STATE OF INDIANA	)	IN THE JOHNSON SUPERIOR COURT NO. 1
	) SS:	
COUNTY OF JOHNSON	)	CAUSE NO. 41D01-1506-PL-000054

MSM REAL ESTATE HOLDINGS, LLC, Plaintiff,	)
- V -	)
EASY STREET CONDOMINIUMS, LLC, Defendant.	)

ORDER AND JUDGMENT

The above cause of action came before the Court for trial by court on dates of September 5, 2017 and September 6, 2017. Plaintiff, MSM Real Estate Holdings, LLC, appeared by representative, Dr. Mark Ritter, and by counsel, Thomas W. Vander Luitgaren, Esq. Defendant, Easy Street Condominiums, LLC, appeared by representative, Dr. Rick Poe, and by counsel, Eric D. Schmadeke, Esq. Parties and witnesses were sworn. Evidence was presented.

And the Court, having taken the matter under advisement, and being duly advised in the premises, now FINDS As follows:

1. The parties entered into a Purchase Agreement on November 3, 2014. By the terms of the Purchase Agreement, Plaintiff agreed to purchase and Defendant agreed to sell approximately six and one-acres of real estate situated in Johnson County, Indiana. The Purchase Agreement was admitted as Exhibits 1, 2 and 3 and is hereafter referred to as "Purchase Agreement".

2. In parts relevant, the Purchase Agreement provided:

"D. Earnest Money: Buyer submits $25,000.00 as earnest money which shall be applied to the purchase price. The listing broker shall deposit earnest money received into its escrow account within two (2) banking days of acceptance of this Agreement and hold it until time of closing the transaction or termination of this Agreement. . . . If this offer is accepted and Buyer fails or refuses to close the transaction, without legal cause, the earnest money shall be retained by Seller for

damages the Seller has or will incur, and Seller retains all rights to seek other legal and equitable remedies. . . . .

. . .

G. Closing. The closing of the sale (the "Closing Date") shall be on or before _____, or within 90 days after Acceptance, whichever is later or this Agreement shall terminate unless an extension of time is mutually agreed to in writing. Any closing date earlier than the latest date above must be by mutual written agreement of the parties. The settlement or closing fee incurred in conducting the settlement charged by the closing agent or company shall be paid by X shared equally. . . .

L. Title Approval: Prior to closing, Buyer shall be furnished with X a title insurance commitment for the most current and comprehensive ALTA Owner's Title Insurance Policy available in the amount of the purchase price . . . . Seller must convey title free and clear of any encumbrances and title defects, with the exception of any mortgage assumed by Buyer and any restrictions or easements of record not materially interfering with Buyer's intended use of the Property. . . . .

O. Time: Time is of the essence. Time periods specified in this Agreement and any subsequent Addenda to the Purchase Agreement are calender days and shall expire at 11:59 P.M. of the date stated unless the parties agree in writing to a different date and/or time."

3. The Purchase Agreement further provided:

"9. This Agreement constitutes the sole and only agreement of the parties and supersedes any prior understandings or written or oral agreements between the parties respecting the transaction and cannot be changed except by their written consent."

4. The property subject to purchase consisted of 6.5 acres of real property. The property had been partially developed by Seller as a condominium development. A single building was on the south part of the property which consisted of four units. Itamar Cohen, the realtor for Plaintiff, used an Unimproved Property Purchase Agreement with a Zoning/Governmental Approval Addendum.

5. Plaintiff desired to use the property as a rehabilitation site in connection with it's sports medicine facility that adjoined the north property line of the property. Based upon Plaintiff's desired use of the property, the property would need to be rezoned by the City of Greenwood, the relevant zoning authority. The Purchase Agreement provided: "2. PA is subject to final approval of the city official and zoning department See Zoning/Governmental Addendum for additional contingencies." Exhibit 1, page 5, lines 308-309.

6. A Zoning/Governmental Approval Addendum was included with the Purchase Agreement. The Addendum provided in parts relevant:

"Buyer's performance under the Purchase Agreement is conditioned upon the following which are for the Buyer's benefit and may be waived by the Buyer, at Buyer's sole discretion: (Check the applicable paragraph letter below)

X A. Zoning. Buyer shall have 60 days from the date of acceptance of the Purchase Agreement to determine whether the Property is finally and unconditionally zoned for Buyer's intended uses and purposes as outdoor performing sports facility with all necessary classifications, variance, permissions and exceptions required for such use. If the Property or any part thereof is not suitably zoned, or if variances from the existing zoning classifications are required by Buyer, and Buyer determines that such rezoning or variance(s) is feasible, Buyer shall have the right to have the zoning classification or requirements changed at Buyer's expense and to take such action, including the filing of petitions for rezoning or for variance of zoning requirements, as Buyer deems necessary. Buyer shall have 30 days from the date of acceptance to obtain such changes, and Buyer shall proceed diligently." Exhibit 2.

7. A four unit building was on the property. The building was the first building in a condominium project that Defendant had planned for the site. The project was planned immediately prior to the 2008 recession. No units had been sold. Development was discontinued when the Defendant could not sell units during the recession. Two of the four units had been conveyed into the name of Richard Poe, a member of Easy Street. Two of the four units had been conveyed into the name of Richard Afterkirk, a member of Easy Street. Conveyance had been required by lenders to repay a mortgage holder, Flagstar Bank, after Flagstar Bank had called a demand note during the recession.

8. The only provision in the Purchase Agreement specifically related to the four unit building was as follows:

"4. Purchase to include Existing 4 unit condo building on Lot #4 vacant land including improvements, HOA control Appx 6.52 Acres". Exhibit 1, page 5, lines 312-313.

Although a Purchase Agreement for unimproved property, the Purchase Agreement contained a provision according to Buyer the right to have an independent inspection ordered and completed within sixty (60) days of acceptance. Exhibit 1, lines 119-127.

9. The time period for Plaintiff to obtain requested rezoning expired without a petition for rezoning being filed with the City of Greenwood.

10. The parties subsequently signed "Addendum #1 to Purchase Agreement Commercial-Industrial Real Estate" prior to the expiration of the time allowed for closing under the Purchase Agreement. (The original Purchase Agreement was identified as an agreement for Unimproved Property as opposed to Commercial-Industrial Property.)

The Addendum, hereinafter "Addendum", provided:
Buyer to file rezoning petition on or before 1/19/15.

Closing extended to thirty days after municipal approval of rezoning petition, but no later than April 1, 2015 provided seller may terminate if in buyer's sole discretion it is unsatisfied with the rezoning or permit proceedings, approval or disapproval.

Seller shall request final inspection of building and take steps necessary to obtain COO and provide evidence of same prior to closing.

Seller shall provide utility easement to Buyer in form reasonably acceptable to parties as soon as possible.

Seller shall assign leases to Buyer on form acceptable to parties at closing.

Seller shall provide leases to Buyer as soon as possible for Buyer's review and approval." Exhibit 4.

11. Meridian Title Corporation was engaged to perform the title work. A title binder was initially prepared on November 12, 2014. Ultimately, six amended title binders were issued. Exhibit 8.

12. Amendment No. 5 dated March 12, 2016 was the last title binder prepared prior to the deadline for closing under the Purchase Agreement of April 1, 2015. Exhibit 8.

13. The title binder of March 12, 2016 showed that two of the units of the four unit building were owned by Richard Poe individually. Two units of the four unit building were owned by Kenneth Afterkirk individually. (Parcel II and Parcel III of Amendment No. 5.)

14. Richard Poe was known to be a member of Easy Street Condominiums. However, Kenneth Afterkirk was unknown to MSM.

15. Paragraph 8 of the title binder shows a mortgage in the amount of $630,000 from Edward Garry, as mortgagor, to Irwin Union Bank & Trust, as mortgagee. Edward Garry was a prior owner of the property.

16. The title binder of March 12, 2016 showed a mortgage on the parcel owned by Richard Poe in the amount of $328,424.54 to Old National Bank as mortgagee. The title binder showed judgment liens against Richard Poe. Sewer liens and a mechanic's lien in favor of the City of Greenwood were also shown on the title binder.

17.The title binder of March 12, 2016 showed a mortgage on the parcel owned by Kenneth Afterkirk in the amount of $344,993.29 to Old National Bank as mortgagee.

18. Amendment 5 to the title binder of March 12, 2016 showed liens against the property in excess of the amount to be paid for the property by MSM Real Estate Holdings, LLC.

19. A closing had been set for April 1, 2015. Mr. Vander Luitgaren issued a letter to Dr. Poe that set forth concerns as to Easy Street's ability to perform on March 30, 2015. (The letter was not offered or admitted into evidence. The letter was attached to Plaintiff's Complaint as Exhibit "D', however, Defendant objected to the letter as "self-serving hearsay". As an extraneous document that is not subject to inclusion under Trial Rule 9.2, the letter does not constitute part of the record in the absence of offer and admission.)

20. Jarrod Brown, an attorney who specialized in real estate transactions, had been engaged by Easy Street to correct a problem arising from Easy Street Condominiums, LLC having been administratively dissolved by the Secretary of State. Mr. Brown's role was expanded to include all matters related to Easy Street's compliance with the Purchase Agreement in the days before the April 1, 2015 closing.

21. Mr. Brown testified that Mr. Vander Luitgaren's letter requested a response by April 3, 2015. 4:30 P.M., September 5, 2017.

22. Mr. Brown and Mr. Vander Luitgaren had a conversation on April 1, 2015 to discuss the issues that Mr. Vander Luitgaren had raised in his letter of March 30, 2015.

23. Mr. Brown issued a written response to Mr. Vander Luitgaren on April 3, 2015. Mr. Brown's letter shows the following issues were addressed by Mr. Brown in response to issues raised by Mr. Vander Luitgaren:

A. Title was held by multiple owners, including non-parties to the Purchase Agreement;

B. Unreleased mortgages appeared on the title work.

C. A pay-off figure had not yet been received for the sewer liens in favor of the City of Greenwood.

D. Issues were acknowledged as to the defects in compliance with the horizontal property regime law. Mr. Brown invited discussion to resolve the issue.

E. Mr. Brown noted that other issues were discussed on April 1, 2015.

24. Mr. Brown included a copy of a mortgage release that he had procured so as to release the mortgage from Edward Garry to Irwin Union Bank. In addition, he included correspondence about releasing two other mortgages from Edward Garry as mortgagee that had already been removed as exclusions from coverage under Amendment 5 to the title binder. Mr. Brown provided assurance that title would be conveyed "at Closing by executing multiple deeds in favor of your client, from the Company and its individual members." Exhibit 16.

25. Significantly, Mr. Brown prepared a written Addendum to the Purchase Agreement to extend the closing date to May 1, 2015. Mr. Brown's letter of April 3, 2015 states: "If you are satisfied with our discussions and the contents of this correspondence, to the extent your client wishes to proceed with this transaction, please have your client execute the Addendum, return it, and we will have our client sign." Exhibit 16.

26. The proposed Addendum to the Purchase Agreement was never signed by either party.

27. A closing had been set for April 1, 2015. The closing was taken off at the request of Mr. Cohen, the real estate agent for MSM. Meridian Title had not prepared a closing statement in preparation for closing. A closing statement sets forth the financial transactions occurring as to each party as a result of the transaction and includes the existing liens being satisfied from the proceeds of sale.

28. Subsequently, MSM had an inspection performed of the four unit building. The inspection report revealed several repairs. Exhibit 17.

29. The evidence does not reveal any other communications by or between Mr. Brown or Mr. Vander Luitgaren.

30. Mr. Crawford, Easy Street's realtor, contacted Mr. Cohen by e-mail on April 23, 2015 to establish a date for closing. On the same day, Mr. Cohen, MSM's realtor, advised Mr. Crawford by e-mail that he had contacted Meridian Title to set up closing on April 30, 2015. Exhibit 19.

31. Also on April 23, 2015, the governing body of MSM decided not to proceed with the purchase of the property under the Purchase Agreement. Dr. Ritter, President of MSM, cited the concerns about Easy Street's ability to close, including condos that were not condos due to the absence of a homeowner's association, title liens and another owner not part of the purchase agreement. 8:43, September 6, 2017.

32. Mr. Cohen communicated MSM's decision to Mr. Crawford. Closing did not occur.

33. An earnest money deposit of Twenty-Five Thousand Dollars ($25,000.00) had been tendered to Defendant's broker in accordance with the Purchase Agreement.

34. MSM seeks a return of the earnest money deposit. Easy Street seeks to retain the earnest money deposit and seeks specific performance and damages for breach of contract. Easy Street also maintains an action for injunction unrelated to the Purchase Agreement.

35. Under paragraph D of the Purchase Agreement, Seller is authorized to retain the earnest money deposit unless "Buyer fails or refuses to close the transaction, without legal cause".

36. Closing was set by the terms of the Addendum, which stated: "Closing extended to thirty days after municipal approval of rezoning petition, but no later than April 1, 2015 provided seller may terminate if in buyer's sole discretion it is unsatisfied with the rezoning or permit proceedings, approval or disapproval."

37. Mr. Cohen testified that the purpose of the Addendum was to deal with issues resulting from the lack of resolution of the rezoning issue. The Addendum provided for closing to take place within thirty (30) days of approval of rezoning but no later than April 1, 2015. Easy Street asserts that the language "provided Seller may terminate if in Buyer's sole discretion it is

unsatisfied with the rezoning permit proceedings, approval or disapproval" renders the April 1, 2015 "drop dead" date ambiguous. As worded, and as noted by Mr. Cohen, the wording "makes no sense". The Zoning/Governmental Approval Addendum allowed Plaintiff to seek rezoning of the property for it's intended use. Inasmuch as the Buyer was the party seeking rezoning, the opportunity to terminate would be vested with the Seller. The wording "Buyer's sole discretion" is clearly in error and should be "Seller's sole discretion".

Further, the language is not modifying April 1, 2015. Rather, the language addresses the contingency created by the Zoning/Governmental Approval Addendum. At the time of execution of the Addendum, the time period under the Purchase Agreement for the contingency to be removed had expired. The language of the Addendum served to preserve the contingency created by the Zoning/Governmental Approval Addendum, but enabled Seller to terminate the amended Purchase Agreement if it was dissatisfied with Buyer's effort to obtain rezoning.

38. The Addendum established a closing date of April 1, 2015. By the terms of the Purchase Agreement, time was "of the essence". The Purchase Agreement provided that any modification of the Purchase Agreement had to be in writing. The time provision specifically required that a change of date required that "the parties agree in writing".

39. As a contract for the sale of land, the Purchase Agreement is subject to the statute of frauds. Indiana Code 32-21-1-1(b)(4). An amendment of a contract for the sale of land must likewise be in writing. Huber v. Hamilton, 33 N.E.3d 1116, 1122 (Ind. Ct. App. 2015).

40. Promissory estoppel may prevent application of the Statute of Frauds. Promissory estoppel requires the following elements: "(1) a promise by the promisor; (2) made with the expectation that the promissee will rely thereon; (3) which induces reasonable reliance by the promissee; (4) of a definite and substantial nature; and (5) injustice can be avoided only by enforcement of the promises." Huber v. Hamilton, 33 N.E.3d 1116, 1124 (Ind. Ct. App. 2015).

41. The Court turns to the facts presented. On March 30, 2015, Mr. Vander Luitgaren requested assurance by Easy Street that it could perform. "(W)hen an obligee to a contract

reasonably believes that the obligor will not perform, the obligee may demand assurance of performance and suspend his own performance until such assurances are given. Hawa v. Moore, 947 N.E.2d 421, 426 (Ind. Ct. App. 2011)(citing Restatement (Second) of Contracts Sections 250, 251); see generally Ind. Code 26-1-2-609, 26-1-2-610." 3155 Dev. Way, LLC v. APM Rental Props, LLC, 52 N.E.3d 854, 859 (Ind. Ct. App. 2016).

42. Section 251 of the Restatement (Second) of Contracts provides:

"(1) Where reasonable grounds arise to believe that the obligor will commit a breach by non-performance that would of itself give the obligee a claim for damages for total breach under Section 243, the obligee may demand adequate assurance of due performance and may, if reasonable, suspend any performance for which he has not already received the agreed exchange until he receives such assurance.

(2) The obligee may treat as a repudiation the obligor's failure to provide within a reasonable time such assurance of due performance as is adequate in the circumstances of the particular case."

43. Mr. Vander Luitgaren was made aware of Mr. Brown's involvement in clearing issues on March 30, 2015. Mr. Brown stated: "From what I can tell, we have some work to do." Exhibit 15. Mr. Vander Luitgaren stated that he would e-mail a copy of the letter sent to Dr. Poe earlier that day. Exhibit 15.

44. Easy Street asserts that inasmuch as closing was not conducted, the time of performance had not yet arrived. Easy Street asserts that it was in a position to close on April 1, 2015. Easy Street asserts that if MSM had not taken the scheduled closing off on April 1, 2015, it could have complied with it's contractual obligations.

45. The Court determines that MSM did have reasonable grounds to believe that Easy Street could not convey marketable title on April 1, 2015 so as to request assurance that Easy Street could perform.

The condition of the title in Amended Title Binder No. 5 shows that the outstanding mortgages and liens against the property exceeded the contract amount in the Purchase Agreement. Significantly, a mortgage was against the property where a prior owner, Dr. Edward Gerry, was the mortgagor and Old National Bank was the mortgagee. Prior title binders had shown two additional mortgage in which Dr. Gerry was the mortgagor. Mr. Brown was able to obtain releases of all mortgages involving Dr. Gerry. However, as set out in Mr. Brown's letter of April 3, 2015, a release was not yet in hand. Based upon the existence of the unreleased mortgages, a cloud was upon the title and the title would be unmarketable. While Mr. Brown had resolved the issue, closing could not occur until the releases were in hand.

Amended Title Binder No. 5 shows that the four condominium units were held in the names of Richard Poe and Kenneth Afterkirk. MSM was dealing with Richard Poe. He was known. There is no evidence that any representative of MSM knew who Kenneth Afterkirk was prior to the communication between Mr. Vander Luitgaren and Mr. Brown. Richard Poe and Kenneth Afterkirk were not parties to the Purchase Agreement between MSM and Easy Street. A request by MSM that Easy Street can convey title to property held by Richard Poe and Kenneth Afterkirk was reasonable. Easy Street asserts that Richard Poe and Kenneth Afterkirk were members of Easy Street and that they were willing to convey title. While Easy Street is correct that performance would not be required until closing, Easy Street was required to provide assurance that Richard Poe and Kenneth Afterkirk could convey title as required by Easy Street as a condition to performance. Mr. Brown's letter of April 3, 2015 explains the intent of Easy Street to have Dr. Poe and Mr. Afterkirk to convey title by separate deed at closing. The evidence does not establish if this issue was discussed by Mr. Vander Luitgaren and Mr. Brown in their discussion of April 1, 2015. Evidence does not establish if Mr. Brown's written assurance was deemed sufficient to satisfy MSM's concern over ability to perform. From the evidence, Dr. Poe and Mr. Afterkirk were eager to perform. However, the question is whether MSM had been provided with sufficient assurance at the time. The evidence does not support assurance prior to April 3, 2015.

Mr. Brown's letter shows that a final amount of the sewer lien owed to the City of Greenwood had not yet been received as of April 3, 2015. Although the sewer lien would be paid

from the proceeds of sale, the amount of the lien would need to be known before the closing statement could be prepared by the title company and closing conducted.

The property purchased included a four unit building that had been established as a condominium. Easy Street had agreed to transfer HOA control. No HOA had ever been established. A Code Of By-Laws Of Easy Street Condos And Of Easy Street Condos Homeowners' Association, Inc. was recorded with the Johnson County Recorder. The recorded document is entitled the Articles of Organization of Easy Street Condominiums Limited Liability Company. An issue is present as to how Easy Street was to transfer control in the absence of the requisite entities and documents compliant with Indiana Code 32-25-8. Inasmuch as Easy Street would transfer a four unit building to MSM which had no interest in developing the property for condominiums, the most prudent course was the offer of Mr. Brown to explore alternative resolution of the issue. However, there is no evidence of subsequent communication on the issue. Also, the Purchase Agreement required that "(d)ocuments for mandatory membership association" be provided to MSM. In light of the circumstance of MSM's intended use of the property, the provision made little sense inasmuch as MSM needed to have control of the condominium project. However, MSM is correct in asserting that Easy Street had never complied with the provision.

The Court notes that Easy Street Condominiums, LLC had been administratively dissolved by the Secretary of State. The evidence would support a finding that the members or manager would be empowered under Indiana Code 23-18-9-4 to wind up the affairs of the limited liability company without reinstatement by the Secretary of State. However, MSM would need assurance that Easy Street Condominiums, LLC was winding up it's business so as to vest it's members or manager with authority under Indiana Code 23-18-9-4 if reinstatement from the Secretary of State was not being sought under Indiana Code 23-18-10-4.

46. Based upon the foregoing, the Court would conclude that MSM had a reasonable basis to question Easy Street's ability to perform and could suspend performance until Easy Street supplied proof of ability to perform. As of the date established for performance, April 1, 2015, Easy Street could not perform. Mr. Brown provided a response to MSM's request on April 3,

2015. Mr. Brown is clearly knowledgeable and had made progress in clearing obstacles. However, even as of April 3, 2015, not everything was in place.

47. The question presented is the effect of Mr. Vander Luitgaren's letter of March 30, 2015. The letter invited a response as to Easy Street's ability to perform on April 3, 2015. The request for proof of ability to perform was issued two days before closing in a letter issued to Dr. Poe. MSM suspended performance. Mr. Cohen called off the closing set for April 1, 2015. The Purchase Agreement had provided for an April 1, 2015 closing date, established that time was of the essence and provided that the provisions could be modified in writing. Notwithstanding the fact that it requested proof of ability to comply after the date of closing, MSM asserts that the parties were out of contract because they did not close on or before April 1, 2015.

48. As to time of performance generally, Professor Corbin writes:

"When two performances, agreed equivalents, are to be exchanged simultaneously, a tender of his performance by either one of the parties is a condition precedent to the duty of performance by the other. This is a case of so-called concurrent conditions. If time is of the essence in a case of this kind, the failure of both parties to make tender within the time limit operates as a discharge of the contract. Neither one can thereafter put the other in default. But the fact that a specific time for mutual performances is agreed upon does not necessarily make that time "of the essence." If the stated time is not of the essence, then each party has a 'reasonable time' within which he can tender his performance and enforce the contract."
Sec. 1258, Corbin on Contracts (1 vol. ed. 1952).

Professor Corbin continues:

"Suppose a bilateral contract for the sale of land, the buyer makes a down payment of $1000, balance payable on delivery of deed on a specified later date. In this case, the conveyance and the final payment are concurrent conditions. As long as neither party makes a tender, of the deed or of the money, neither party is in default. If tender at the exact time is of the essence, and there is no waiver or estoppel, the contract obligation is discharged.. If performance on time is not of the essence - as generally it is not in land sales - it is not easy to say how soon the parties will be discharged by mutual failure to tender performance." Id.

49. In the case of Barrington Mgmt. Co v. Paul E. Draper Family Ltd. P'ship., 695 N.E.2d 135 (Ind. Ct. App. 1998), the Indiana Court of Appeals held:

> "When a written agreement to convey real property makes time of the essence, fixes a termination date, and there is no conduct giving rise to estoppel or waiver, the agreement becomes legally defunct upon the stated termination date if performance is not tendered. Smith v. Potter, 652 N.E.2d 538, 542 (Ind. Ct. App. 1995), trans. denied. Where time is of the essence of the contract and a time for performance is specified, strict performance at that point of time is necessary unless waived. Id."
>
> Id. at 141.

50. Professor Corbin and Indiana case law note two exceptions to discharge by non-performance when time of the performance is of the essence, to-wit: waiver and estoppel. Waiver is defined as the voluntary and intentional relinquishment of a known right. Unincorporated Operating Div. Of Ind. Newspapers, Inc. v. Trs. of Ind. Univ. 787 N.E.2d 893 (Ind. Ct. App. 2003). "It is a well established general rule that the protection or benefit of the Statute of Frauds, which is a defense personal to the party to be charged and that party's privies, may be effectively waived by the party entitled to it's protection or benefit, thereby rendering the contract binding and enforceable against that party." 73 Am. Jur. 2d Statute of Frauds Sec. 457.

51. In the case of Everley v. Equitable Surety Co., 190 Ind. 274, 130 N.E. 227 (1921), the Indiana Supreme Court wrote:

One who has become liable to an action upon a contract within the Statute of Frauds can waive stipulations in his own favor, or estop himself to deny liability because of a failure of the other party to perform conditions as to what should be done after liability had accrued, the same as if the principal contract were not within the Statute of Frauds, 25 R.C.L. 711, Sec. 356.

Where a person tacitly encourages an act to be done, he cannot afterwards exercise his legal right in opposition to such consent, if his conduct or acts of encouragement induced the other party to change his position, so that he will be pecuniarily prejudiced by the assertion of such adversary claim." And this rule applies to the waiver of conditions tending to bar an action for breach of a

contract within the Statute of Frauds, as well as in other cases. Swain v. Seamens, (1869), 9 Wall. (76 U.S.) 254, 19 L.Ed. 554.". 190 Ind. at 280, 130 N.E. at 229.

52. As to the statute of frauds, the letter of March 30, 2015 could be sufficient under the Statute of Frauds as a letter signed by MSM's agent. However, the Purchase Agreement required a document signed by both parties.

53. "To establish a waiver of the protection of the Statute of Frauds, there must be shown some act or omission on the part of the one charged with the waiver fairly evidencing that party's intention permanently to surrender the right in question. Such waiver must be considered in its ordinary sense of the voluntary and intentional relinquishment of a known legal right, and it implies an election to dispense with something of value or forgo some advantage which the party waiving it might, at the party's option, have demanded or insisted upon. The waiver may be express or implied, but if it is of the latter class, the facts and circumstances relied upon must be unequivocal in character. A waiver of the Statute of Frauds may occur by an affirmative act showing an intention to affirm the contract in issue, and silence alone is not a waiver as silence is a waiver only where there is an obligation to speak." 73 Am.Jur. 2nd Statute of Frauds, Sec. 458.

54. Based upon MSM's concern about Easy Street's ability to perform, MSM elected to request proof of ability to perform. MSM could have simply appeared at closing scheduled for April 1, 2015 and determined if Easy Street could perform but instead decided to require proof of ability before appearing at closing. MSM then requested a response by April 3, 2015. The act of vacating the event at which performance was to be tendered and requesting proof of ability to perform after the date of closing, necessarily places the time of performance after the date set out in the Purchase Agreement. MSM cannot both extend the time for performance and then assert that the extension caused the contract to be unenforceable as being outside of the Statute of Frauds.

55. The Court would conclude that the act of vacating closing and the written statement requesting that Easy Street supply proof of ability to perform after the date of performance in the Purchase Agreement constitutes a waiver.

56. However, the interchange between the parties becomes murky. It is difficult to determine the terms and scope of waiver. Mr. Vander Luitgaren's letter of March 30, 2015 is not in evidence. The terms of the letter are placed of evidence through Mr. Brown's testimony. Evidence was not established about rescheduling closing from the terms of the letter or from the subsequent conversation between Mr. Vander Luitgaren and Mr. Brown on April 1, 2015.

57. Most critically, Mr. Brown believed that the obligations of the parties under the Purchase Agreement had terminated. In his letter of April 3, 2015, Mr. Brown included a written amendment to the Purchase Agreement to extend the time of closing. He states: "**to the extent your client wishes to proceed with this transaction**, please have your client execute the Addendum, return it, and we will have our client sign." (Emphasis added.)

58. In light of Mr. Brown's letter, the Court concludes that time of performance was at an end. As of April 3, 2015, no communication from Mr. Vander Luitgaren served as a basis for waiver of the Statute of Frauds and the time of the essence provision.

59. A second basis to take the contract out of the Statute of Frauds is estoppel. An element of estoppel is reliance. Brown v. Branch, 758 N.E.2d 48, 52 (Ind. 2001). Since Easy Street could not perform on April 1, 2015, it could not have relied upon Mr. Vander Luitgaren's letter of March 30, 2015 as a basis for it's failure to perform. Estoppel is not present.

60. Easy Street asserts that the e-mail communication between the realtors, Exhibit 18, served as the written instrument to extend the time of closing. Time of performance of the Purchase Agreement had ended. The e-mail communication was not the amendment of an existing contract but the reinstatement of an expired contract. As such, it would be subject to consideration and none is present. In addition, Mr. Cohen was not an agent of MSM to enter into contracts. Mr. Crawford was not established to be an authorized agent of Easy Street to enter into contracts. The Court does not find that the contract was "revived". See, 17A Am.Jur.2d Contracts Sec. 572.

61. After Mr. Brown's letter of April 3, 2015, the parties remained on course to close the transaction until MSM's governing body pulled out of the transaction on April 23, 2015. MSM

had an inspection conducted of the four unit building. However, the court does not find a basis for contractual liability. Easy Street's attorney had already acknowledged that time for performance had ended in the absence of a written amendment. No communications are cited from an MSM agent as a basis for waiver after the April 3, 2015 date. The court does not find any change of position or reliance by Easy Street.

62. For MSM to recover the Earnest Money deposit, it must show that it had legal cause not to close. MSM had a reasonable basis to request proof of assurance that Easy Street could close. As of April 3, 2015, Easy Street was not in a position to close. Easy Street had recognized that time of performance under the contract had ended so as to terminate the obligations of the parties under the contract. MSM is entitled to a return of the Earnest Money deposit.

63. MSM is entitled to a return of the Earnest Money Deposit of Twenty-Five Thousand Dollars ($25,000.00).

64. MSM also seeks attorney fees. Paragraph R of the Purchase Agreement provides: "Any party to this Agreement who is the prevailing party in any legal or equitable proceeding against any other party brought under or with relation to the Agreement or transaction shall be additionally entitled to recover court costs and reasonable attorney's fees from the non-prevailing party." The award of attorney fees is hence mandatory.

65. Time records for counsel for MSM are in the amount of $38,514.75 as well as expenses of litigation in the amount of $214.98.

An award of fees in such amount would be unreasonable. First, the amount includes items that seem unwarranted such as the following charges: $4,040.00 for preparation of a motion for summary judgment, which was never filed; $687.50 for dealing with the encroachment issue (Counterclaim III), which was not subject to the Purchase Agreement and not subject to the attorney fee provision; $424.00 for arranging for the testimony of Mr. Mooney who was not called as a witness; and $556.00 for requesting a continuance due to the trial schedule of Plaintiff's counsel.

Second, the complexity of the litigation was substantially increased by issues created by MSM. Mr. Vander Luitgaren, counsel for MSM, requested a response as to ability to perform after the April 1, 2015 closing date. Despite the absence of a contract compliant within the Statute of Frauds, MSM moved forward with conducting an inspection of the existing building. Despite the absence of a written amendment to the contract, the realtors for both parties continued work towards a closing. The title company prepared a sixth amendment on April 16, 2015 which it presumably would not have done if the transaction was not believed to be proceeding to closing. Simply stated, it seems incongruous to award fees to litigate issues that a party injected into the proceeding.

After assessing the foregoing, reasonable fees are assessed in the amount of Fifteen Thousand Dollars ($15,000.00) and are awarded in favor of Plaintiff MSM Real Estate Holdings, LLC and against Defendant Easy Street Condominiums, LLC. Expenses of litigation are also awarded in the amount of Two Hundred Fourteen Dollars and Ninety-Eight Cents ($214.98) and which includes the costs of the action.

66. The Court turns to the Counterclaims of Easy Street Condominiums, LLC. Three counterclaims are asserted, to-wit: first, specific performance, second, breach of contract, and third, injunction.

67. As to the first cause of action for specific performance and the third cause of action for injunction, the causes of action were dismissed by Order Granting Motion To Dismiss Counts I and III Of Defendant's Counterclaim on September 1, 2017.

68. As to the second cause of action for breach of contract, Easy Street did not establish tender of performance so as to place MSM in breach. "It is a settled rule of law, that when a particular day is fixed, on which the purchase-money is to be paid and the deed executed, the vendor, to recover the purchase money, must aver a performance of his party of the contract, or an offer to perform it, on the day specified for the performance; and must prove the averment, unless the tender has been waived by the purchaser. A tender of the deed, at a subsequent day, is not sufficient. Nor is a tender at the day, if the vendor have not the legal title. Ibid." Leonard v. Bates, 1 Blackf. 172, 176 n. 2 (Ind. 1822).

69. While noting the issues caused by MSM's request for proof of ability to perform as opposed to proceeding to closing, the Court does not find that Easy Street presented proof of present ability to perform by the April 1, 2015 date as provided by the Purchase Agreement or by the April 3, 3015 on which Mr. Vander Luitgaren had requested proof of ability to perform. The termination of the contractual obligations of the parties is recognized in Mr. Brown's letter of April 3, 2015.

IT IS THEREFORE ORDERED BY THE COURT, That MSM is entitled to receive the earnest money deposit of Twenty-Five Thousand Dollars ($25,000.00).

IT IS FURTHER ORDERED BY THE COURT, That reasonable fees and expenses of litigation are assessed in the amount of Fifteen Thousand Two Hundred Fourteen Dollars and Ninety-Eight Cents ($15,214.98), including the costs of the action, and are awarded in favor of Plaintiff MSM Real Estate Holdings, LLC and against Defendant Easy Street Condominiums, LLC.

Dated: January 3, 2018.

KEVIN M. BARTON, JUDGE
JOHNSON SUPERIOR COURT NO. 1

Distribution:

Thomas W. Vander Luitgren, Esq.
Van Valer Law Firm, LLP
225 South Emerson Avenue, Suite 181
Greenwood, IN 46143

Eric D. Schmaedek, Esq.
Densborn Blachly, LLP
500 East 96th Street, Suite 100
Indianapolis, IN 46240