SIXTH DIVISION
June 30, 2011

No. 1-10-0928

NOTICE: This order was filed under Supreme Court Rules 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PRIME/MANSUR INVESTMENT PARTNERS, LLC,	)	Appeal from
	)	the Circuit Court
Plaintiff and Counterdefendant-Appellant,	)	of Cook County
	)	
v.	)	No. 06 CH 1987
	)	
PHOENIX OFFICE, LLC,	)	Honorable
	)	Rita M. Novak,
Defendant and Counterplaintiff-Appellee.	)	Judge Presiding.

JUSTICE CAHILL delivered the judgment of the court.
Justices McBride and Robert E. Gordon concurred in the judgment.

O R D E R

Held: The trial court's summary judgment ruling against plaintiff was affirmed. The trial court's entry of summary judgment in favor of defendant's counterclaim was affirmed.

Plaintiff Prime/Mansur Investment Partners, LLC (Prime) appeals the trial court's grant of summary judgment dismissing Prime's breach of contract and unjust enrichment claims against defendant Phoenix Office, LLC's (Phoenix) and granting summary judgment on Phoenix's counterclaim to retain $80,000 in earnest money. Prime contends that the court erred in granting summary judgment in favor of Phoenix because: (1) Phoenix extended the closing date and waived its right to terminate the contract; (2) Phoenix unjustifiably caused a required party to refuse to approve the transaction, making it impossible for Prime to meet its contractual obligations; and (3) Phoenix is not entitled to the escrow amount. We affirm.

Prime and Phoenix's parent company settled an unrelated lawsuit in Maryland in May 2005. As part of the settlement agreement, Phoenix agreed to provide Prime with an option to purchase Phoenix's 23.1% interest in Plumcor/Thistle, LLC (Plumcor).

Under section 2.1 of the option agreement, Prime was required to place $80,000 in earnest money in escrow along with written notice of Prime's intent to exercise the option. Section 9.2 of the sale and purchase agreement (sale agreement) specified that:

> "The Closing shall occur on a date designated in writing by [Prime] on not less than five (5) days prior written notice which closing date shall be on or before the later to occur of the following: (i) the date which is one hundred (100) days from the date of this Agreement (but in no event later than December 15, 2005), and (ii) the date to which Purchaser may elect to extend such closing date (but such extended closing date shall not be later than the earlier to occur of: (A) thirty (30) days following the closing date determined in accordance with clause (i) of this *Section 9.2*, or (B) December 15, 2005), solely for the purpose of obtaining required lender, member, and/or rating agency consents, approvals, and releases, as described in *Section 5* above[.]" (Emphasis in original.)

The option agreement contains a "Modifications" clause that states:

> "No change or modification of this Option Agreement shall be valid or binding upon the parties hereto, nor shall any term or condition of this Agreement be considered waived by a party, unless such change or modification or waiver shall be in writing and signed by the party to be charged."

Section 16.4 of the sale agreement states: "This Agreement may be amended only by a written memorandum executed by each of the parties hereto." Section 16.5 of the sale agreement contains a waiver provision: "No waiver of any provision or condition of this Agreement by any party shall be valid unless in writing signed by such party or its attorneys named above. No such waiver shall be taken as a waiver of any other or similar provision or of any future event, act or default." Section 16.10 states: "Time is of the essence in the performance of all the parties' respective obligations under this Agreement."

Under section 5.1 of the sale agreement, Prime needed the consent of Plumcor's manager, Judson Ball, before the transfer of the Plumcor interest could take place:

> "[Prime] shall be responsible for obtaining *** all necessary member consents with respect to a transfer of the Member Interests. *** If such consents, approvals, opinions and releases cannot be obtained by [Prime] as to the Member Interests or any financing secured by the Property by the Closing Date (as it may be extended by [Prime] pursuant to *Section 9.2* below), then either [Phoenix] or [Prime] may, at such party's sole option and in such party's respective sole and absolute discretion, terminate this Agreement in its entirety, and thereafter [Prime] shall not have any further rights with respect to the purchase of the Member

Interests, nor shall [Phoenix] have any further obligation to sell the Member Interests to [Prime]." (Emphasis in original.)

Plumcor's operating agreement also required Ball to reasonably exercise his power as manager in granting or denying his consent to transfers of Plumcor interests. Before the December 15, 2005, closing date, Ball indicated that he intended to consent to the transfer.

On October 25, 2005, Prime's attorney, William Ralph, gave Phoenix notice that Prime intended to exercise the option to purchase Phoenix's interest in Plumcor. Prime deposited $80,000 into escrow, as required under section 2.1 of the option agreement.

On November 21, 2005, Ralph forwarded the assignment agreement to Ball for his signature.

On December 2, 2005, Ball's attorney, Peter Santin, sent a letter to Emily Colantino, an attorney at the Jones Day law firm representing Phoenix. Santin wrote that Ball was willing to "use diligent efforts to obtain the Partnership's consent to the transfer" provided that the conditions set forth in section 6 of Plumcor's operating agreement were satisfied. Section 6.2.3 of the option agreement requires Prime to obtain an opinion from counsel that the transfer would not result in the dissolution, termination or liquidation of Plumcor or violate state or federal laws. Santin noted that any transfer without complying with these requirements "shall be null and void and, at [Ball's] option, a material default under the Operating Agreement" but "[a]ssuming that the conditions precedent to the transfer can be met, [Phoenix's lawyers] will provide revisions to the assumption document."

That same day, Susan Matejck, another attorney at Jones Day representing Phoenix, wrote an email to Ralph advising him that "while [Ball] does intend to consent, [Santin] thought that there were certain formalities under the Operating Agreement that needed to be observed and that [Ball] wanted everything to be 'by the book'."

On December 14, 2005, Matejck emailed Santin and said that to provide an opinion addressing the tax consequences of the transfer, Jones Day needed to know: (1) whether there had been transfers of interests in Plumcor in the past 12 months; (2) whether there had been actual transfers of interests in Plumwood Associates II, the primary shareholder of Plumcor, in the past 12 months; (3) whether there had been any transfers of company debt in the past 12 months; and (4) whether there were more than 100 direct and indirect partners in Plumcor. Santin replied that he did not have access to that information but would forward the email to his clients.

On December 21, 2005, Matejck sent Satin a formal letter, requesting a status update. Matejck explained that while Ball said he required an opinion of counsel in connection with the proposed transfer, Jones Day was "unable to proceed with the opinion until Mr. Ball provides us with the information about [Plumcor] that [was] previously requested." Matejck concluded the letter: "Phoenix Office would like to finalize the proposed assignment as quickly as possible, *preferably by the end of this year*. Please provide us with the information we have requested as soon as possible so that the required opinion can be prepared and the transfer finalized." (Emphasis added.)

That same day Satin sent a letter to Emily Colantino of Jones Day, stating that Ball had declined to approve the transfer. Satin explained that Matejck's December 14 email "led to several discussions among Judson Ball, the Manager of the Company, myself, and others with relation to the information requested and the legal concerns behind those requests." Ball "had previously been unaware of various specific problems that such a transfer could precipitate." Satin explained that, "[a]fter these discussions, Mr. Ball now has a much better understanding of the potential legal ramifications, liabilities, and restrictions on future actions that may result from the proposed transfer. These risks far outweigh any potential positive impact on [Plumcor]. Pursuant to Section 6 of the Operating Agreement of [Plumcor], Mr. Ball, acting in his capacity as Manager, declines to approve this transfer."

On December 22, 2005, Dan Miller, another attorney at Jones Day, sent a letter to Prime formally terminating the agreement: "Enclosed herewith is written notice on behalf of the manager of the Company declining to consent to the transfer of the Member Interests to [Prime]. Accordingly, pursuant to Section 5.1 of the Agreement, [Phoenix] hereby terminates the Agreement in its entirety." Miller also sent Ball a letter telling him the agreement was terminated and to have no further discussions with Prime about the transaction.

Prime's attorney Mr. Ralph responded the same day, saying "[Phoenix] has absolutely no right to terminate the Agreement," and "[i]t appears in part that Mr. Ball's opposition to consent was due to unreasonable requirements imposed upon Mr. Ball by Jones Day to issue its legal opinion." Ralph said he still believed Ball would consent to the transfer.

On December 23, 2005, Ralph wrote Santin and told him Prime expected to deliver an opinion of counsel letter the following week. Ralph said Ball had previously indicated to Prime he was consenting to the transfer and that Phoenix's instructions to Ball to have no further contact with Prime constituted a breach of its obligations under the agreement. Ralph demanded that when the opinion letter was delivered, Ball issue his consent in accordance with the agreement.

Santin responded that Ball never indicated to Prime he was consenting to the transfer but that he would "reconsider his rejection if all of the requirements of the Operating Agreement could be met to his satisfaction and if [Phoenix] and [Ball] would be indemnified against various potential risks." (Emphasis in original.)

On December 27, 2005, Miller responded to Ralph's December 22, 2005, letter. Miller pointed to section 5.1 of the agreement and explained that without securing Ball's signature by December 15, 2005, it was within Phoenix's sole discretion to terminate the agreement. Miller also said that Phoenix was entitled under section 2.1 of the agreement to keep the $80,000 Prime placed in escrow.

On December 28, 2005, Ralph wrote to the Jones Day attorneys and enclosed an opinion letter from Larry Blust, an attorney at Barnes & Thornburg. Ralph said that Prime was "confident" Ball would give his consent for the transfer on receiving the opinion letter. Blust's letter essentially opined that the transaction would not result in the dissolution, liquidation or termination of Plumcor or in adverse tax consequences or violate federal or state securities laws. Ralph requested that Phoenix forward the letter to Santin and Ball "and inform them in writing that you have withdrawn your prior instruction to them, request [Ball's] consent to the transfer of the Member interest to [Prime], and inform them of your desire to have the transaction close as intended."

On December 29, 2005, Miller responded to Ralph's letter and said that Phoenix was unwilling to comply with any of Ralph's request because Phoenix had terminated the agreement. Ball and Santin did not read Blust's opinion because they had been instructed by Phoenix to have no further contact with Prime about the transfer.

At his deposition, Ball said: "[O]ver the period of time of the request, I considered a lot of documentation, a lot of oral input, a lot of discussion with people I trust. I thoroughly examined the components of my decision, and I used every reasonable test that I have ever experienced or known in my business experience and lifetime to come to a conclusion as to whether or not this was reasonably appropriate to grant, and I within my own purview came to the reasonable conclusion that this in the form that it was being presented was something that we could not accept[.]"

Prime filed suit against Phoenix and Ball, alleging breach of contract and unjust enrichment. Prime alleged that Phoenix breached the contract and violated the covenant of good faith and fair dealing by refusing to close the transaction. Prime also alleged Ball refused to consent to the transfer without a good-faith basis and Phoenix failed to require or demand that Ball not unreasonably withhold consent to the transfer.

Phoenix counterclaimed for the $80,000 in earnest money. Ball moved to dismiss the breach of contract claim against him and the court granted the motion.

Phoenix moved for summary judgment. Phoenix argued that it was within its right to terminate the contract due to Prime's failure to obtain Ball's consent to the transfer by December 15, 2005, and that it had no obligation to extend the closing date indefinitely. Phoenix said that

Prime was essentially trying to have the court rewrite the terms of the contract to avoid the consequences of its decision to exercise the option less than four weeks before the closing deadline.

Prime responded that Phoenix was not entitled to summary judgment because the facts showed Phoenix had no right to declare a forfeiture. Phoenix had waived the December 15 closing date when Phoenix's counsel wrote to Ball's counsel that they hoped to close "by the end of [the] year." Prime alleged that Phoenix wrongfully failed to give notice of its intent to declare a termination in the future and give Prime reasonable time to obtain Ball's consent. Phoenix could only prevail if it could show that Prime could never have obtained Ball's consent. Phoenix's interference with Prime's efforts to get Ball's consent negated any argument consent would not have been obtained, and the evidence showed Ball would have had no reasonable basis to withhold consent.

The trial court entered summary judgment in favor of Phoenix and against Prime. The court noted that "the sale agreement very clearly required" Prime to obtain Mr. Ball's consent by December 15, 2005, and when it did not, either party was entitled to terminate the agreement. The court noted that while Prime argued that Phoenix breached the covenant of good faith and fair dealing by declaring a forfeiture before the end of the year, the covenant "does not require a party with discretion to forebear from exercising its right to terminate a contract for the benefit of the other party of the agreement."

The court found that:

> "The evidence indicates that [Phoenix] was willing to work towards

> closing the deal even after December 15, 2005, the closing date, until it received notice that Ball would not consent. No evidence indicates that [Phoenix] was willing to keep the date open indefinitely. At best it agreed to give [Prime] until the end of the year. What became apparent is that Ball would not consent and the nature of his inquires and demands were not going to be satisfied within the nine days left before the remainder of the year, and so in the Court's view there really was not a waiver in terms of total waiver of the December 15th court date. *** [W]hat drives the Court's determination that there is no disputed issue of fact is that [Prime] has failed to show any evidence that Mr. Ball would have consented regardless of the amount of time [Prime] had to convince him or to provide the information that it could have presented to him."

The court said Phoenix did not act in bad faith because after terminating the sale agreement, Phoenix was under no obligation to continue to facilitate the negotiations between the parties. The court summarized its findings: "Overall, the evidence points to a single conclusion, the sale agreement very clearly required the consent of the manager to be obtained prior to the closing date. If this did not happen [Phoenix] was entitled to terminate. This is exactly what happened."

Phoenix also moved for summary judgment on its counterclaim to keep the escrow amount and Prime moved to reconsider the award of summary judgment on Prime's complaint. Phoenix contended that the trial court already found Phoenix did not breach the contract, so it was entitled to the escrow. Prime argued that it would be unfair for Phoenix to retain the escrow, Phoenix suffered no damages as a result of the cancellation of the contract, and the doctrine of commercial frustration barred Phoenix's counterclaim.

The court entered summary judgment in favor of Phoenix. The court said the plain language of the contract supported a finding that Phoenix was entitled to retain the $80,000 earnest payment. The court said that Ball's withholding of consent was not a cognizable event under the doctrine of commercial frustration.

On appeal, Prime contends that: (1) Phoenix had no right to terminate the contract because it waived the closing date; (2) Phoenix deliberately caused Ball to refuse his consent, making it impossible for Prime to meet its contractual obligations; and (3) Phoenix is not entitled to the escrow amount.

We review *de novo* the trial court's grant of summary judgment. *Weather-Tite, Inc. v. University of St. Francis*, 233 Ill. 2d 385, 389, 909 N.E.2d 830 (2009). Summary judgment is proper where the pleadings, depositions, admissions and affidavits show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2006); *Village of Palatine v. Palatine Associates, LLC.*, 406 Ill. App. 3d 973, 978, 942 N.E.2d 10 (2010). We may affirm the trial court on any basis supported by the record. *Palatine Associates*, 406 Ill. App. 3d at 979.

" 'Parties to a contract are free to include any terms they choose, as long as those terms are not against public policy and do not contravene some positive rule of law.' " *In re Foreman*, 365 Ill. App. 3d 608, 611, 850 N.E.2d 387 (2006) (quoting *Green v. Safeco Life Insurance Co.*, 312 Ill. App. 3d 577, 581, 727 N.E.2d 393 (2000)). In construing the terms of a contract, the court's primary objective is to give effect to the intent of the parties at the time the contract was made. *Fidelity National Title Insurance Co. of New York v. Westhaven Properties Partnership*, 386 Ill. App. 3d 201, 214, 898 N.E.2d 1051 (2007).

If the language of a contract is clear and unambiguous, the court must determine the intention of the parties solely from the four corners of the document itself and without use of extrinsic evidence. *Air Safety, Inc. v. Teachers Realty Corp.*, 185 Ill. 2d 457, 462, 706 N.E.2d 882 (1999); *Owens v. McDermott, Will & Emery*, 316 Ill. App. 3d 340, 344, 736 N.E.2d 145 (2000). A clear and unambiguous contract will be enforced as written. *Virginia Surety Co. v. Northern Insurance Co. of New York*, 224 Ill. 2d 550, 556, 866 N.E.2d 149 (2007). The court will not add terms to reach a result more equitable to one of the parties. *Mid-West Energy Consultants, Inc. v. Covenant Home, Inc.*, 352 Ill. App. 3d 160, 165, 815 N.E.2d 911 (2004).

Prime urges us to consider extrinsic evidence that the closing date was extended and argues that Phoenix breached the contract by terminating it early. But, Phoenix had no obligation to extend the closing date after December 15, 2005. Section 5.1 of the sale agreement explicitly makes Prime responsible for obtaining the consent of Judson Ball, Plumcor's manager, as a condition precedent for the ownership transfer to take place. Section 5.1 clearly provides for the consequence of Prime's failure to obtain Ball's consent by the closing date:

> "If such consent[] *** cannot be obtained by [Prime] *** by the Closing Date ***, then either [Phoenix] or [Prime] may, at such party's sole option and in such party's respective sole and absolute discretion, terminate this Agreement in its entirety, and thereafter [Prime] shall not have any further rights with respect to the

> purchase of the Member Interests, nor shall [Phoenix] have any further obligation to sell the Member Interests to [Prime]."

When Prime failed to obtain Ball's consent by December 15, 2005, the contract became terminable at *either* "party's respective sole and absolute discretion." See *Meyer v. Marilyn Miglin, Inc.*, 273 Ill. App. 3d 882, 888, 652 N.E.2d 1233 (1995) ("[i]f the contract terms are unambiguous, the parties' intent must be ascertained exclusively from the express language of the contract, as a matter of law"). Phoenix's communications that it would like to get the deal "off its books at year end" and "would like to finalize the proposed assignment as quickly as possible, preferably by the end of this year" were mere accommodations, unsupported by additional consideration. See *Moehling v. W.E. O'Neil Construction Co.*, 20 Ill. 2d 255, 265-66, 170 N.E.2d 100 (1960) ("[t]he law is well settled that a promise to do something one is already obligated to do is no consideration and creates no new obligation"); *Doyle v. Holy Cross Hospital*, 289 Ill. App. 3d 75, 79, 682 N.E.2d 68 (1997) ("[a] modification solely for the benefit of one of the parties is unenforceable"). When Ball informed the parties on December 21, 2005, that he would not give his consent for the transfer, Phoenix lawfully terminated the contract as Ball's consent was a condition precedent to the transaction. See *Resolution Trust Corp. v. Holtzman*, 248 Ill. App. 3d 105, 113, 618 N.E.2d 418 (1993) (parties are entitled to enforce the terms of their agreements to the letter without being penalized for a lack of good faith). Prime has failed to show an ambiguity in the contract or point to a clause Phoenix has breached, so it will be enforced as written. *Owens*, 316 Ill. App. 3d at 346 ("for this court to go beyond the four corners of a contract we must first find that an ambiguity exists with respect to its construction").

Because the contract is clear and unambiguous, Phoenix was within its right to terminate the contract by its terms when Prime failed to obtain Ball's consent before December 15, 2005.

Prime cites *Chariot Holdings, Ltd. v. Eastmet Corp.*, 153 Ill. App. 3d 50, 58, 505 N.E.2d 1076 (1987), for the proposition that the court was required to determine whether the December 15 closing date was "essential" to the agreement. But, in contrast to *Chariot*, the issue here is not whether Prime's failure to secure Ball's consent was a material breach of the contract but whether Phoenix was in breach by terminating the agreement after Prime failed to satisfy a condition precedent. Also, unlike the contract in *Chariot*, the agreement here contains a "time is of the essence" clause. As discussed above, under the plain and unambiguous language of the contract, Phoenix was entitled to terminate the agreement when Prime failed to obtain Ball's consent by the closing date.

Prime contends that it was unforeseeable Ball would withhold his consent and that the evidence shows Ball would have consented. But the contract contains a clause providing for the consequences of Ball's refusal to consent, which shows the parties contemplated the possibility that this condition precedent might not occur. Further, as stated above, the contract unambiguously states that either party had the right to terminate the contract if Ball's signature was not obtained by December 15, 2005. Because the contract is unambiguous, we will not consider the extrinsic evidence offered by Prime. See *Owens*, 316 Ill. App. 3d at 346.

Prime relies on *Gamm Construction Co v. Townsend*, 32 Ill. App. 3d 848, 336 N.E.2d 592 (1975), for the proposition that Phoenix was required to provide Prime with notice of a new closing date and a "reasonable" extension after waiving the closing date. In *Gamm* the plaintiff subcontractor entered into an agreement with the defendant contractor to complete certain work on the house within 70 days of September 29, 1970. During construction the defendant made several changes to the original construction plans and bad weather caused delays. The defendant sent the plaintiff a letter on March 22, 1971, telling him he had 48 hours to complete the job. On March 24, 1971, the defendant ordered plaintiff off the job. The plaintiff sued for damages based on its performance before termination of the contract by the defendant. The trial court found that the defendant had waived the 70-day provision by making additions to the job and failing to inform the plaintiff that the provision was in full force and effect. On appeal, the defendant argued that the plaintiff breached the contract by being on the job 116 days without completion. The appellate court affirmed, finding that the delays in the performance of the contract were caused by the defendant's actions. The court noted that the defendant waived the 70-day completion date by allowing the plaintiff to continue to work until March 21, 1971, long past the completion date. *Gamm*, 32 Ill. App. 3d at 851.

Gamm is distinguishable. The evidence there showed the defendant prevented performance of the contract by making additions to the contract and allowing the plaintiff to continue work on a construction project for months after the completion date had passed. *Gamm*, 32 Ill. App. 3d at 849-51. Here, as discussed above, Phoenix did not waive the closing date but allowed Prime additional time to obtain Ball's signature, even though it was not required to do so. Phoenix did not add additional contractual terms to the agreement or sit idly by for an extended period of time after the closing date passed before exercising its discretion to terminate the contract.

Prime's contention that Phoenix's "unreasonable interference" caused Ball to withhold consent is also unpersuasive. This accusation is contradicted by Ball's deposition testimony that rather than Phoenix's interference, it was Ball's own "reasonable conclusion" to decline to approve the transaction after considering documentation and oral input from people he trusted. Prime points to no provision in the contract requiring Phoenix to withhold terminating the contract after receiving word that Ball would not consent to the transfer.

Prime also suggests that Phoenix breached the covenant of good faith and fair dealing by unjustifiably interfering in Prime's efforts to get Ball's consent for the transfer. "Where a contract specifically vests one of the parties with broad discretion in performing a term of the contract, the covenant of good faith and fair dealing requires that the discretion be exercised 'reasonably and with proper motive, not arbitrarily, capriciously, or in a manner inconsistent with the reasonable expectations of the parties.' " *Mid-West Energy Consultants, Inc. v. Covenant Home, Inc.*, 352 Ill. App. 3d 160, 165, 815 N.E.2d 911 (2004) (quoting *Holtzman*, 248 Ill. App. 3d at 112). To plead a breach of the covenant of good faith and fair dealing a plaintiff must show the existence of contractual discretion. *Mid-West Energy*, 352 Ill. App. 3d at 165. The covenant does not apply where no contractual discretion exists. *Mid-West Energy*, 352 Ill. App. 3d at 165.

Here, the contract is clear that Prime was responsible for obtaining Ball's signature. Prime has failed to show that Phoenix unreasonably failed to exercise discretion in performing a term of the contract. The covenant of good faith and fair dealing does not support Prime's position.

Finally, Prime contends that the court erred in granting summary judgment for Phoenix on its counterclaim to retain the $80,000 Prime placed in escrow.

The language of the sale agreement states in section 2.1:

> "Concurrently with the execution of this Agreement, [Prime] shall deposit with Chicago Title Insurance Company (**"Escrow Agent"**) the sum of $80,000.00 (the **"Deposit"**) ***. Any interest earned on the Deposit shall be credited to [Prime] unless [Prime] defaults, in which case it shall be paid to [Phoenix]. The Deposit shall be paid to [Phoenix] in all events (including, but not limited to, if [Phoenix] or [Prime] terminates this agreement in accordance with the terms of this Agreement), except only in the event that: (i) [Prime] terminates this Agreement in accordance with the provision hereof which allows such termination by [Prime] because [Phoenix] defaulted in any of its obligations under this Agreement, or (ii) [Prime] terminates this Agreement within the one hundred (100)-day period referenced to in *Section 9.2* below because [Prime] fails to obtain all the consents, approvals, opinions and releases referred to in *Section 5* below with respect to the Property within such one hundred (100)-day period." (Emphasis in original).

As discussed above, Phoenix was entitled to terminate the agreement when Prime failed to obtain Ball's signature by the closing date. Based on the clear, unambiguous language of the contract, when Phoenix terminated the agreement in accordance with its terms, Phoenix was entitled to keep the escrow amount. See *Kohenn v. Plantation Baking Co., Inc.*, 32 Ill. App. 3d 231, 236, 336 N.E.2d 491 (1975) ("by the terms of the contract defendant was entitled to retain plaintiff's earnest money as liquidated damages").

Grossinger Motorcorp, Inc. v. American National Bank and Trust Co., 240 Ill. App. 3d 737, 607 N.E.2d 1337 (1992), and *Jones v. Hryn Development, Inc.*, 334 Ill. App. 3d 413, 778 N.E.2d 245 (2002), are distinguishable. *Grossinger* involved an optional liquidated damages provision, unlike the provision in this case. The court there noted that "the first consideration in determining whether a liquidated damages provision is enforceable is whether the parties intended to agree in advance to the settlement of damages that might arise from the breach." *Grossinger*, 240 Ill. App. 3d at 750. The court went on to find that "the optional nature of the liquidated damages clause shows that the parties never intended to establish a specific sum to constitute damages in the event of a breach." *Grossinger*, 240 Ill. App. 3d at 750. Here, the agreement specifically states that the $80,000 earnest payment was to be retained by Phoenix if Phoenix terminated the agreement in accordance with its terms. In contrast to the defendant in *Jones*, here there is no evidence that Phoenix actually profited by terminating the contract with Prime. Phoenix simply retained the interest it already owned.

We also find Prime's commercial frustration argument unpersuasive. As stated above, the very fact that the sophisticated parties involved in this transaction chose to include a clause providing for the consequences of Ball's refusal to consent shows the parties contemplated the possibility that this condition precedent might not occur. See *Greenlee Foundries, Inc. v. Kussel*, 13 Ill. App. 3d 611, 617, 301 N.E.2d 106 (1973).

We affirm the trial court's entry of summary judgment against Prime on it's breach of contract claims against Phoenix. We also affirm the court's entry of summary judgment in favor of Phoenix on its counterclaim.

Affirmed.