

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

NER TAMID CONGREGATION)	
OF NORTH TOWN,)	
)	
Plaintiff,)	No. 08 C 1261
)	
v.)	Magistrate Judge Cole
)	
IGOR KRIVORUCHKO,)	
)	
Defendant.)	

MEMORANDUM OPINION AND ORDER

INTRODUCTION

Ner Tamid Congregation, like so many others, was the victim of the extraordinary downturn in the economy that resulted from the crash of the subprime real estate market. In 2006, it had contracted to sell property to the defendant, who breached the contract, claiming he could not get the kind of financing he wanted. The contract did not contain the standard financing clause that is often, if not invariably, seen in commercial and residential real estate contracts. It did contain a provision requiring \$150,000 escrow deposit, which was to be applied against the purchase price at closing. The contract did not so much as hint that the escrow deposit was a liquidated damages provision in the purchaser failed to close.

Ner Tamid sued for breach of contract, never claiming that the \$150,000 constituted liquidated damages. Quite the contrary, as well shall see. The defendant claimed that the economic downturn could have been foreseen and that, as a consequence of it, he could not get the kind of financing he wanted. That, in his view, relieved him of his contractual obligations. For the reasons explained at length in *Ner Tamid Congregation of North Town v. Krivoruchko*, _F.Supp.2d_, 2009

WL 3202465 (N.D. Ill. 2009), that defense was rejected and summary judgment was entered on behalf of Ner Tamid on the issue of liability. *See also Hoosier Energy Rural Elec. Co-op., Inc. v. John Hancock Life Insurance. Co.* 582 F.3d 721, 728 (7th Cir. 2009)(“the ‘impossibility’ doctrine never justifies failure to make a payment, because financial distress differs from impossibility. *See* Restatement (Second) of Contracts § 261 & comment d.”).¹ It remained for a jury to determine damages.

At trial, Ner Tamid argued to the jury that it was entitled to two separate measure of damages. The first was based on the difference between the contract price of the property and the value on the date of the breach. Ner Tamid’s appraiser calculated the diminution in value to be approximately \$850,000. The second damage component consisted of the expenses Ner Tamid had continued to incur in maintaining the property from the date of the breach. Neither at nor before trial did Ner Tamid contend that the \$150,000 earnest money deposit made by the defendant was liquidated damages.

The complaint took precisely the opposite position, and prior to trial, counsel for Ner Tamid requested that the escrow clause in the real estate sales contract be redacted to ensure that the jury would not erroneously conclude that the measure of damages was intended by the parties to be the \$150,000, which was the amount the defendant had deposited in escrow. (Motion in Limine No. 6) [Docket No. 112]. That motion was granted. The motion pointed out that “[t]he parties’ contract in this case nowhere limits the amount of damages to the amount of the escrow money.” (Motion

¹ Earlier, the defendant’s belated, unpersuasive and exceedingly dubious claim that there was no subject matter jurisdiction because, despite his prior repeated contentions that he was a citizen and resident of Florida, he suddenly realized that he was a citizen and resident of Illinois. *Ner Tamid Congregation of North Town v. Krivoruchko*, 638 F.Supp.2d 913 (N.D. Ill. 2009).

at 1). At no time prior to or during trial did Ner Tamid ever contend that under the contract, if the jury concluded that the actual damages were less than \$150,000, Ner Tamid was entitled to the \$150,000 in the escrow in lieu of the lesser damages.

Indeed, such an assertion would have been contrary to the complaint's allegations. The one-count complaint for breach of contract alleged that "[a]s *partial satisfaction* of its compensatory damages, Ner Tamid is entitled to receive the Earnest Money. To achieve that result, Ner Tamid is entitled to an order directing [defendant] to authorize the Escrowee to release the Earnest Money to Ner Tamid." (Complaint ¶28)(emphasis supplied). The WHEREFORE clause repeated the partial satisfaction language and asked for entry of judgment ordering the defendant "to authorize the Escrowee to release the earnest money to Ner Tamid *in partial satisfaction* of the compensatory damages." (Complaint at p.5)(emphasis supplied). It was never contemplated in any filing of Ner Tamid prior to the instant motion that Ner Tamid was entitled to \$150,000 no matter what.

At trial, the defendant argued that there were no damages of any kind, and that real estate values in fact had remained essentially stable in the area in which Ner Tamid's property was located. Each side called MAI appraisers to support its position. The testimony was quite complicated and the defendant argued that the plaintiff's appraiser was biased because he was being paid a fee for being an expert witness as contrasted to the defendant's expert whose appraisal was done at an earlier point in time on behalf of a bank that was considering lending money to the defendant.

At the conclusion of the trial, the jury awarded \$98,219.07 in maintenance costs and nothing for the claimed diminution in value of the property. The defendant made clear that it was prepared to authorize a turnover from the escrow of the amount awarded the plaintiff by the jury, but insisted it was entitled to the balance. Ner Tamid refused to accept that offer and has filed a "Motion For

Declaratory Judgment As To Earnest Money.” [No. 146]. The Motion seeks a turnover of the entire amount held in the escrow on the theory that it was the intent of the parties, as expressed in the real estate sales contract, that in the event of litigation in which the plaintiff prevailed on a breach of contract claim, Ner Tamid would get the entire escrow amount of \$150,000, if the proven actual damages were less than the amount of the escrow. Under Ner Tamid’s theory, if the jury awarded more than the \$150,000 in actual damages, Ner Tamid would get the amount awarded by the jury. In short, under this theory, Ner Tamid could not lose.

In the alternative, Ner Tamid’s Motion asks the court to declare that it has a legal right to receive \$98,219 of the earnest money.

ANALYSIS

1.

In support of its construction of the real estate sales contract as giving it an option to take the funds held in escrow or the jury’s award, whichever is greater, the Motion points to the various provisions in the contract relating to the deposit of earnest money. None remotely support the plaintiff’s theory. They merely require the purchaser to deposit earnest money by certain dates and reflect that earnest money has already been deposited to the Escrowee, who is to hold the money in an interest bearing account “for the benefit of the parties.”

The escrow provisions are contained in subparagraphs 2.2.1 - 2.3 under the heading “2. PURCHASE PRICE.” On November 12, 2007, the parties extended the closing date and added paragraph 2.2.1, which required the purchaser to deposit an additional \$50,000 by November 14, 2007. Paragraph 2.3 provides that the earnest money is to be credited to the purchase price at the closing. Finally, the Motion refers to paragraph 14.1, which is contained under the heading

“MISCELLANEOUS.” It provides that if either party is in default under the contract, the non-defaulting party shall be entitled to all remedies under law, contract, or equity.

The Motion concedes that neither party has initiated any interpleader action relating to the earnest money. Nonetheless, it argues that the “spirit and purpose of the Earnest Money requirements in Section 2” of the real estate sales contract require that the \$150,000 be turned over to Ner Tamid. How else, the motions asks, “could the earnest money ‘benefit’ Ner Tamid” if it is not turned over in its entirety. The Motion concludes by saying that “[t]he spirit and purpose of the Contract shows that the Earnest Money was partial security for Krivoruchko’s performance.” (Motion at 5).

Curiously, the defendant’s response brief does not directly address the argument based on the intent of the parties as expressed in the real estate sales contract. Instead, it raises a series of other arguments, including waiver based upon what is claimed to be a skeletal presentation, the failure to have requested a declaratory judgment in the complaint, the doctrine of election of remedies, the doctrine of judicial estoppel, *res judicata* and collateral estoppel and the prohibition under Illinois law that makes unenforceable a clause in a contract that gives a seller the option to retain earnest money as liquidated damages or seek actual damages. The defendant concedes that Ner Tamid is entitled to \$98,219.07 plus appropriate costs as the victor out of the proceeds of the earnest money. Ner Tamid has not responded to these arguments.

2.

The objective in construing a contract is to give effect to the intent of the parties. *Hampton v. Ford Motor Co.*, 561 F.3d 709, 714 (7th Cir.2009); *Village of South Elgin v. Waste Management of Illinois, Inc.*, 348 Ill.App.3d 929, 941, 810 N.E.2d 658, 670 (2nd Dist.2004). This does not mean

a court somehow actually divines what the parties were thinking; after all, judges, after all cannot crawl into peoples' minds. They act on the basis of external signs. Posner, *Overcoming Law*, 276 (1995). Thus, a court must look to the parties' objective intent as manifested in their written agreement. *Hampton*, 561 F.3d at 714; *Vill. of S. Elgin*, 348 Ill.App.3d at 941, 810 N.E.2d at 670. This is how the court put it in *McElroy v. B.F. Goodrich Co.*, 73 F.3d 722, 727 (7th Cir.1996) (Posner, C.J.):

When courts say that if contract language is clear the judge should look no further, ... they mean nothing more portentous than that the security that contracting parties seek when they commit their deal to writing requires a presumption that a written contract is to be interpreted without bringing in a jury to decide whose oral testimony about what the parties *really* intended is more credible. Only if the judge is stumped after making his best interpretive efforts and only if the oral or other "extrinsic" evidence that would be offered at trial would be likely to disambiguate the contract does the court convene a trial.²

It follows that contract interpretation starts with the language of the agreement, which must not be interpreted in a way contrary to the plain, obvious, and generally accepted meaning of its terms. *Hampton*, 561 F.3d at 714; *Krilich v. American Nat. Bank and Trust Co. of Chicago*, 334 Ill.App.3d 563, 575, 778 N.E.2d 1153, 1164 (2nd Dist.2002). And, courts will not make contracts

² The "objective theory" of contract interpretation, *Newkirk v. Village of Steger*, 536 F.3d 771, 774 (7th Cir.2008); *Laserage Technology Corp. v. Laserage Laboratories, Inc.*, 972 F.2d 799, 802 (7th Cir.1992), traces its acceptance to, among others, Justice Holmes. Since at least *The Path of the Law*, 10 Harv.L.Rev. 457 (1897), it has been understood that the formation of a contract does not actually require the meeting of the minds of the parties in the sense a literal reading of the terms conveys. Today there is common agreement that "no one will understand the true theory of contract or be able to discuss some fundamental questions intelligently until he has understood that all contracts are formal, that the making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs not on the parties having meant the same thing but on their having said the same thing." *Id.* at 464. See *Navair, Inc. v. IFR Americas, Inc.*, 519 F.3d 1131, 1139 (10th Cir.2008) ("Put another way, the inquiry will focus not on the question of whether the subjective minds of the parties have met, but on whether their outward expression of assent is sufficient to form a contract."). See also *Goode v. Riley*, 153 Mass. 585, 586, 28 N.E. 228 (1891)(Holmes, J.).

for sophisticated parties or supply provisions by implication where there is no standard available for reasonable implication. See *International Brotherhood of Electrical Workers, Local 176 v. Balmoral Racing Club, Inc.*, 293 F.3d 402, 409 (7th Cir. 2002)(citing Restatement of Contracts § 201 comment. c (1981) (noting that “[t]he objective of interpretation in the general law of contracts is to carry out the understanding of the parties rather than to impose obligations on them contrary to their understanding: ‘the courts do not make a contract for the parties.’ ”); *Association Ben. Services, Inc. v. Caremark RX, Inc.*, 493 F.3d 841, 852 (7th Cir. 2007).

No matter how often one reads the real estate sales contract, the conclusion is inescapable that the parties did not agree on what would happen to the earnest money in the event of a breach by the purchaser. The contract merely provided that the required earnest money deposit of \$150,000 would be held by the Escrowee, not as the Motion contends for the “benefit” of Ner Tamid, but for the benefit of the “parties” – that is Ner Tamid *and* Mr. Krivoruchko. The real estate sales contract is silent on the question of what happens to the escrowed funds in the event of a breach by the purchaser. Is Ner Tamid entitled to that sum as liquidated damages? The contract does not say. Indeed, the contract does not use the term “liquidated damages” at all. It merely says that the \$150,000 is to be credited towards the purchase price at closing. (Paragraph 2.3).

Nothing in Paragraph 14.1, dictates the fate of the earnest money in the event of a breach by the buyer. It simply states the obvious: the non-defaulter has what remedies the law allows. But what those remedies are will be determined by whether the parties intended the \$150,000 to be liquidated damages. Paragraph 14.1 is thus unilluminating in regard to the question raised by the Motion.

To the extent Paragraph 14.1 is even relevant here, and to the extent that the \$150,000 can be deemed a liquidated damage clause – which it cannot – Paragraph 14.1 undercuts Ner Tamid’s Motion. As the defendant’s response brief points out, under Illinois law, a clause that gives to a seller the option of pursuing a damage claim for breach of contract or retaining as liquidated damages the amount of earnest money held in escrow is unenforceable. See *Resource Technology Corp. v. Congress Development Co.*, 2003 WL 22057489 (N.D.Ill. 2003); *Catholic Charities v. Thorpe*, 318 Ill.App.3d 304, 741 N.E.2d 651 (1st. Dist. 2000). These cases rest on the theory that the supposed liquidated damage clause is in fact not a liquidated damage clause at all: “[T]his scheme distorts the very essence of liquidated damages, which in effect is to provide the parties with a pre-ordained settlement of a damage sum when actual damages would otherwise be difficult to determine.” *Catholic Charities*, 318 Ill.App.3d at 312-313, 741 N.E.2d at 65.

One may question the logic of these cases and of a prohibition that prevents sophisticated parties from being limited in their ability to specify as a remedy for breach of contract the right of the non-defaulting party to sue for actual damages or treat the escrow funds as liquidated damages. Indeed, in the context of a liquidated damages case – although one not presenting the precise issues here – Judge Posner has done exactly that and persuasively made the case for expanded contractual freedom. See *XCO Intern. Inc. v. Pacific Scientific Co.*, 369 F.3d 998, 1001 -1003 (7th Cir. 2004). But at least for now the law in Illinois does not give contracting parties the ability to allow a defaulting party the option of suing or treating escrow funds as liquidated damages. More importantly, nothing in the contract remotely supports the idea that Ner Tamid as the non-defaulting party has the option to pursue a claim for actual damages and then, if the award is less than the escrow amount, opt to take the entire amount of the escrow.

But that is precisely what Ner Tamid's Motion contends the real estate contract was intended to permit. Even "[w]here a contract is susceptible to one of two constructions, one of which makes it one that prudent men would naturally execute, while the other makes it inequitable, unusual, or such as reasonable men would not be likely to enter into, the interpretation which makes a rational and probable agreement must be preferred." *Sutter Insurance Co. v. Applied Systems, Inc.*, 393 F.3d 722, 726 (7th Cir.2004). To construe the real estate sales contract as Ner Tamid does is neither rational, probable, nor consonant with common sense, which "is as much a part of contract interpretation as is the dictionary or the arsenal of canons." *Dispatch Automation, Inc. v. Richards*, 280 F.3d 1116, 1119 (7th Cir.2002) (Posner, J.).³

That the real estate sales contract did not Ner Tamid the extraordinary option it now seeks to exercise is perhaps best illustrated by Ner Tamid's own conduct, which is often the most reliable indicator of a contract's meaning. *National Diamond Syndicate, Inc. v. United Parcel Service, Inc.*, 897 F.2d 253, 261 -262 (7th Cir. 1990). Had Ner Tamid thought the contract gave it the rights for which it now contends, its Complaint would not have been drafted as it was. It would not merely have said that the \$150,000 should be turned over to it in "partial satisfaction" of its actual damages. Rather, it would have contained alternative allegations that the real estate sales contract required that the entire earnest money deposit be turned over as liquidated damages in the event the jury award was less than \$150,000. *Cf. Muhammad v. Oliver*, 547 F.3d 874, 877 (7th Cir. 2008) (Posner, J)("[I]f there is an executed standstill agreement, one would expect an allegation to that effect. There is

³ Here the contract is not susceptible to two constructions. It is simply silent on the issue. And since Illinois law forbids a clause in a contract that gives a breaching party the option to sue or treat the escrowed funds as liquidated damages, the option for which Ner Tamid contends cannot be implied in the contract.

none. The complaint's silence is deafening.").

But let us suppose that the real estate sales contract did give Ner Tamid the more limited and not unheard of option of treating the \$150,000 as liquidated damages in the event of a default or suing for actual damages and that such a clause was enforceable under Illinois law. By electing to sue and to see the case through to entry of judgment, Ner Tamid chose its remedies, and it is bound by that election. *See Williamson-Company LLC v. AML & Associates, Inc.*, 2009 WL 2391841 (N.D.Ill. 2009).

3.

The defendant agreed on the day the jury's verdict was returned (in off the record discussions in court) and thereafter that it had no objection to Ner Tamid receiving from the escrow the amount the jury awarded Ner Tamid so long as the balance was refunded to him. That is its current position. Consequently, Ner Tamid and Mr. Krivoruchko are ordered to take such steps as are necessary immediately to cause the Escrowee to pay to Ner Tamid from the escrow the amount awarded Ner Tamid by the jury, \$98,219.07, plus \$2,607.45 for costs, for a total of \$100,826.52. Ner Tamid shall take such steps as are necessary to authorize the remainder to be paid to the defendant.

CONCLUSION

The defendant's response to the Motion fairly sums up the current status of things: "Now, and only after being disappointed by the jury award as to the amount of [actual] damage, Ner Tamid has drastically changed course claiming that it is damages were actually liquidated by the contract." Of course, Ner Tamid was disappointed in the jury's verdict. By its lights, it had been sorely abused

by the defendant, and the jury's verdict came as a surprise. But that cannot justify a retrospective rewriting of the parties' real estate contract to achieve in some small measure what Ner Tamid perceives to be its due. What was said in an earlier opinion in this case rejecting a theory advanced by Mr. Krivoruchko bears repeating in this context:

Courts' historic refusal to rewrite contracts to accord with some ill-defined notion of fairness acquired in the light of subsequent developments is deeply ingrained in judicial consciousness. The reasons are as sound as they are obvious. If judges were allowed to act as *post-hoc* revisory boards and to ignore the agreement of the parties in order to relieve one of them from a hard bargain, voluntarily and honestly made, there would be created "an insecurity in business transactions which would be intolerable." *Effinger v. Kenney*, 115 U.S. 566, 572 (1885). "As Justice Brandeis recognized, '[p]unctilious fulfillment of contractual obligations is essential to the maintenance of the credit of public as well as private debtors.'" *United States v. Winstar Corp.*, 518 U.S. 839, 885 (1996). *See also Farrington v. State of Tennessee*, 95 U.S. 679, 682 (1877). "While we recognize that a rule of strict compliance might lead to harsh results, such a rule tends to 'enforce [] commercial certainty.'" *Thomson Learning, Inc. v. Olympia Properties, LLC*, 365 Ill.App.3d 621, 631, 850 N.E.2d 314, 323 (2nd Dist.2006).

Ner Tamid Congregation of North Town, 638 F.Supp.2d at 934-935 (footnote omitted). Chief Judge Easterbrook has made the point more compendiously: "...it is hard to see how an economic downturn can be alleviated by making contracts less reliable. Enforceable contracts are vital to economic productivity." *Hoosier Energy Rural Cooperative v. John Hancock Life Insurance Co.*, 582 F.3d 721, 727 (7th Cir. 2009).

The Motion for Declaratory Judgment as to Earnest Money [Docket No. 146] is denied in part and granted in part.

ENTERED:


UNITED STATES MAGISTRATE JUDGE

DATE: 2/3/10