IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE	: CHAPTER 11
	:
MK LOMBARD GROUP I, LTD.	:
DEBTOR(S)	: BANKRUPTCY NO. 02-36936 SR

OPINION

By: STEPHEN RASLAVICH, UNITED STATES BANKRUPTCY JUDGE.

I. Introduction

Before the Court is Philip Lombard Street, L.P.'s ("PLS") Objection ("Objection") to Claim Number 12 of Leon W. Silverman, Esquire, on Behalf of Himself and on Behalf of Gaskill Street, LLC, and to Duplicative Claim Number 32 of Abraham Woidislawsky. Mr. Silverman, on behalf of himself, Gaskill Street, LLC, and his predecessor-in-interest, Woidislawsky, filed a Response in support of his Claim and in Opposition to PLS's Objection and New Matter ("Response") on December 8, 2003. The Court held a hearing on PLS's Objection on December 18, 2003 ("Hearing", hereinafter cited as "T-___"). Following the Hearing, the parties submitted concurrent briefs and reply briefs. For the reasons set forth below, the Court will sustain PLS's Objection.

II. Procedural Background

On November 26, 2002, an involuntary bankruptcy petition under Chapter 7 was filed against Debtor, MK Lombard Group I, Ltd. ("Debtor"). On January 30, 2003, Debtor moved to convert the involuntary Chapter 7 case to a voluntary Chapter 11 case. The Court granted Debtor's motion on February 14, 2003, converting the case to Chapter 11.

Debtor owned real property located at Third and Lombard Streets, Philadelphia, Pennsylvania (the "Property"). On March 14, 2003, Silverman, on behalf of himself and Gaskill Street, LLC (collectively, "Silverman"), timely filed proof of claim number 12 in the amount of $157,788 for monies paid pursuant to an agreement of sale for the Property ("Silverman Claim"). On March 26, 2003, Woidislawsky filed proof of claim number 32 in the amount of $100,000 for amounts due under an agreement of sale for the Property ("Woidislawsky Claim", and, collectively with the Silverman Claim, "the Claims"). The parties do not dispute that the Woidislawsky Claim duplicates $100,000 worth of the Silverman Claim; therefore, the total amount of the Claims remains only $157,788.[1]

On September 9, 2003, the Court confirmed Debtor's Amended Chapter 11 Plan of Reorganization dated August 28, 2003 ("Plan"). Under the terms of the Plan, Debtor agreed to convey the Property to PLS. The Plan provided that proceeds from the sale of the Property were to be used to pay allowed claims of creditors. The Plan also gave PLS, as the Plan proponent, the right to file objections to creditor claims after confirmation.

Exercising its right, PLS filed the present Objection to the Claims on November 6, 2003, and Silverman thereafter responded. On December 15, 2003, PLS closed on the purchase of the Property pursuant to the Plan. The Plan provided that PLS would indemnify Debtor's partner, Stephen Goldner, for $25,000 that Goldner previously guaranteed to

[1] PLS objects to Woidislawsky's Claim on the basis that it is wholly subsumed within the Silverman Claim and therefore duplicative. Because the parties do not dispute that the claims are duplicative, the Court will sustain PLS's Objection to the Woidislawsky Claim on that basis. In the remainder of this Opinion, the Court will address the merits of the Silverman Claim.

Silverman if Silverman were not paid directly under the Plan. Instead of indemnifying Goldner, PLS elected to pay the $25,000 directly to Silverman. The $25,000 was designated as an "undisputed" portion of the Claims. At the Hearing, the parties stipulated that the $25,000 payment was made against the Claims and that the true amount now at issue is $132,788. [T-138].

III. Facts

The Claims arise from an Agreement of Sale executed between Silverman and Debtor on September 28, 2002 (the "September Agreement" or "Agreement"). The parties entered into the September Agreement after they failed to close on an earlier June 10, 2002 Agreement of Sale (the "June Agreement"). The purpose of both agreements was to effectuate a sale of the Property to Silverman and his predecessor-in-interest, Woidislawsky.

Under the June Agreement, Woidislawsky and Silverman made two advances: Woidislawsky made an initial advance of $100,000 on June 1, 2002, and Silverman made a second advance of $25,000 on July 19, 2002 (collectively, the "June Advances"). Under the September Agreement, Silverman made an additional advance of $32,788 (the "September Advance").

The September Agreement

Refund/Retention of Monies

The September Agreement is a fully integrated document that superceded and rendered null and void the June Agreement. *See* September Agreement, at 15, § 16; 17, §

30. By its terms, the September Agreement acted as a complete and general release of all claims either party had, or might have had, under the June Agreement. *Id.* at 17, § 30. This necessarily included claims for the return of the June Advances paid under the June Agreement. Section 30 of the September Agreement, however, did provide for the return of a "deposit and other advances" totaling $125,000 under certain limited circumstances:

> . . . [Debtor] acknowledges that it received a deposit and other advances totaling $125,000 from Prior Purchaser pursuant to the Prior Agreement. Without acknowledging that [Silverman] has any right to a refund of said $125,000, if [Debtor] elects to terminate this Agreement pursuant to Section 4.3, and thereafter closes on the sale of the [Property] to any other party (other than pursuant to a Bankruptcy Action or foreclosure proceeding instituted by Republic or any other creditor of Seller), [Debtor] agrees to pay [Silverman] the sum of $125,000.

Id.

Under Section 4.3, Debtor could terminate the September Agreement after notifying Silverman of the termination ten (10) days in advance. *Id.* at 5, § 4.3. If Debtor exercised its Section 4.3 rights, it was obligated to repay Silverman not only the $125,000 outlined above in Section 30 but also all sums paid pursuant to Section 2, discussed *infra*. *Id.* at 4-5, § 4.3.

In addition to the obligation to repay $125,000 as set forth above, the September Agreement also provided for the return of monies advanced under the Agreement in Sections 10.1(b) and 12.1. Section 10.1(b) provided either party the right to terminate the Agreement upon written notice to the other party if Silverman could not obtain funding prior to the closing date. *Id.* at 7, § 10.1(b). Under those circumstances, Debtor was to repay Silverman monies advanced prior to closing as set forth in the Agreement. *Id.*

Similarly, Section 12.1 provided that, in the event of a Debtor default, Silverman's sole and exclusive remedy was to receive the return of any sums of money advanced pursuant to the Agreement prior to closing. *Id.* at 10, § 12.1. That provision also required, however, that Silverman provide written notice to Debtor of any defaults and a ten (10) day opportunity to cure the defaults. *Id.* at 11, § 12.1. Section 15 of the September Agreement required all notices to be in writing and set forth the manner in which such notices were to be sent. *Id.* at 14, § 15.

In contrast, in the event of a Silverman default, Debtor's sole remedy was to retain, without obligation to refund, all advances made by Silverman under the Agreement. *Id.* at 11, § 12.2.

Closing and Purchase Terms

Under Section 4.1 of the September Agreement, closing was to take place on or before October 30, 2002, unless extended in accordance with the terms of the Agreement. *Id.* at 4, § 4.1. Sections 4.1 and 28 provided that time was of the essence with regard to both the closing date and the Agreement as a whole. *Id.* at 4, § 4.1; 16, § 28.

Silverman could opt to extend the closing date under Section 4.2 if three conditions were met: (1) on or before ten (10) days prior to the closing date, Silverman paid Property mortgage holder, MKLG Holding Partnership, LP ("MKLG"), the next installment due under a judgment note ("Judgment Note") securing its mortgage; (2) Silverman caused Property mortgage holder, Republic Bank, to standstill and forbear from exercising any further remedies under its mortgage notes and loan documents; and (3) Debtor had not filed a

voluntary petition, nor had anyone filed against Debtor an involuntary petition, in bankruptcy. *Id.* at 4, § 4.2.

Section 2 of the September Agreement, titled "Purchase Price," set forth various terms relating to the purchase of the Property. Among those terms, Silverman agreed to assume and pay off certain liabilities and obligations of Debtor. Specifically, Silverman was to pay outstanding balances on two mortgage notes on the Property owed to Republic Bank. *Id.* at 2, § 2(a)(i). In addition, Silverman agreed to pay off or assume the obligations of the mortgage on the Property held by MKLG securing its Judgment Note, which mortgage the Agreement provided "may be assumed at Closing and not paid off, with the agreement of MKLG, which consent the [Debtor] shall obtain". *Id.* at 2, § 2(a)(ii). The September Agreement additionally provided that, if MKLG required a replacement letter of credit from Silverman in conjunction with its Judgment Note, Silverman would not be required to deliver a letter of credit in an amount exceeding $550,000 provided the other conditions outlined in Section 2(a)(v) were also met. *Id.* at 2, § 2(a)(v). The $550,000 letter of credit would be at a significant discount to the $1 million letter of credit required by the Judgment Note. Silverman paid the September Advance of $32,788 under Section 2 of the Agreement.

The Closing Date Passes

It is not disputed that Silverman failed to close on the Property on or before October 30, 2002 as required by Section 4.1 of the September Agreement. Moreover, Silverman did not request, nor did Debtor agree to, any extension of the closing date pursuant to Section 4.2 of the September Agreement.

As a result, Debtor considered Silverman in default and the September Agreement null and void. On October 31, 2002, Debtor's counsel, Joel S. Luber, Esquire, notified Silverman by letter that he was in default, and the Agreement accordingly terminated.

On November 5, 2002, Silverman sent a letter to Debtor's counsel indicating changes that he would like to see made to the September Agreement. Thereafter, on November 8, 2002, Silverman sent a letter to Debtor's counsel acknowledging Debtor's voluntary election to terminate the September Agreement and demanding the return of $157,788 pursuant to Section 30 of the Agreement. The next business day, November 11, 2003, Debtor's counsel responded to Silverman's November 8 letter reiterating Silverman's material default and the end of the September Agreement. In that letter, counsel also expressly denied any voluntary election to terminate by Debtor under Section 4.3. The parties continued to negotiate with one another even following Debtor's October 31, 2002 notice until approximately November 8, 2002, at which time the parties' negotiations ceased.

The Parties' Claims

In its Objection, PLS alleges that the Claims should be disallowed because Silverman defaulted under the September Agreement by failing either to close on or before October 30, 2002 as required by Section 4.1 or to seek an extension of that date as required by Section 4.2. PLS asserts that Silverman's failure to close was a material breach of the Agreement because time was of the essence. Because of the default, PLS claims that it is entitled to retain all monies paid by Silverman under the plain language of Section 12.2 of the Agreement.

In response, Silverman alleges that he is entitled to recover the full amount of the

Claims under the following alternative theories: (1) Debtor voluntarily terminated the Agreement under Section 4.3, entitling him to both payment of $125,000 under Section 30 and a refund of the September Advance under Section 4.3; (2) Section 10.1(b) (the finance contingency clause) allowed Silverman to terminate the Agreement and obtain a refund of all advances because he was unable to obtain financing prior to closing; (3) Debtor defaulted first under the Agreement, constituting anticipatory breach and rendering Silverman's own performance impossible, thereby entitling Silverman to the return of advances under Section 12.1; (4) Debtor, through its partner, Stephen Goldner, promised to repay him at least $57,788; (5) Debtor's misrepresentations amount to fraud in the inducement, making the Agreement voidable; and (6) equity demands that Silverman not forfeit his advances.

For the reasons discussed below, the Court will sustain PLS's Objection.

IV. Legal Standard

The relative burdens of proof for claims brought under 11 U.S.C.A. § 502(a) are set forth in *In re Allegheny Int'l, Inc.*, 954 F.2d 167, 173 (3d Cir. 1992). Initially, a claimant must allege facts sufficient to support his claim. *In re Allegheny*, 954 F.2d at 173. If claimant's averments meet the standard of sufficiency, they are considered *prima facie* valid. *Id.* (omitting citations). The burden of going forward then shifts to the objector to submit evidence sufficient to negate the *prima facie* validity of the claim. *Id.* If the objector produces sufficient evidence to negate one or more of the sworn facts in the proof of claim, the burden shifts back to the claimant to prove the validity of the claim by a preponderance of the evidence. *Id.* at 174 (omitting citations). The burden of persuasion always rests on the claimant. *Id.*

V. Discussion

A. Silverman Has Failed To Prove His Claims By A Preponderance Of The Evidence

Silverman claims that he is entitled to the return of both the June Advances (totaling $125,000) and the September Advance ($32,788) under the terms of the September Agreement. The Court finds the September Agreement is express and unambiguous. Under that Agreement, the only provision that entitles Silverman to recover the $125,000 is Section 30. The only relevant provisions that entitle Silverman to recover the $32,788 are Section 10.1(b), governing finance contingency, and Section 12.1, governing seller default. The Court finds that Silverman has failed to prove by a preponderance of the evidence that Section 30 or Sections 10.1(b) or 12.1 apply in this case. The Court further finds that Silverman has failed to prove by a preponderance of the evidence that a promise of repayment, fraudulent inducement, or equity entitle him to recovery. Consequently, Silverman is not entitled to the refund of any monies in this case.

1. Section 30 Is Inapplicable And Does Not Entitle Silverman To The Refund Of Any Advances

Silverman argues that he is entitled to recoupment of all advances paid under Section 30 of the September Agreement. Under Section 30, the June Agreement was declared "null and void" and superceded in its entirety by the September Agreement. *See* September Agreement, at 17, § 30. Moreover, under that same provision, Silverman waived and released all claims under the June Agreement – including any claims to the June Advances

that had been paid under the June Agreement.[2] *Id.* Although Section 30 did create a new obligation of the Debtor to repay $125,000 for a "deposit and other advances," it did so only when two conditions were met: (1) Debtor elects to terminate the September Agreement under Section 4.3, and (2) thereafter closes on a sale of the Property to any other party except pursuant to a bankruptcy action. Here, neither condition of Section 30 has been satisfied.

First, Debtor did not elect to terminate the Agreement under Section 4.3.[3] On October 31, 2002 – one day following the passing of the scheduled closing date under the Agreement – Debtor's counsel sent notice to Silverman that he was in default of the Agreement for failing to close by October 30. The Court finds that Debtor's October 31, 2002 letter was intended not as a Section 4.3 termination but rather as a clear notice of default. That interpretation is supported by not only the October 31, 2002 letter itself but by Debtor's counsel's second letter to Silverman on November 11, 2002, reiterating its position and confirming Silverman's default.

Second, Debtor conveyed the Property to PLS in bankruptcy. Thus, the second criteria of Section 30 has not been met. Consequently, the Court finds that no obligation to pay

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[2] At the Hearing, the parties spent considerable time eliciting testimony concerning the interpretation of various provisions of the September Agreement, including Section 30. Because the parties have not claimed, nor does the Court find that the Agreement is ambiguous, the Court holds that such testimony is barred by Pennsylvania's parol evidence rule, discussed *infra*, and will not be considered.

[3] Because the Court finds Section 4.3 is not applicable, Silverman also is not entitled to the refund of any advances paid under Section 2 (i.e., the September Advance) as provided for in that provision.

Silverman $125,000, or any other amount, ever arose under Section 30 of the September Agreement.[4]

2. Section 10.1(b) Is Inapplicable And Does Not Entitle Silverman To The Refund Of Any Advances

Silverman also argues that he is entitled to a refund of all advances paid under Section 10.1(b) because he was unable to obtain financing in time for closing. Section 10.1(b) of the September Agreement allowed for termination by either party in the event of failure to obtain sufficient financing "upon written notice to the other." *See* September Agreement, at 7 § 10.1(b) (emphasis added). Section 15 provided that all notices be in writing and set forth the manner in which such notices were to be sent. *Id.* at 14, § 15. In the event of a proper Section 10.1(b) termination, Silverman would be entitled to the return of

[4] The Court also finds unpersuasive Silverman's argument that he is entitled to the $125,000 (June Advances) under Sections 10.1(b) and 12.1 based on an alleged discrepancy of terms. Silverman notes that Sections 10.1(b) and 12.1 speak to the return of sums advanced under "this Agreement" prior to closing, whereas Section 3.2 speak to the repayment of sums advanced "pursuant to Section 2." Based on that, Silverman argues that, given the limiting language of Section 3.2, the broader language of Sections 10.1(b) and 12.1 should be interpreted to provide for recovery of both the June and September Advances, thus entitling him to the entire $157,788. To read the provisions as Silverman does, however, would make the express language of Section 30 meaningless and would essentially resuscitate claims under the June Agreement. Section 30 clearly provides that, with the execution of the September Agreement came a full and total abolishment of the June Agreement and a release of all claims for monies paid thereunder. It added a new obligation to repay $125,000 but only in very limited circumstances. Reading the Agreement as a whole, therefore, the Court finds that the differing phrases used in Sections 3.2 and 10.1(b) and 12.1 are not meant as conceptually distinct terms of art. Again, the only provision that would allow Silverman to recoup the $125,000 paid as June Advances is Section 30. As discussed, *supra*, the conditions of Section 30 have not been met.

"any sums of money advanced . . . as set forth in this Agreement prior to Closing."[5] *See id.*

Silverman admittedly failed to send written notice of termination in accordance with Section 10.1(b). Absent such notice, whether Silverman could or could not obtain financing, or whether Debtor had actual notice of his inability to obtain financing, is irrelevant. Under the express terms of the September Agreement, he needed to provide written notice of his intent to terminate the Agreement based on a lack of funding. Because he failed to do so, he is not entitled to a refund under Section 10.1(b).

The Court is also unpersuaded by Silverman's argument that Debtor's concealment of its own defaults made it impossible to declare a termination under this provision. Silverman admittedly learned of the defaults that he claims interfered with his ability to obtain funding prior to the scheduled closing date. [T-122, 127]. In addition, Section 10.1(b) had no notice provision. Consequently, Silverman could have terminated the September Agreement anytime up to and including the closing date. Because Silverman failed to meet the express terms of Section 10.1(b), he cannot now rely on that provision for relief.

3. Section 12.1 Is Inapplicable And Does Not Entitle Silverman To The Refund Of Any Advances

Silverman next argues that he is entitled to recovery under Section 12.1 of the September Agreement. Section 12.1 entitles Silverman to the return of advances paid under

[5] As discussed in Footnote 4 *supra*, the Court interprets the "this Agreement" language as referring only to the $32,788 September Advance, not the June Advances. The Court also notes that, even if Silverman were entitled to recovery, the $32,788 would be reduced by the $25,000 already paid to him under the Plan.

the Agreement if Debtor defaults, provided that Silverman gave written notice of the default and Debtor failed to cure such default within ten (10) days after receipt of such notice. *See* September Agreement, at 11, § 12.1. Silverman admits that he failed to provide written notice of any default and opportunity to cure under Section 12.1. [T-127]. He argues, however, that Debtor's own prior defaults relieved him of all obligations under the Agreement because the defaults constituted anticipatory breaches and frustration of purpose.

Silverman recites a litany of defaults by Debtor. The first three defaults Silverman points to include (1) Debtor's failure to obtain MKLG's consent to Silverman's assumption of the Judgment Note as required under Section 2(a)(ii) of the Agreement;[6] (2) MKLG's refusal to release lots from the lien of its mortgage as also required under Section 2(a)(ii) of the Agreement; and (3) Debtor's failure to obtain MKLG's consent to keep the required letter of credit from exceeding $550,000 in violation of Section 2(a)(v) of the Agreement. With respect to these three defaults, Silverman further argues that Debtor concealed them by misrepresenting that it had obtained MKLG's consent to assumption of the MKLG Judgment Note, that MKLG did not consider Debtor in default, that MKLG would allow Silverman to replace the expired letter of credit with one in an amount not to exceed $550,000, and that MKLG was releasing lots from the lien of its mortgage upon receipt of the required monthly installments as set forth in the MKLG Judgment Note. Silverman additionally claims that

[6] In his Brief, Silverman spends considerable time arguing that there is no notice provision contained in Section 2(a)(ii) requiring Silverman to first provide notice to Debtor of its desire to assume the MKLG mortgage. The Court agrees with Silverman that no notice was required from him under Section 2(a)(ii) but also pointedly recognizes Silverman's acknowledgment that notice was expressly mandated by other provisions of the Agreement, including provisions at issue here, Sections 10.1(b) and 12.1.

Debtor misrepresented the amount due on the mortgage as $1.6 million when MKLG was claiming it to be $1.8 million.

In addition to the above defaults, Silverman alleges that Debtor defaulted by failing: (1) to disclose three judgments against it in violation of Section 5 of the Agreement; (2) to deliver a title report within five days after the Agreement was executed in violation of Section 3.1 of the Agreement; (3) to provide Exhibit B referenced in Section 2(a)(ix) of the Agreement, setting forth the outstanding balance due from contractors, subcontractors, materialmen and construction managers who performed work on the Property; (4) to pay one half of the transfer tax in violation of Section 6.2 of the Agreement; and (5) to pay any amount in excess of $2 million on two First Republic Bank loans in violation of Section 2(a) of the Agreement.

The Court presided over a lengthy evidentiary Hearing at which the parties disputed the factual circumstances surrounding these alleged defaults.[7] Despite all of the evidence presented, the Court finds most compelling the undisputed fact that Silverman failed to provide written notice of any of these alleged Debtor defaults in accordance with the express terms of the Agreement. As discussed below, this fact, along with Silverman's conduct following the purported defaults, bar his entitlement to a refund under Section 12.1 of the Agreement.

(a) Failure To Notice/Waiver

[7] With respect to the last five defaults, in addition to disputing their merits, PLS also argued that they were non-material, curable and/or premature, in that performance was not due until closing actually took place.

Even accepting *arguendo* the Debtor's defaults, Silverman still cannot recover under Section 12.1 of the Agreement because (1) he failed to properly send written notice of any default, and (2) waived any defaults that may have occurred.

The plain language of Section 12.1 requires written notice of defaults and a ten (10) day period to cure. Despite knowing of "almost all" of Debtor's defaults prior to closing [T-122, 127], Silverman admittedly failed to send written notice of a single default in accordance with Sections 12.1 and 15 of the Agreement. [T-127]. Absent such notice, Silverman is not entitled to the protections afforded by Section 12.1.[8]

Silverman claims that he needed not provide written notice because Debtor already knew of its defaults and on many occasions was the one that informed him of the non-compliance. [T-97, 101, 135]. Silverman's argument fails to account for the dual purpose of written notice. First and most obviously, it provides notice to the other party of the default and provides an opportunity to cure the default. Second, and just as importantly, it provides notice to the other party that the noticing party considers the contract terminated and the party does not intend to waive the default, thereby preserving the non-defaulting party's termination remedies under the contract. In other words, in addition to providing notice that a default has occurred, notice establishes the rights of the respective parties and their intentions with respect to termination. With that dual purpose in mind, the Court rejects Silverman's contention that written notice here was a mere formality and useless ceremony.

[8] Again, the Court interprets Section 12.1 as allowing for a refund of only the $32,788 September Advance, not the June Advances. Moreover, even if recoverable, the $32,788 amount would have to be reduced by the $25,000 already paid to Silverman.

Silverman is a sophisticated real estate lawyer with decades of experience with contracts.[9] In this case, he admits that he did not provide notice because he did not want to terminate the Agreement and wanted the sale to proceed. [T-128-129]. His position was understandable. However, by electing not to protect his rights under the Agreement by properly noticing a Debtor default, he took the risk that he might forfeit the advances if the transaction did not ultimately close.

The Court also rejects Silverman's attempt to argue that Debtor's defaults excused not only his obligation to close but even his obligation to provide notice of Debtor's defaults under the Agreement. Silverman could have easily provided written notice as was required but chose not to. Debtor's alleged defaults cannot be used to excuse Silverman's performance in that regard. Notice was particularly relevant here, in a case where the parties continued to communicate and negotiate subsequent to the alleged defaults. The argument that a party's obligation to provide notice should be excused due to the occurrence of the very default to which the notice applies is counterintuitive, and accepting it would undoubtedly upset contractual obligations and understandings, leaving parties no clear way of knowing where the other stood with respect to each other's respective rights under the Agreement.

Furthermore, the Court finds that Silverman, in continuing to deal with Debtor pursuant to the terms of the September Agreement following Debtor's defaults, waived any purported defaults. A party may waive a default under a contract either by express agreement or by

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[9] Silverman's past performance demonstrates he knew that written and actual notice was required to protect his contractual rights in the event of a Seller default. On August 15, 2002, he did just that by sending a written notice of default and demanding the return of advances paid to Debtor under the June Agreement.

words and conduct. *See Gray v. Gray,* 448 Pa. Super. 456, 467, 671 A.2d 1166, 1172 (1996) (citing *Wilson v. King of Prussia Enterprises, Inc.*, 422 Pa. 128, 221 A.2d 123 (1966); *Davis v. Laurenzi*, 263 Pa. Super. 71, 397 A.2d 1 (1978)). If a party waives the other party's default, "he may not thereafter take advantage of the default by seeking rescission of the contract on the ground of [the breach]." *Gray*, 448 Pa. Super. at 467, 671 A.2d at 1172 (citing *Cohn v. Weiss*, 356 Pa. 78, 51 A.2d 740 (1947); *Davis*, *supra*).

On one hand, Silverman opted not to provide written notice of Debtor's alleged defaults in the hope that the deal would go forward. On the other hand, after Debtor declared Silverman's default, Silverman sought to retroactively declare a Debtor default, despite having failed to give any notice at the time as required by the September Agreement. Simply put, Silverman cannot have it both ways. By failing to provide notice of the Debtor defaults and continuing with negotiations,[10] Silverman is estopped from taking advantage of those alleged breaches now under the Seller default provision of the Agreement.

(b) Anticipatory Breach & Frustration Of Purpose

Finally, the Court pauses to note that, even if it were to look past Silverman's failure to notice the defaults and subsequent waiver, Silverman nevertheless failed to prove that such defaults amounted to anticipatory breach or frustration of purpose, or to prove that such breaches excused his own default.

Turning first to the anticipatory breach argument, under Pennsylvania law, anticipatory

[10] Indeed, even after Debtor declared Silverman's default, Silverman still continued to negotiate with Debtor in an effort to reach a new or modified agreement based on the post-default situation. [T-128,129]. This is substantiated by Silverman's own letter to Debtor dated November 5, 2002 discussing modified terms.

breach is found only "where there is an absolute and unequivocal refusal to perform or a distinct and positive statement of an inability to do so." *See 2401 Pennsylvania Ave. Corp. v. Federation of Jewish Agencies of Greater Philadelphia*, 507 Pa. 166, 172, 489 A.2d 733, 736 (1985) (citing *McClelland v. New Amsterdam Cas. Co.*, 322 Pa. 429, 433, 185 A. 198, 200 (1936) (emphasis added)).

Here, Silverman argues that Debtor's statements concerning MKLG's (1) failure to consent to his assumption of the mortgage and reduced letter of credit, and (2) refusal to release lots amounted to anticipatory breach. Specifically, Silverman testified that, just prior to October 30, 2002, Debtor's partner, Richard Kline, told him "there was no way [MKLG President and General Partner Marina Kats] was going to cooperate" with regard to Silverman's assumption of the mortgage and the reduced letter of credit. [T-88, 96]. Silverman also testified that Kline told him before October 30, 2002 that MKLG refused to release lots, a condition that Silverman claims was necessary for him to complete financing. [T-96]. Silverman argues that these statements acted as an unequivocal breach of the Agreement, preventing him from being able to obtain adequate financing for closing or of having the time necessary to seek extension of the closing date, and relieving him of any further obligations under the Agreement.

Kline's statements, however, must be viewed in context. The parties were speaking daily regarding an obviously fluid situation, and Silverman was aware of everything that was transpiring. [T-163]. Goldner testified that, although obstacles were present, he believed Kats would ultimately agree to Silverman's assumption of the mortgage and reduced letter of credit had he been able to present her with an appropriate deal. [T-151, 152, 165]. The totality of

the evidence makes clear that both parties recognized a continuing process of negotiation to secure MKLG's consent. As such, Silverman's attempt to pick several out-of-context statements and give them independent meaning must be ignored. The Court finds that Debtor's statements did not represent an unequivocal refusal to move forward with the closing or repudiate the contract and, quite simply, do not meet *McClelland's* requirement of an "absolute and unequivocal" refusal to perform.

In any event, even if this Court were to construe the above statements as an unequivocal refusal to perform, the parties' conduct following the alleged repudiatory statements supports a finding that adequate assurances were made and any purported repudiation was nullified. *See Edwards v. Wyatt,* 335 F.3d 261, 273-74 (3d Cir. 2003) (trial court erred in failing to consider evidence of events that took place following repudiatory letter, which may have supported finding that adequate assurances of performance were given, that repudiation was nullified, or that new contractual agreement was reached). Both parties continued to work toward closing following their discussions concerning Kats's spoken refusal to consent. In essence, Silverman's own conduct demonstrates that he never interpreted any statement by Debtor as a repudiation or termination of the Agreement. Consequently, the Court rejects Silverman's argument based on anticipatory breach.

Turning next to the frustration of purpose theory, the Court finds this argument equally unpersuasive. Pennsylvania law recognizes the doctrine of frustration of purpose. *See In re Greenfield Dry Cleaning & Laundry, Inc.*, 249 B.R. 634, 644 (Bankr. E.D. Pa. 2000). The Restatement (Second) of Contracts § 261 (1979) defines frustration of purpose as follows:

> Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render performance is discharged, unless the language or the circumstances indicate the contrary.

Restatement (Second) of Contracts § 261. The doctrine assumes the occurrence of a supervening event, the nonoccurrence of which was a basic assumption on which the parties based their contractual agreement. *See Luber v. Luber*, 418 Pa. Super. 542, 548-49, 614 A.2d 771, 774 (1992). The theory "is based on an objective standard and will not apply if performance remains practicable and is merely beyond a particular party's capacity to render it." 418 Pa. Super. at 549, 614 A.2d at 774.

Here, Silverman bases his frustration of purpose argument primarily on his inability to assume the mortgage of MKLG. [T-100]. Silverman testified that, without the assumption of the MKLG mortgage, he would have had to obtain financing for significantly more money, estimated to be from $1.6 to 1.8 million. [T-100]. He further testified that, because he was notified that MKLG would not cooperate just prior to the October 30, 2002 closing date, he did not have adequate time to obtain the additional funding or seek an extension of the closing date under the Agreement.[11] Consequently, Silverman argues that because Debtor's last

[11] In addition, Silverman argues that seeking such an extension was futile because he could not meet the other conditions required under Section 4.2 – that is, get First Republic to agree to a standstill and pay MKLG the next installment since MKLG was refusing to release its mortgage lien on lots upon payment of the installments due under its Judgment Note. [T-123]. Although the law does not require futile acts, Silverman's actions were entirely inconsistent with a party claiming futility. On the contrary, Silverman never noticed any of these defaults but instead continued to negotiate with Debtor and act in a manner that was consistent with his willingness and desire to perform under the Agreement.

minute default made his performance impossible, his default should be excused.

The Court finds the frustration of purpose doctrine does not apply. A supervening event beyond the parties' control did not prevent the performance of the parties' contract. Although Silverman's performance may have been rendered more difficult without the assumption of MKLG's mortgage, the circumstances do not rise to the level of legal impossibility or impracticability. Moreover, Silverman's own conduct undermines his frustration of purpose argument. At no time did Silverman ever notice a single Debtor default. On the contrary, he continued negotiating with Debtor through daily contact, remaining silent as to Debtor's purported breaches under the Agreement. Silverman even admits that he did not notice any Debtor default because he desired the deal to continue. [T-128]. This conduct is inconsistent with a finding of performance that has been rendered impossible.

Furthermore, the Court is unpersuaded by the argument that Silverman's obligation to provide actual written notice as required under the Agreement was made impossible by Debtor's defaults. Providing written notice of default as required by Section 12.1 was a task that could have been simply executed and was by no means rendered impossible by Debtor's conduct. Accordingly, the Court finds that frustration of purpose did not excuse Silverman's default or other obligations under the Agreement.[12]

Having rejected Silverman's arguments based on Debtor's alleged defaults, the Court finds that Silverman is not entitled to a refund of any advances paid under Section 12.1 of the

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[12] PLS additionally argues that no language in the Agreement made Debtor's performance under any of the covenants related to its supposed defaults a condition precedent to Silverman's performance. Because, however, Silverman has not argued that Debtor failed to fulfill a condition precedent (Silverman Reply Brief, at 8), the Court need not reach this issue.

September Agreement.

4. Debtor's Alleged Promise To Repay Does Not Entitle Silverman To Refund Of Advances

Silverman also argues that he is entitled to the return of the three advances paid because (1) the Plan included a commitment to pay him $25,000; (2) Debtor, through its partner, Stephen Goldner, promised to repay him the $25,000 and $32,788 advances; and (3) Debtor recognized its obligation to repay him the $100,000 advance by virtue of the fact that it agreed to repay him $25,000. None of the above arguments has merit.

First, the provision in the Plan to repay Silverman $25,000 as an "undisputed" portion of the Claims was in no way an admission of any sort by Debtor or PLS. Indeed, the Plan provided that PLS was to indemnify Debtor's partner Goldner for a personal guaranty he made to Silverman, in the event that Silverman was not paid directly under the Plan. PLS, rather than indemnifying Goldner, opted simply to pay Silverman directly.

Second, Goldner's alleged oral promises are not enforceable and barred by both Pennsylvania's parol evidence rule, discussed *infra*, and the express terms of the Agreement. Section 16.1 of the Agreement provides that any agreement made after entry of the Agreement "shall be ineffective to change, modify, discharge or affect an abandonment of this Agreement in whole or in part unless the agreement is in writing and signed by the parties to this Agreement." *See* September Agreement, at 15, § 16.1. Further, the parties expressly agreed that "[t]here are no collateral understandings, representations or agreements other than those expressly contained herein, and no salesperson, employee or agent of [Debtor] has the authority to modify the terms hereof, or has the authority whatsoever to make any

reference, representation or agreement not contained in the Agreement." *Id.* at 15, § 16.2. Absent a written and executed modification of the Agreement, therefore, the Court will not look beyond the four corners of the Agreement to find relief for Silverman.[13]

Finally, the Court finds wholly unpersuasive Silverman's argument that the Plan's provision for the payment of a $25,000 "undisputed" portion of the Claims amounts to an admission by Debtor that Silverman is owed the "other" $100,000 advance paid under the June Agreement. Nothing in the record or the Plan can be characterized as an admission by Debtor. Moreover, PLS made the payment simply to satisfy a $25,000 guaranty made by Debtor's partner, Goldner, to Silverman, and was not an acknowledgment of any debt owed by Debtor. Further, the $25,000 payment was undesignated, meaning that the Court cannot presume that the $25,000 represented one of the June Advances or any other specific portion of the Claims. Even if it were designated as one June Advance, however, no evidence supports Silverman's argument that the payment of one June Advance is necessarily an admission that the other $100,000 June Advance is also owed. Contrary to Silverman's suggestion, this Court does not believe that the payment of $25,000 as an undisputed and undesignated portion of the Claims breathes life back into the June Agreement and Silverman's claims under that Agreement.

Consequently, the Court finds no enforceable promise of repayment that entitles

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[13] Even crediting statements made outside of the Agreement, Goldner's statements were only regarding the $25,000 and $32,788, not the $100,000. [T-134]. As previously discussed, PLS has already paid $25,000 to Silverman under the Plan. [T-154]. As to the $32,788, the Court construes Goldner's statements to be nothing beyond a mere promise to try to repay Silverman out of the proceeds of future deals. [T-153].

Silverman to the return of monies beyond which he has already received under the Plan.

5. Silverman's Fraudulent Inducement Claim is Barred

Silverman also argues that he was fraudulently induced into entering into the Agreement and that therefore the Agreement is voidable. Silverman contends that Debtor misrepresented material facts that induced him to enter into the Agreement, including a representation that MKLG had agreed to allow Silverman to assume its mortgage and to accept a letter of credit in the discounted amount of $550,000, that Debtor was not in default on the mortgage, and that MKLG was releasing lots from the lien of its mortgage upon receipt of the required monthly installments. PLS, in turn, argues that Silverman's fraud in the inducement claim is barred by Pennsylvania's parol evidence rule and the "gist of the action" doctrine.

(a) Parol Evidence

PLS asserts that Silverman's fraud in the inducement claim is barred by the parol evidence rule. The Court agrees. Pennsylvania's parol evidence rules provides that:

> Where the parties to an agreement adopt a writing as the final and complete expression of their agreement, . . . evidence of negotiations leading to the formation of the agreement is inadmissible to show an intent at variance with the language of the written agreement. Alleged prior or contemporaneous oral representations or agreements concerning subjects that are specifically dealt with in the written contract are merged in or superseded by that contract. The effect of an integration clause is to make the parol evidence rule particularly applicable. Thus, the written contract, if unambiguous, must be held to express all of the negotiations, conversations, and agreements made prior to its execution, and neither oral testimony, nor prior written agreements , or other writings, are admissible to explain or vary the terms of the contract.

Goldstein v. Murland, 2002 WL 1371747, at *2 (E.D. Pa. June 24, 2002) (citing *1726 Cherry St. Partnership v. Bell Atlantic Properties, Inc.*, 439 Pa. Super. 141, 653 A.2d 663, 665 (1995) (citing *McGuire v. Schneider, Inc.*, 368 Pa. Super. 344, 534 A.2d 115, 117-18 (1987))).

Courts have held that, in the face of a clear and fully integrated written agreement, the rule bars use of parol evidence to prove a fraudulent inducement claim. *See Dayhoff, Inc. v. H.J. Heinz Co.*, 86 F.3d 1287, 1300-01 (3d Cir. 1996). *See also LeDonne v. Kessler*, 256 Pa. Super. 280, 294 n.10, 389 A.2d 1123, 1130 n. 10 (1978) ("A party cannot justifiably rely upon prior oral representations, yet sign a contract denying the existence of those representations."); *Blumenstock v. Gibson*, 811 A.2d 1029, 1035 (Pa. Super. 2003) (omitting citations) (If party relied on certain understandings, promises, representations or agreements prior to execution of the written agreement "they should have protected themselves by incorporating in the written agreement the promises or representations upon which they now rely ...."). It follows therefore that "Pennsylvania law prohibits recovery on a claim of fraud in the inducement where the contract represents a fully integrated written agreement."[14] *Goldstein*, 2002 WL 1371747, at *2. *See also Titelman v. Rite Aid Corp.*, 2002 WL

[14] Courts distinguish "fraud in the execution" from "fraud in the inducement" cases. In a "fraud in the execution" case, one party is claiming that he was fraudulently led to believe that the document he was signing contained terms that were actually omitted therefrom. Such a case is distinguishable from a "fraud in the inducement" case such as the instant one, where the party seeking modification or rescission contends that representations were fraudulently made and that but for them, he would never have entered into the agreement. In contrast to "fraud in the inducement" claims, the Pennsylvania Supreme Court has held that parol evidence may be used to prove "fraud in the execution" cases. *See 1726 Cherry St.*, 439 Pa. Super. at 147, 653 A.2d at 666.

32351182, at *2 (E.D. Pa. Feb. 5, 2002) (fraud in inducement claim barred by parol evidence rule in face of fully integrated written contract); *Sunquest Information Sys., Inc. v. Dean Witter Reynolds, Inc.*, 40 F. Supp. 2d 644, 656 (W.D. Pa. 1999) (integration clause in stock purchase agreement barred fraud and negligent misrepresentation claims which were based on alleged representations made prior to entry of agreement).

Here, the parties' Agreement represents a fully integrated written document. Specifically, the Agreement provides that it "constitutes the entire Agreement between the parties, and there are no other terms, obligations, covenants, representations, statements or conditions, oral or otherwise, of any kind whatsoever that are not herein referred to or expressly incorporated by reference." *See* September Agreement, at 15, § 16.1. Moreover, the Agreement provides that "[Silverman] acknowledges that, other than as expressly stated herein, no representations have been made by [Debtor], its agents or employees, to induce [Silverman] to enter into this Agreement." *Id.* at 15, § 16.2. Because the Agreement is a fully integrated document, the parol evidence rule bars Silverman's reliance on prior alleged misrepresentations to prove his claim of fraud. Accordingly, the Court holds that Silverman's claim of fraudulent inducement is barred.

(b) "Gist of the Action"

PLS also argues that Silverman's fraudulent misrepresentation claim is barred by the "gist of the action" doctrine. Although the Pennsylvania Supreme Court has never adopted the "gist of the action" doctrine, the Pennsylvania Superior Court and a number of United States District Courts have predicted that it would. *See Etoll, Inc. v. Elias/Savion Advertising, Inc.,* 811 A.2d 10, 14 (Pa. Super. 2002). The doctrine is designed to maintain the conceptual

distinction between breach of contract claims and tort claims. *Etoll*, 811 A.2d at 14 (citations omitted). When one party alleges the other party committed a tort in the course of carrying out a contractual agreement, Pennsylvania courts examine the claim to determine whether the "gist" or gravamen of it sounds in contract or tort. *Id.* A tort claim is maintainable only if the contract is "collateral" to conduct that is primarily tortious. *Id.*

Silverman argues that the "gist of the action" doctrine does not act as a bar to fraud in the inducement claims. Federal courts applying the gist of the action doctrine do appear to distinguish "fraudulent inducement" claims from "fraud in the execution" claims, and recognize that fraud in the inducement claims "would not necessarily be covered by the 'gist of the action' doctrine because fraud to induce a person to enter a contract is generally collateral to (i.e. not 'interwoven' with) the terms of the contract itself." *See Air Products and Chem., Inc. v. Eaton Metal Products Co.*, 256 F. Supp. 2d 329, 341 (E.D. Pa. 2003) (quoting *Etoll*, 811 A.2d at 17 (discussing *Foster v. Northwestern Mut. Life*, 2002 WL 31991114, at *2-3 (E.D. Pa. July 29, 2002))); *see also Flynn v. Health Advocate, Inc.*, 2004 WL 51929, at *10 (E.D. Pa. Jan. 13, 2004). In light of the case law suggesting the lessened applicability of the "gist of the action" doctrine to fraud in the inducement claims, this Court will decline to hold that the doctrine as a matter of law bars Silverman's fraud in the inducement claim.

Nonetheless, because the Court finds that Silverman's fraudulent inducement claim is barred by the parol evidence rule, he is not entitled to the recovery of any monies advanced under his fraudulent inducement theory.[15]

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[15] The Court additionally observes that Silverman has not proven the underlying (continued...)

5. Equity Does Not Entitle Silverman To Refund Of Any Advances

Finally, Silverman urges this Court to invoke equitable principles to prevent him from forfeiting the advances paid. The Court will not, however, use equity to circumvent the express terms of a written agreement. Here, Silverman negotiated and agreed to the terms of the Agreement informed by 40 years of experience as an attorney. He failed to notice Seller defaults and terminate the Agreement when he had the opportunity, opting instead to continue to deal with Debtor in the hope that the Agreement would ultimately be consummated. In doing so, he failed to protect his rights under the Agreement and risked the loss of the advances he paid. The Court will not now go back and rescue Silverman from a contract he negotiated and agreed to, but voluntarily failed to comply with.

B. Because Silverman Has Failed To Prove His Claims By A Preponderance Of The Evidence, He Is Not Entitled To Any Refund Under The Agreement And PLS Is Entitled To Retain The Advances Paid By Silverman

In the event of a Purchaser default, Section 12.2 of the Agreement expressly provides that Debtor's sole remedy is retention of all advances made by Purchaser. *See* September Agreement, at 11, § 12.2. Because the Court finds that Silverman materially defaulted under

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[15](...continued)
elements of a fraudulent misrepresentation claim. The elements of fraudulent misrepresentation are (1) a misrepresentation; (2) a fraudulent utterance thereof; (3) an intention by the maker to induce the recipient thereby; (4) justifiable reliance by the recipient on the misrepresentation; and (5) damage to the recipient as a proximate result of the misrepresentation. *See Air Products*, 256 F. Supp. 2d at 338 n.7 (citing *Thomas v. Seaman*, 451 Pa. 347, 304 A.2d 134, 137 (1973)). Silverman has not proven that he signed the Agreement under false pretenses. On the contrary, the evidence indicates that Silverman suspected the alleged Debtor defaults under the MKLG mortgage as early as August 14, 2002 and yet he still voluntarily signed the Agreement.

the Agreement, and that he failed to prove by a preponderance of the evidence that his default was excused, or that any other provisions entitling him to relief apply, he is not entitled to a return of any monies. On the contrary, PLS is entitled to retain all advances paid pursuant to Section 12.2 of the Agreement. The instant claim objection will, accordingly, be sustained.

An appropriate Order follows.

By the Court:

_____
Stephen Raslavich
United States Bankruptcy Judge

Dated: May 21, 2004

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE	: CHAPTER 11
	:
MK LOMBARD GROUP I, LTD.	:
DEBTOR(S)	: BANKRUPTCY NO. 02-36936 SR

ORDER

AND NOW, upon consideration of Philip Lombard Street, L.P.'s ("PLS") Objection ("Objection") to Claim Number 12 of Leon W. Silverman, Esquire, on Behalf of Himself and on Behalf of Gaskill Street, LLC, and to Duplicative Claim Number 32 of Abraham Woidislawsky, Silverman's Response in opposition thereto, and after a hearing held thereon on December 18, 2003, it is hereby:

ORDERED, that for the reasons stated in the accompanying Opinion, PLS's Objection shall be and hereby is SUSTAINED.

BY THE COURT:

STEPHEN RASLAVICH
UNITED STATES BANKRUPTCY JUDGE

DATED: May 21, 2004

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