of the acceptance of this Offer, Purchaser shall deposit With the Ohio Title Company the sum of [$20,000.00] which deposit is to be held in escrow in an interest bearing account, (a) and shall be applied to the purchase price at closing in the event the sale is consummated, (b) if Seller fails or refuses to perform, or any contingency is not satisfied or waived, the deposit with interest shall be returned; (c) if purchaser fails or refuses to

> perform, this deposit with interest shall be paid to Seller as liquidated damages as full settlement between Purchaser and Seller with no other recourse in any action for damages or specific performance.

{¶ 18} In general, a contract for the sale of real estate containing a provision " 'allowing the vendor to keep the earnest money paid in the event of a default by the vendee is a valid, enforceable provision.' " *Windsor v. Riback*, 11th Dist. No. 2007-G-2775, 2008-Ohio-2005, ¶ 54, quoting *Cochran v. Schwartz*, 120 Ohio App.3d 59, 61 (2d Dist.1997). Further, " '[e]arnest money * * * is generally subject to forfeit where it is a comparatively small advance payment.' " *Riback* at ¶ 54, quoting *Ottenstein v. W. Res. Academy*, 54 Ohio App.2d 1, 3 (9th Dist.1977).

{¶ 19} Appellant relies upon *Gaskins v. Young*, 2d Dist. No. 20148, 2004-Ohio-2731, ¶ 31, for the proposition that, "unlike liquidated damages, which constitute both the maximum and minimum damages available to the non-defaulting party, a reasonable (and, therefore, enforceable) earnest money provision sets forth the minimum, but not the maximum, damages," and that, "[w]hen actual damages exist, the non-breaching party may also pursue specific performance or actual damages." In *Gaskins*, however, the contract language, which entitled the seller to the earnest money in the event of the purchaser's default, further provided: "Payment or refund of the Earnest Money shall not prejudice the rights of the Broker(s) or the non-defaulting party in an action for damages or specific performances against the defaulting party." *Id*. at ¶ 5.

{¶ 20} In contrast, the 2003 offer to purchase between Pingue and Family Video provides that if the purchaser fails or refuses to perform, the deposit shall be paid to the seller as liquidated damages "as full settlement between Purchaser and Seller with no other recourse in any action for damages or specific performance." Thus, whereas the agreement in *Gaskins* specifically reserved other remedies to the non-defaulting party, the liquidated damages clause of the 2003 offer to purchase contains language evincing the "earmarks of remedial exclusivity." *22810 Lakeshore Corp. v. XAM, Inc.*, 8th Dist. No. 79091 (Jan. 3, 2002).

{¶ 21} We note that litigation surrounding liquidated damages provisions such as the one in the instant case usually involves the issue of whether the amount of earnest

money to be retained by the non-breaching seller is too high, i.e., in the form of a penalty. *See Margaret H. Wayne Trust v. Lipsky*, 123 Idaho 253, 259, 846 P.2d 904 (1993) ("Typically, a defaulting buyer objects to enforcement of a liquidated damage clause because he believes the amount forfeited is too high"). Conversely, courts have routinely rejected claims by a non-breaching seller that a liquidated damages clause "is too small in light of the damages actually suffered." *Azalea Garden Bd. & Care, Inc. v. Vanhoy,* N.C.Super. No. 06 CVS 0948 (Mar. 17, 2009). Rather, courts have found "[t]here is no penalty where a nonbreaching seller is paid the liquidated sum it agreed to accept in the event of a default by the buyer." *Id. See also Roscoe-Gill v. Newman,* No. 2 CA-CV 96-0140, 188 Ariz. 483, 937 P.2d 673 (1996) ("The principle under which unreasonably excessive liquidated damage clauses are deemed punitive and therefore unenforceable does not apply to liquidated damage provisions that are claimed to be insufficient").

{¶ 22} Under Ohio law, "[i]n construing the terms of a written contract, the primary objective is to give effect to the intent of the parties, which we presume rests in the language that they have chosen to employ." *In re All Kelley & Ferraro Asbestos Cases*, 104 Ohio St.3d 605, 2004-Ohio-7104, ¶ 29. In considering contractual terms, " '[c]ommon words appearing in a written instrument will be given their ordinary meaning unless manifest absurdity results, or unless some other meaning is clearly evidenced from the face or overall contents of the instrument.' " *Id.*, quoting *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241 (1978), paragraph two of the syllabus. Further, "[w]here the terms are clear and unambiguous, a court need not go beyond the plain language of the agreement to determine the rights and obligations of the parties." *In re Kelley* at ¶ 29, citing *Aultman Hosp. Assn. v. Community Mut. Ins. Co.*, 46 Ohio St.3d 51, 53 (1989).

{¶ 23} In the present case, under the clear terms of the agreement, Pingue agreed to be paid a liquidated sum in the event the purchaser failed or refused to perform and, as noted above, the language employed words of exclusivity, i.e., "full settlement" and "with no other recourse." Parties are free to enter into contracts that contain provisions apportioning damages in the event of a default. *Lake Ridge Academy v. Carney*, 66 Ohio St.3d 376, 381 (1993). Upon review, we find no error with the trial court's determination that Pingue was bound by the language agreed upon by the parties, and therefore he was

not entitled to damages in excess of the liquidated amount set forth in the 2003 offer to purchase.

{¶ 24} Based upon the foregoing, Pingue's first assignment of error is without merit and is overruled.

{¶ 25} Under his second assignment of error, Pingue argues that the trial court committed reversible error by failing to find an enforceable settlement agreement between Pingue and Family Video as of July 12, 2005. Pingue argues that the evidence indicates that an agreement to settle the instant litigation was formed as of 1:30 p.m. on that date, based upon negotiations conducted by counsel for both parties.

{¶ 26} Under Ohio law, "a settlement agreement is a contract designed to terminate a claim by preventing or ending litigation and * * * such agreements are valid and enforceable by either party." *Continental W. Condominium Unit Owners Assn. v. Howard E. Ferguson, Inc.*, 74 Ohio St.3d 501, 502 (1996). Further, "[t]he result of a valid settlement agreement is a contract between parties, requiring a meeting of the minds as well as an offer and an acceptance thereof." *Rulli v. Fan Co.*, 79 Ohio St.3d 374, 376 (1997). In order to establish a breach of a settlement agreement, the party alleging such breach must prove: "1) existence of the Settlement Agreement, 2) performance by the plaintiff, 3) breach by the defendant, 4) resulting damages or loss to the plaintiff." *Raymond J. Schaefer, Inc. v. Pytlik*, 6th Dist. No. OT-09-026, 2010-Ohio-4714, ¶ 24.

{¶ 27} This court's standard of review is whether or not the trial court erred in denying the motion to enforce settlement agreement. *Continental W. Condominium Unit* at 502 ("[B]ecause the issue is a question of contract law, Ohio appellate courts must determine whether the trial court's order is based on an erroneous standard or a misconstruction of the law. The standard of review is whether or not the trial court erred").

{¶ 28} By way of background, during the hearing on the motion to enforce settlement agreement, both sides presented testimony as to whether a settlement was reached in 2005, including testimony by counsel for both Pingue and Family Video with respect to negotiations that took place. As noted under the facts, the parties initially agreed in July 2003 to enter into the 2003 offer to purchase for an approximate one-acre parcel of commercial land, with a single shared access point. Under the terms, Family

Video was to purchase the land for the sum of $450,000. The contract permitted the purchaser to "extend this Agreement for a period of two (2) thirty (30) days options" upon payment to the seller of extension fees. The contract also set forth various contingencies with respect to both the buyer and seller. The parties, however, never proceeded to closing on the 2003 offer to purchase.

{¶ 29} As also noted under the facts, as a result of letters on behalf of both Pingue and Family Video to Ohio Title, in which each side argued entitlement to the $20,000 earnest money deposit, Ohio Title filed its interpleader complaint, and an initial trial date was set for April 27, 2005. Prior to trial, the parties indicated to the court that they believed a settlement could be reached. A status conference was held on April 6, 2005; counsel met in a conference room at the courthouse, and the parties spoke that day with the trial court in chambers. It is not disputed that the parties failed to reach a settlement on that date. At the conclusion of the conference, however, counsel for Pingue, James R. Billings, and counsel for Family Video, John M. Spencer, entered into negotiations in an attempt to reach a settlement.

{¶ 30} Pingue's theory of the case was that he accepted an offer from Family Video to purchase the property for $480,000 on July 12, 2005. Pingue argues that, as early as April of 2005, Family Video expressed its intent to close on the transaction upon obtaining a second curb cut on the property. Around that time, the parties discussed a total purchase price of $480,000 (comprised of the original price of $450,000, as well as the $10,000 cost of the curb cut, and $20,000 for extension fees). Pingue, however, submitted a counteroffer demand on July 11, 2005, seeking additional extension fees, as well as legal expenses, that would have increased the total purchase price to $501,000. Pingue argues that, following his counteroffer, Family Video submitted, at 10:50 a.m. on July 12, 2005, a non-contingent offer to close the transaction for $480,000, which Pingue then accepted at 1:30 p.m. on that date.

{¶ 31} Pingue argues that the trial court erred by determining that his July 11, 2005 counteroffer somehow negated the July 12, 2005 offer by Family Video. Pingue contends that the timing of the submissions of the correspondence shows the court's error. Specifically, Pingue asserts that the counteroffer was submitted on July 11, 2005, a day before Family Video made its offer and ultimatum. Pingue argues that the evidence

shows he accepted Family Video's 10:50 a.m. offer when his attorney, Billings, phoned counsel for Family Video, Spencer, at 1:30 p.m. on July 12, 2005, and informed Spencer that Pingue "has agreed to close on your terms." (Tr. 205.) Pingue argues there is no evidence that Family Video withdrew the July 12, 2005 10:50 a.m. offer prior to Pingue's acceptance, and that there is no written record of any withdrawal of the offer prior to Pingue's acceptance and performance.

{¶ 32} Pingue's contention that there is no evidence Family Video withdrew its 10:50 a.m. offer (on July 12, 2005) prior to Pingue's acceptance fails to take into account the testimony of Family Video's counsel, Spencer. During the hearing, Spencer gave the following account of the events surrounding his negotiations with Billings over a three-day period from July 11 to July 13, 2005. According to Spencer, the parties had initially agreed to schedule a closing on July 12, 2005. The day before (July 11, 2005), Spencer had "several conversations" with the title company "because they could never get Mr. Billings to commit as to what his client's understanding of the terms were." (Tr. 145.) Spencer informed the title company that the closing was scheduled for July 12, 2005 at 1:30 p.m., and that the total purchase price would be $480,000, "a take-or-leave-it deal." (Tr. 145.)

{¶ 33} Spencer testified that he attempted to contact Pingue's attorney "five to six times" on July 11, 2005. (Tr. 140.) Billings, however, "would not take my phone calls." (Tr. 140-141.) Later that day, at approximately 6:30 p.m., Billings called Spencer "and told me that he did not know what the terms of the deal were. He could not guarantee me that Mr. Pingue was closing, that Mr. Pingue was going to make an additional counteroffer and that he was not closing for the 480." (Tr. 141.) Spencer testified that he expressed to Billings his "frustration" with the fact that "[w]e have a closing scheduled for tomorrow, July 12th at 1:30, and now you're telling me that we still don't have the terms of this deal worked out." (Tr. 142.)

{¶ 34} During this conversation, Billings told Spencer that Pingue wanted to speak directly with Spencer's client, Charles Hoagland, the president of Family Video. Spencer told Billings "if you do that, the deal will be blown. I said do not do that; that you and I have been negotiating this deal for the last three months; do not have your client call Mr. Hoagland because if he does, it will blow the * * * deal," (Tr. 147) because Spencer's client,

Hoagland, "was fed up with this entire negotiation." (Tr. 148.) Spencer testified that he was "instructed by Family Video, [Doug] Klang in particular, that if Mr. Pingue had any contact with Mr. Hoagland the deal was blown, the deal would be blown and that the offer would be withdrawn." (Tr. 160.)

{¶ 35} The next morning, Spencer wrote a letter to Billings "in response to my frustration that here we are the day before the closing and Mr. Pingue is still attempting to negotiate the terms of the contract with Family Video." (Tr. 141.) One of the exhibits admitted at trial included the letter from Spencer to Billings, dated July 12, 2005, which states in pertinent part:

> This letter is written to confirm our telephone conversation last evening.
>
> Family Video is prepared to proceed to closing at Title First in Columbus, Ohio under the terms and conditions as we agreed to in April. As you and I have discussed many times, Family Video agreed to pay an additional $20,000.00 as and for extension fees and $10,000.00 for the curb cut. It's now my understanding from our telephone conversation that Mr. Pingue is requesting additional extension fees and his attorney fees paid. It is further my understanding that you don't know the exact amount of extension fees Mr. Pingue is requesting at this time.
>
> Please be advised that Family Video will not pay any additional monies other than agreed to as set forth above for the purchase of this property. Family Video has worked diligently and in good faith these last several months to purchase this property and they will honor their commitment to do so. Family Video fully expects Mr. Pingue to honor the terms of our deal as previously agreed to.
>
> Please again review the terms of the deal with Mr. Pingue and let me know his thoughts. Family Video is prepared to proceed to closing by Wednesday, June 13th [sic] at 5:00 p.m. under the above terms and conditions. If Mr. Pingue chooses not to close, please be advised that Family Video withdraws the above offer and intends to proceed to Court seeking an Order from the Court returning their $20,000.00 earnest money deposit with Ohio Title and any other equitable remedies available to them under the laws of the State of Ohio.

{¶ 36} Spencer sent the letter at approximately 10:30 a.m. on July 12, 2005. Also that morning, Spencer sent an e-mail to Angela Ritterspach, of Ohio Title, at 11:26 a.m., indicating that Family Video was prepared to proceed to closing "provided Mr. Pin[g]ue agrees to accept the sum of $480,000.00 * * * as and for the purchase price of the property." Spencer's e-mail further stated: "I have faxed Mr. Billings a letter informing him of the same and further informing him that the offer will be withdraw[n] if the deal does not close by Wednesday, July 12th, 2005 at 5:00 p.m. I am waiting to hear from Mr. Billings after he discusses the same with Mr. Pingue."

{¶ 37} The evidence further indicates that, on either July 11 or July 12, 2005,[1] Pingue sent a fax to Charles and Keith Hoagland of Family Video. During the hearing, a copy of Pingue's facsimile transmission, dated July 11, 2005, was admitted into evidence. In the document, Pingue states in part: "Enclosed please find an accounting arriving at a final closing cost. * * * I truly hope to come to an amicable agreement on these issues and to close this transaction tomorrow." Attached to the fax transmission was a sheet listing various cost items totaling $501,000, including "Selling Price per Contract" ($450,000), "One Full Access on Worthington Woods Bl." ($10,000), "Contract Extensions" ($36,000), and "Legal Expenses" ($5,000).

{¶ 38} Spencer testified that he never received a copy of the fax Pingue sent to Hoagland requesting $501,000. Rather, he first became aware of Pingue's fax when he received a call from Family Video's representative, Klang, "around noon [on July 12, 2005] saying what's going on. And I'm like, what are you talking about?" (Tr. 162.) Klang informed Spencer that "Mr. Pingue sent a letter to Mr. Hoagland who's irate. We are not doing the deal." (Tr. 162.)

{¶ 39} Spencer testified that he subsequently spoke with Billings at 1:30 p.m. and told Billings "the deal was blown." (Tr. 149.) Spencer testified: "I withdrew the offer at 1:30 on July 12th." (Tr. 149.)

{¶ 40} Spencer elaborated on his 1:30 p.m. telephone conversation with Billings as follows:

---

[1] Pingue testified during the hearing that he did not recall whether he sent the fax to Charles and Keith Hoagland on July 11 or July 12, 2005.

> So when we have a 1:30 telephone call, I say to him, after my conversation to Doug Klang where did this letter to Mr. Hoagland come for the $501,000? I said, I told you last night if there was any contact between Mr. Pingue and Mr. Hoagland, the deal was going to be blown. And I reiterated that at the 1:30. I said there is no offer on the table for the 480 at this point in time because Mr. Hoagland is disgusted, he's fed up. He's tired of arguing. He's tired of bickering. He is tired of this back and forth. The deal is off.

(Tr. 187.)

{¶ 41} Billings asked Spencer to "go back to your client to see if we can get him to accept the 480." (Tr. 185.) Spencer told Billings "it's not going to happen because as I told you last night on the telephone, if Mr. Pingue had any contact with Keith Hoagland at Family Video it blew the deal and I had told him the deal was off the table." (Tr. 185.) Spencer also told Billings, however, that he had "an ethical duty to go back to my client and relay a settlement offer that they wanted to close at the 480." (Tr. 185.)

{¶ 42} Spencer had a further conversation later that afternoon with Billings in which Billings "dropped the offer from the 501 to the 470 [sic] after I told him [in the 1:30 p.m. conversation] Family Video is done with the deal, we're washing our hands of it." (Tr. 150.) Spencer testified that Billings called him back at "approximately 5:20, 5:30 [p.m.] asking me to get Family Video to reconsider." (Tr. 150.) During this conversation, Billings again asked Spencer, "did you talk to Family Video. Are you going to reconsider? And I said no." (Tr. 163.)

{¶ 43} At 6:38 p.m. on July 12, 2005, Billings sent an e-mail to Spencer "to confirm our telephone conference at approximately 5:20 p.m. today where I advised you, consistent with our telephone conference of 1:30 p.m. today that Mr. Pingue is ready, willing and able to close the transaction tomorrow morning." Billings' e-mail further stated in part:

> As we discuss, upon receiving your fax at noon today, I forwarded it to Mr. Pingue, and he immediately called me back and authorized me to schedule the closing under the terms that we had previously discussed, $480,000.00.
>
> From our conversation, it appears that a letter directly from Mr. Pingue to your client has caused some concern. However,

> it appears that the letter was sent very early today and my later conversations with him indicate that he is ready to close tomorrow.

{¶ 44} Spencer testified that the e-mail "from Mr. Billings to me accepting the offer was after I had rejected it." (Tr. 150.) Spencer characterized the e-mail from Billings as "posturing. It's lawyering. I had already rejected it at 1:30 and again at 5:20." (Tr. 163.)

{¶ 45} On July 13, 2005, at 4:21 p.m., Spencer sent an e-mail to Billings stating:

> This email is written to confirm our telephone conversation last evening and confirm also that I did talk with Family Video again this morning regarding the purchase of the subject property from Mr. Pingue. Family Video does not intend to now follow through and purchase the subject property from Mr. Pingue. As we discussed yesterday, Family Video intended to purchase the property as of yesterday morning for the purchase price of $480,000.00. This price included $450,000.00 for the subject property plus $20,000.00 for the extension fees and $10,000.00 for the curb cut.
>
> Mr. Pingue faxed a letter to Mr. Hoagland, President of Family Video, at his corporate office in Illinois yesterday morning, the day of the scheduled closing, requesting a change of the purchase price to $501,000.00. Mr. Pingue's request included additional contract extension fees as well as a partial payment towards his attorney fees. I had specifically requested that Mr. Pingue not contact Family Video and that all negations [sic] for the subject property go through us in light of the parties past history. Mr. Pingue's letter caused great damage to the settlement of this transaction.
>
> In light of the above, Family Video has chosen not to consummate this transaction. Family Video operated in good faith these past two months * * * to purchase the property for the purchase price of $480,000.00. Family Video did not deem it appropriate that Mr. Pingue requested an additional $21,000.00 in extension\attorney fees the morning of the closing.

{¶ 46} On cross-examination, Spencer was asked whether he recalled, during the 1:30 p.m. conversation, whether he told Billings that the offer Family Video made that morning at 10:30 a.m. had been withdrawn. Spencer responded: "I said the offer is off." (Tr. 189.) Spencer testified that he "withdrew the offer" during the 1:30 p.m. telephone

conversation based upon his "contact with Mr. Klang about noon." (Tr. 187.) According to Spencer, "I had a conversation with Mr. Klang around noon informing me that Mr. Hoagland, his boss, told him the deal was off. And that's what I related to Mr. Billings." (Tr. 189.) Spencer was also asked on cross-examination whether the first thing Billings said to him during the 1:30 p.m. telephone conversation was that Pingue had accepted Family Video's terms. Spencer testified: "No. I don't recall that. I recall the sum and substance of our conversation is that the deal was withdrawn." (Tr. 190.) According to Spencer, "if that offer had been accepted, we wouldn't have had the 5:20 conversation and he wouldn't have e-mailed me at 6:38 accepting any offer." (Tr. 150.)

{¶ 47} The other party to the negotiations, Billings, gave testimony at odds with that of Spencer. Specifically, Billings testified that, when he telephoned Spencer at 1:30 p.m. on July 12, 2005, he told Spencer: "I got good news, Mr. Pingue has agreed to close on your terms." (Tr. 205.) According to Billings, Spencer did not state during the 1:30 p.m. telephone conversation that Family Video was withdrawing the offer or that it was not going to close, but that Spencer did indicate his clients were upset with the fax/letter Pingue had sent. Billings testified that he called Spencer later that day at 5:20 p.m., and that Spencer then indicated that Family Video was "not planning on closing on the 13th." (Tr. 209.)

{¶ 48} Under "traditional contract principles * * * an offer may be withdrawn at any time before it is accepted." *Complete Gen. Constr. Co. v. Kard Welding, Inc.*, 182 Ohio App.3d 119, 127, 2009-Ohio-1861, ¶ 24. *See also Wallace v. N. Ohio Traction & Light Co.*, 57 Ohio App. 203, 211 (9th Dist.1937) ("No citation of authority is necessary to sustain the contention that an offer may be withdrawn at any time before it is accepted in its terms"); *Bretz v. Union Cent. Life Ins. Co.*, 134 Ohio St. 171, 175 (1938), quoting *William Weisman Realty Co. v. Cohen*, 157 Minn. 161, 195 N.W. 898 (1923) (" 'An offer, not supported by a consideration, may be revoked before acceptance, even though it expressly gives an offeree a definite time within which to accept' "); Restatement of the Law, 2d, Contracts, Section 42 (1981) ("An offeree's power of acceptance is terminated when the offeree receives from the offeror a manifestation of an intention not to enter into the proposed contract").

{¶ 49} Here, the parties do not dispute that Pingue's request for $501,000 to close the transaction constituted a counteroffer. It is also undisputed that Pingue's counteroffer, which Spencer testified he was unaware of when he e-mailed Billings at 10:30 a.m. on July 12, 2005, was never accepted by Family Video. Further, despite Pingue's contention that there is no evidence Family Video withdrew its 10:30 a.m. offer prior to Pingue's acceptance, the record indicates conflicting testimony on this issue for the trier of fact to consider. Specifically, there was testimony that, if found credible by the trial court, would have supported a determination that Family Video's offer was no longer open at the time Pingue attempted to accept it.

{¶ 50} In addition to evidence that Family Video withdrew its offer prior to Pingue's acceptance, there was evidence upon which the trial court could have found a lack of meeting of the minds as to the essential terms of a settlement. As noted, one of the sticking points during the negotiations was the issue of a second curb cut. Moreover, several other terms apparently remained up in the air, including the issue of maintenance of the common driveway, and Pingue's desire to reserve a non-exclusive easement on the property. Pingue's counsel, Billings, acknowledged that, during his discussions with Spencer on July 12, 2005, Spencer expressed "concern about the language and * * * the deed regarding the shared access." (Tr. 206-207.) Billings testified he did not recall "discussing the issue of who was going to maintain the access. I guess my presumption all along was it was going to be on their land, they should maintain it. We did not discuss that." (Tr. 207.)

{¶ 51} The trial court, in concluding there was no meeting of the minds, made the following findings on the record at the close of the hearing:

> There [are] absolutely, positively too many contingencies, unanswered questions, confusion hanging out there. It clearly demonstrates to me we had no meeting of the minds.
>
> It is true that Mr. Pingue originally was going to sell this property for $480,000. We know the purchase price * * * but one term doesn't make a contract. We had many other contingencies. We went all through the contingencies about additional access. Well, you know, as of this date, when it's asserted that there was a contract * * * where was the access. It was straight up in the air. It hadn't been granted by the city.

> * * *
>
> We have terms here that based on all the testimony I heard no one had ever talked about. For example, grantee and successors and/or assigns shall construct and maintain the shared driveway and/or pavement within the easement area at its sole expense. That's in the deed. Based on what I heard from both of you, nobody ever talked about it. Is that a meeting of the minds? I don't think so.
>
> There is also provision in the deed, grantor reserves the right to himself, his heirs, successors and assigns a nonexclusive easement for ingress and egress regarding such shared driveway. Never discussed. Is that a big deal? May not be a big deal. But the point is, we have all these aspects of the contract that were never discussed.
>
> * * *
>
> And * * * I'm not here to criticize anyone. Sounds like to me, the lawyers worked very hard. But the cold hard facts are, we never had an agreement on anything. This whole deal was – it was like a juggling act. * * * We never had a meeting of the minds on so many issues.
>
> * * *
>
> And most importantly, getting back to the underlying concern that I have with regard to these outstanding contingences of access road, maintenance of the access road and all these things, an easement reserve to the grantor apparently no one knew about. Those are significant terms in a real estate contract.

(Tr. 220-223.)

{¶ 52} In order to find the existence of a valid contract, "both parties to the contract must consent to its terms, there must be a meeting of the minds of both parties, and the contract must be definite and certain." *Bethke v. Airport Mini Storage*, 8th Dist. No. 85217, 2005-Ohio-3589, ¶ 13. In the instant case, even assuming the parties had agreed on the purchase price, the record supports the trial court's determination that the parties did not reach mutual assent as to other essential terms. Upon review of the

record, Pingue has not demonstrated that the trial court erred in finding a lack of meeting of the minds as to a settlement agreement. Based upon the foregoing, the trial court did not err in denying Pingue's motion to enforce settlement.

{¶ 53} Accordingly, Pingue's second assignment of error is not well-taken and is overruled.

{¶ 54} We next address Family Video's assignment of error on cross-appeal, in which it contends the trial court erred in not finding that Pingue breached the contract. Family Video further contends that the trial court erred in finding that Family Video breached the purchase contract by failing to obtain necessary permits and approvals.

{¶ 55} Family Video notes that the 2003 offer to purchase sets forth certain contingencies with respect to the purchaser and seller. Specifically, the purchase contract states in part:

> CONTINGENCIES:
>
> Purchaser performance under this agreement is contingent upon:
>
> Purchaser shall have one hundred twenty (120) days from the date of receipt of Seller's written acceptance of this agreement of Offer to Purchase Real Estate to satisfy the following contingencies:
>
> 1. Seller to provide for Phase One environmental survey and Phase Two if necessary, showing all of the subject property meets all United States Environmental Protection Agency and Ohio Department of Natural Resource standards for being free of environmental problems, hazards, or dangers.
>
> 2. Purchaser obtaining all necessary permits, approvals, consents, variances, acceptances, authorizations, etc., for the construction of Purchaser's intended building(s) with ample parking (to meet city codes) and, the intended use and occupancy of the premises as required by the Purchaser, and as required by all of the appropriate municipal, village, township, county, state, and federal or other governmental agencies or authorities. Purchaser shall make submissions and applications promptly and use reasonable diligence in attempting to obtain all such permits, approvals, etc.

> 3. Purchaser (shall utilize existing curb cut within the ingress/egress agreement in Exhibit "A") to public thoroughfares and utilities adequate for intended use of premises.
> * * *
>
> GENERAL CONDITIONS
>
> 1. As evidence of clear and marketable title, after Seller has made the $20,000.00 Deposit in escrow Seller agrees to furnish as soon as possible a Commitment of Title Insurance issued by a land title insurance company, acceptable to Purchaser, in an amount not less than the purchase price, bearing date later than the acceptance of this Offer to Purchase Real Estate, and guaranteeing the title required for performance of this Offer to Purchase Real Estate.

(Emphasis sic.)

{¶ 56} Family Video challenges the trial court's finding that Family Video failed to perform a contractual duty by not obtaining necessary permits and approvals. Family Video argues that, under a strict reading of the purchase contract, it was not required to obtain its permits and approvals prior to Pingue providing a commitment of title insurance. Family Video further argues that, even if it chose not to seek the necessary permits and approvals prior to closing, it was not in breach of the agreement; rather, it was merely waiving its right to obtain the necessary permits and approvals, and accepting the attendant risks, after closing, of not being able to use the property for its intended purpose. Finally, Family Video contends that the trial court erred in failing to find that Pingue breached the 2003 offer to purchase.

{¶ 57} In its decision granting summary judgment in favor of Pingue, the trial court set forth the following factual background based upon the evidence submitted:

> Defendant Pingue signed [the 2003 offer to purchase] on June 25, 2003. Complaint Exh. A. Doug Klang, the Director of Real Estate and an employee of Family Video made hand written changes to the contract, signed it on July 7, 2003, and returned it to Defendant Pingue. Klang Aff. ¶1, 3, attached to Family Video's Motion for Summary Judgment as Exh. B.
>
> Family Video deposited $20,000.00 with Plaintiff on August 7, 2003. Complaint ¶3, Exh. B. On August 25, 2003,

> Defendant Pingue mailed the Environmental Report to Doug Klang. Pingue Aff. ¶5, Exh. A thereto. He never got a reply from Mr. Klang, and therefore Mr. Pingue tried to call, and left messages, but never got a return call. Id. ¶6. Mr. Klang claims he never received the Report or the cover letter from Defendant Pingue until much later. Klang Aff. ¶6. On April 6, 2005, at a court conference, Mr. Klang admits that he received the Report when Mr. Pingue handed him a copy dated February 23, 2003. Id.
>
> Because Defendant Pingue had not heard from Mr. Klang, he never provided the title commitment. Id. ¶7. He decided that it would be a waste of money. Id. ¶10. Defendant Pingue tried to facilitate the sale, by offering to extend the time for compliance, and contacting the realtor but, Defendant Family Video never obtained the permits and variances. Id. ¶11-12; March 15, 2005 Answer #4 by Family Video to Requests for Admissions, Exh. C.

(Trial Court Dec., Sept. 23, 2010 at 3-4.)

{¶ 58} In addressing Pingue's claim for breach of contract against Family Video, the trial court found that "obtaining the permits, approvals, consents, etc. identified in the agreement was a condition precedent to performance." (Trial Court Dec., Sept. 23, 2010 at 6-7.) The trial court cited case law providing that a condition precedent is one that is to be performed before obligations in the contract become effective, *Mumaw v. W. & S. Life Ins. Co.*, 97 Ohio St. 1, 10 (1917), and that a condition precedent requires that an act must take place before a duty to perform a promise arises, and if the condition is not fulfilled, the parties are excused from performing. *Atelier Dist. v. Parking Co. of Am., Inc.*, 10th Dist. No. 07AP-87, 2007-Ohio-7138, ¶ 35. Applying the law to the facts, the trial court found that "the language of the agreement expressly made performance, i.e. closing, conditioned upon the Purchaser obtaining permits. That was not done by these parties for the amount listed in the contract. Thus, Defendant Pingue was excused from performing." (Trial Court Dec., Sept. 23, 2010 at 7.)

{¶ 59} Part of the evidence before the trial court on the cross-motions for summary judgment included answers by Family Video to Pingue's request for admissions. In those answers, Family Video admitted that it "did not obtain the necessary permits, approvals, consents, variances, acceptances or authorizations" as required under the 2003 offer to

purchase. (Pingue's Request for Admissions, No. 4.) Family Video also admitted that it "did not apply for the necessary permits, approvals, consents, variances, acceptances, or authorizations" as required by the 2003 offer to purchase. (Pingue's Request for Admissions, No. 5.)

{¶ 60} The record on summary judgment supports the trial court's determination that the agreement "expressly made performance, i.e., closing, conditioned upon the Purchaser obtaining permits," and that Family Video failed to apply for, or obtain, necessary permits, approvals, etc. Further, the language of the agreement expressly provided that the earnest money deposit would be forfeited if the purchaser failed to perform. Upon review, we find no error with the trial court's determination on this issue.

{¶ 61} As noted, Family Video also contends that the trial court erred in failing to find that Pingue breached the 2003 offer to purchase. More specifically, Family Video argues that Pingue committed a breach by failing to timely provide an environmental survey, and in not providing a commitment of title insurance.

{¶ 62} The trial court, in addressing Family Video's breach of contract claim as set forth in its motion for summary judgment, found that Family Video had not properly asserted a claim for breach of contract against Pingue. We agree.

{¶ 63} As support for the argument that it alleged a claim for breach of contract, Family Video relies solely upon its answer to Ohio Title's interpleader complaint, in which Family Video alleged that it was entitled to the funds held in escrow "by reason of the fact that several contingencies in the offer to purchase real estate were not satisfied." Family Video's answer to the interpleader, however, did not include a cross-claim against Pingue for breach of contract. Further, as noted under the facts, after Ohio Title filed its interpleader complaint against both Pingue and Family Video, Pingue filed a cross-claim against Family Video, alleging that Family Video "breached its Contract with Defendant Pingue by failing to perform the obligations required under the Contract." In its subsequently filed answer to Pingue's cross-claim, Family Video raised various affirmative defenses, but did not file a cross-claim against Pingue for breach of contract, nor did Family Video seek to amend its pleading to assert such a claim prior to filing its motion for summary judgment. We therefore find no error with the trial court's determination that Family Video failed to properly plead a claim for breach of contract against Pingue.

{¶ 64} Accordingly, Family Video's assignment of error on cross-appeal is not well-taken and is overruled.

{¶ 65} Based upon the foregoing, Pingue's first and second assignments of error are overruled, Family Video's single assignment of error on cross-appeal is overruled, and the judgments of the Franklin County Court of Common Pleas, granting summary judgment in favor of Pingue, and denying Pingue's motion to enforce settlement, are hereby affirmed.

Judgments affirmed.

BRYANT and DORRIAN, JJ., concur.
