IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

BRIAN HAGAN, Plaintiff, v. WILLIAM J. CRAIGHEAD, *et al.*, Defendant.	)	CASE NO. CV 11 758686 JUDGE BRENDAN J. SHEEHAN **OPINION AND JUDGMENT ENTRY**

I. ISSUES PRESENTED.

This matter is before the Court on the parties' cross-Motions for Summary Judgment. The issues have been fully briefed to the Court.

Plaintiff Brian Hagan is an Ohio attorney and was the sole shareholder and officer of Rockport National Title Agency, Inc. ("Rockport Title"), a company involved in providing escrow and title services for real estate purchase agreements. In 2007, Plaintiff was introduced to Defendants William J. Craighead and Brian A. Cole who were interested in purchasing Rockport Title from Plaintiff. Defendants Craighead and Cole together with Defendant Norman E. Incze were the co-owners/operators of a competing title agency, Cleveland Home Title Agency, Ltd. Defendant Incze is also an attorney licensed to practice in Ohio.

Ultimately, Defendants purchased Rockport Title from Plaintiff pursuant to the terms of a Share Purchase Agreement, which provides in relevant part:

> 2. Purchase Price and Other Payments.
>
> In the exchange for the Shares, the BRIAN A. COLE, WILLIAM J. CRAIGHEAD III and NORMAN E. INCZE shall assume form [sic] the Seller the Small Business Administration

> Loan held by Charter One Bank (no more than $54,000.00), in the form of a Promissory Note, in the form of Exhibit A hereto, containing the following terms:
>
> > (i) Promissory Note in the amount of $50,000.00;
> >
> > (ii) The balance of the Purchase Price, or the balance of the Small Business Administration Loan held by Charter One Bank (no more than $54,000.00), shall be paid in equal monthly installments of $1,803.79 commencing February 10, 2008 and due and payable on each subsequent month no later than the 10th day.
>
> The Promissory Note shall be secured by the guaranties of BRIAN A. COLE, WILLIAM J. CRAIGHEAD III and NORMAN E. INCZE.

Share Purchase Agreement, Ex. D to Plaintiff's Motion for Summary Judgment, p.1.

The Promissory Note (the "Note") provides in pertinent part:

> BRIAN A. COLE, WILLIAM J. CRAIGHEAD III and NORMAN E. INCZE, the undersigned Makers, for value received, promise to pay to the order of BRIAN F. HAGAN, at 3926 Mark Avenue, Cleveland, OH 44115, the sum of Fifty Thousand Dollars ($50,000.00) with interest therein at the rate of zero percent (0%) per annum, payable in monthly installments of $1,803.79, on the assumption of the Small Business administration Loan held by Charter One Bank and upon the closings of orders received from Rockport Title Agency Inc., clientele, commencing February 10, 2007 until paid in full. Each installment is due on the dame day of each following month thereafter. If closings cannot meet the obligations for the current month, the holder of this note shall pay the deficiency amount or make the payment in full so as to keep the SMA loan current.

Note, Ex. A to Plaintiff's Complaint.

The parties do not dispute that Defendants signed the Note and that they thereafter acquired Rockport Title. It is similarly undisputed that the Defendants did not make any payments toward the balance of the purchase price for Rockport Title under the Note.

Plaintiff filed this action on June 29, 2011 seeking damages from Defendants' alleged breach of the Note.

Plaintiff now seeks summary judgment on Defendants' liability under the Note. Defendants maintain that the Note is unenforceable because the underlying loan from Charter One ("SBA loan") was not assignable and because Plaintiff waived its right to payment by failing to demand performance during the time period from 2008 to 2011.

II. LAW AND ANALYSIS.

A. Standard for Summary Judgment.

Under Civ.R. 56, summary judgment is appropriate when, (1) no genuine issue as to any material fact exists, (2) the party moving for summary judgment is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can only reach one conclusion which is adverse to the non-moving party. *Holliman v. Allstate Ins. Co.*, 86 Ohio St.3d 414, 715 N.E.2d 532 (1999); *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1997). When a motion for summary judgment is properly made and supported, the nonmoving party must set forth specific facts showing that there is a genuine issue for trial and may not merely rest on allegations or denials in the pleadings. *Dresher v. Burt*, 75 Ohio St.3d 280, 662 N.E.2d 264 (1996). The nonmoving party must produce evidence on any issue for which that party bears the burden of production at trial. *Wing v. Anchor Media, Ltd.*, 59 Ohio St.3d 108, 111, 570 N.E.2d 1095 (1991). Further, to survive summary judgment, a plaintiff must produce more than a scintilla of evidence in support

of his position. *Markle v. Cement Transit Co., Inc*, 8th Dist. No. 70175, 1997 WL 578940, 2 (Sept. 18, 1997), *citing Redd v. Springfield Twp. School District*, 91 Ohio App.3d 88, 92, 631 N.E.2d 1076 (9th Dist. 1993).

The case before the Court is one of contract interpretation. "If a contract is clear and unambiguous, then its interpretation is a matter of law and there is no issue of fact to be determined." *Inland Refuse Transfer Co. v. Browning–Ferris Indus. of Ohio, Inc.*, 15 Ohio St.3d 321, 322 (1984). In construing a written contract, the primary and paramount objective is to ascertain the intent of the parties." *Aultman Hosp. Assn. v. Community Mut. Ins. Co.*, 46 Ohio St.3d 51, 53, 544 N.E.2d 920 (1989). "The intent of the parties to a contract is presumed to reside in the language they chose to employ in the agreement." *Kelly v. Med. Life Ins. Co.*, 31 Ohio St.3d 130, 132, 509 N.E.2d 411 (1987). Common words appearing in the agreement "are to be given their plain and ordinary meaning unless manifest absurdity results or unless some other meaning is clearly intended from the face or overall contents of the instrument." *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, 245–246, 374 N.E.2d 146 (1978). However, the general rule of liberal construction cannot be employed to create an ambiguity where none otherwise exists. *Karabin v. State Auto. Mut. Ins. Co.*, 10 Ohio St.3d 163, 166-167, 462 N.E.2d 403, 406-407 (1984).

B. Defendants' Argument Concerning Non-Assignability.

Defendants urged that the Note was unenforceable because Plaintiff could not assign the underlying SBA loan. The language of the Share Purchase Agreement and Note indicate that Defendants acknowledged the purchase price in terms of the debt Plaintiff owed under the SBA loan. Their payments were tied to the remaining balance owed on the SBA loan and were designated as an "assumption" of the loan.

"Assumption" means: "The act of taking (esp. someone else's debt or other obligation) for or on oneself; the agreement to so take < assumption of a debt>." Black's Law Dictionary (9th ed. 2009).

"Assignment", on the other hand, means: "1. The transfer of rights or property <assignment of stock options>. 2. The rights or property so transferred <the aunt assigned those funds to her niece, who promptly invested the assignment in mutual funds>." Black's Law Dictionary (9th ed. 2009).

Critical to the Court's determination is the fact that neither the Share Purchase Agreement nor the Note changed Plaintiff's duties under the SBA loan. Plaintiff remained fully obligated to repay the SBA loan and did not transfer any rights or obligations under the loan. In fact, Plaintiff continued to make payments on the SBA loan even though Defendants made no payments to him under the Note. Accordingly, the Court finds that the terms of the SBA loan did not invalidate the Note and Defendants' arguments without merit.

C. Defendants' Argument Concerning Waiver.

Defendants also maintain that Plaintiff's delay in enforcing the Note constitutes a waiver. A waiver is "a voluntary relinquishment of a known right and is generally applicable to all personal rights and privileges, whether contractual, statutory, or constitutional." *Glidden Co. v. Lumbermens Mut. Cas. Co.* , 112 Ohio St.3d 470, 478, 2006 -Ohio- 6553, 861 N.E.2d 109, 118 (2006) citing *State ex rel. Wallace v. State Med. Bd. of Ohio*, 89 Ohio St.3d 431, 435, 2000 -Ohio- 213, 732 N.E.2d 960 (2000); *State ex rel. Athens Cty. Bd. of Commrs. v. Gallia, Jackson, Meigs, Vinton Joint Solid Waste Mgt. Dist.*, 75 Ohio St.3d 611, 616, 1996 -Ohio- 68, 665 N.E.2d 202 (1996).

Considering that the statute of limitations for breach of the Note, as a contract in writing, is fifteen years pursuant to R.C. § 2305.06, the Court cannot find that the Plaintiff's delay in seeking payment constitutes voluntary relinquishment of a known right. Given the state of the economy during the relevant time period, the Court will not mandate that parties risk truncating their right to pursue payment under a written contract simply by allowing additional time for compliance under the circumstances presented.

Additionally, it has long been the law that a notice of failure to perform or demand for payment is unnecessary where the obligation to perform is complete and unconditional. *Thomas v. Matthews*, 94 Ohio St. 32, 113 N.E. 669 (1916). The lack of prior demands for performance standing alone cannot as a matter of law constitute a voluntary relinquishment of a known right when no legal obligation to make a demand existed. Certainly Plaintiff was required to assert his rights within a reasonable time and was similarly required to mitigate his damages. Under the undisputed facts in the current case, the balance Defendants owed to Plaintiff was not subject to any interest charges and, given the undisputed circumstances, Plaintiff's assertion of his rights occurred within a reasonable time. Accordingly, the Court finds Defendants' arguments without merit.

D. Plaintiff's Cause of Action for Breach

To establish breach of the Note by Defendants, Plaintiff must establish the existence of a contract; performance by Plaintiff, breach by the Defendants, and resulting damage to Plaintiff. *Castle Hill Holdings, LLC v. Al Hut, Inc.*, 8th Dist. No. 86442, 2006-Ohio-1353.

As previously stated, the parties do not dispute that Defendants signed the Note and that they thereafter acquired Rockport Title. It is similarly undisputed that the Defendants did not make any payments toward the balance of the purchase price for Rockport Title under the Note.

Accordingly, Plaintiff is entitled to judgment on the unpaid balance of the Note in the sum of $50,000.

III. CONCLUSION.

For the foregoing reasons,

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IS GRANTED.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IS DENIED.

JUDGMENT IS ENTERED IN FAVOR OF PLAINTIFF BRIAN HAGAN AND AGAINST DEFENDANTS WILLIAM J. CRAIGHEAD, BRIAN A. COLE AND NORMAN E. INCZE, JOINTLY AND SEVERALLY, IN THE AMOUNT OF $50,000.00 PLUS POST JUDGMENT INTEREST AT THE STATUTORY RATE.

EACH PARTY TO BEAR THEIR OWN COSTS.

IT IS SO ORDERED.

JUDGE BRENDAN J. SHEEHAN

Dated: 3/9/12

CERTIFICATE OF SERVICE

A copy of the foregoing was mailed to the following this 9th day of March, 2012.

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