

SUPERIOR COURT  
OF THE  
STATE OF DELAWARE

E. SCOTT BRADLEY  
*JUDGE*

SUSSEX COUNTY COURTHOUSE  
1 The Circle, Suite 2  
GEORGETOWN, DE 19947

February 23, 2012

Michael W. Arrington, Esquire  
Parkowski, Guerke & Swayze  
800 King Street, Suite 203  
Wilmington, DE 19801

Steven Schwartz, Esquire  
Schwartz & Schwartz  
1140 S. State Street  
P.O. Box 541  
Dover, DE 19903

**RE: US Acquisition Property XIV, LLC v. The Reserves  
Development Corporation and Abraham P. Korotki  
C.A. No. S10C-06-034-ESB  
Letter Opinion**

Date Submitted: November 10, 2011

Dear Counsel:

This is my decision on the Motion for Summary Judgment filed by Plaintiff US Acquisition Property XIV, LLC against Defendants The Reserves Development Corporation and Abram P. Korotki. This case involves a lawsuit by USAP against Reserves and Korotki based on applications for two letters of credit submitted by Reserves to Wilmington Trust Company and guaranteed by Korotki. Reserves requested WTC to issue two letters of credit in favor of the Sussex County Council in connection with Reserves' residential development project in Sussex County, Delaware. The Sussex County Council required the letters of credit to ensure that Reserves constructed the roads and stormwater drainage at its project in a timely manner. Korotki personally guaranteed Reserves' obligations. WTC issued the two letters of credit to the Sussex County Council. When Reserves did not complete the roads and stormwater drainage as required, the Sussex County Council

demanded that WTC honor the letters of credit and pay it \$2,216,233.00. WTC did that and in turn demanded payment from Reserves and Korotki, who both refused to pay. WTC then filed this lawsuit against Reserves and Korotki and later assigned its interest in the applications, guaranties, and letters of credit to USAP. I have granted USAP's Motion for Summary Judgment, concluding that WTC did what it was obligated to do pursuant to the letters of credit and Reserves and Korotki have no standing to raise any defenses under the letters of credit and waived all of their defenses under the applications and guaranties, respectively.

### **Statement of Facts**

Reserves submitted two Applications for Letters of Credit to WTC for two Letters of Credit in favor of the Sussex County Council on June 7, 2005. They are Letter of Credit No. 1-1731 in the amount of \$1,701,428.00 and Letter of Credit No. 1-1732 in the amount of \$514,805.00. Korotki signed the Applications as President of Reserves. The two Applications are identical except for the amount of credit extended. Reserves agreed in the Applications that the credit is to be available by sight draft being presented to WTC. Reserves further agreed to pay to WTC a sum equal to the amount which has been withdrawn under the Letters of Credit plus any and all charges and expenses which WTC incurred relative to the credit, including reasonable attorneys' fees and court costs. Reserves also agreed to pay interest on any and all amounts remaining unpaid at WTC's National Commercial Rate plus one percent (1.0%). Reserves further agreed that WTC would not have any liability or responsibility other than to pay the sight drafts when presented to WTC by the Sussex County Council under the credit, without any duty or right

of WTC to inquire as to the right of the Sussex County Council to such funds. The Applications for the two Letters of Credit were personally guaranteed by Korotki. He granted WTC a security interest in certain WTC certificates of deposit totaling \$2,216,233.00 as collateral. Reserves and Korotki later substituted, with WTC's consent, a mortgage on certain lots in Reserves' development for the certificates of deposit.

WTC issued to the Sussex County Council an Irrevocable Documentary Standby Letter of Credit on each of the Applications. As beneficiary of the Letters of Credit, the Sussex County Council had the authority to require payment of the credit by a sight draft with the accompanying statement "The Reserves Development Corporation has failed to complete the construction of roads and stormwater management at The Reserves Resort Spa & Country Club. Demand is hereby made in the amount of the enclosed draft." WTC was obligated to honor the sight draft(s) upon presentation to WTC. The Sussex County Council presented WTC with sight drafts for Letter of Credit No. 1-1731 and Letter of Credit No. 1-1732 on June 7, 2010. The sight drafts contained the requisite language to require WTC to honor the demand. WTC paid Sussex County \$1,701,428.00 on Check No. 8010677 for Letter of Credit No. 1-1731, and \$514,805.00 on Check No. 8010678 for Letter of Credit No. 1-1732 on June 9, 2010. WTC then demanded immediate payment from Reserves and Korotki, who both refused to pay.

WTC filed the Complaint in this action on June 25, 2011, requesting a joint and several judgment against Reserves and Korotki in the amount of \$2,216,233.00, interest at WTC's National Commercial Rate plus one percent (1.0 %) beginning June 9, 2010,

expenses, attorneys' fees in the amount of \$221,623.00,<sup>1</sup> and court costs. Reserves and Korotki filed an Answer on January 7, 2011, admitting to the allegations relating to the Applications, Guaranties, demand and non-payment, but denying that they are indebted to WTC for the amounts sought.

WTC assigned to USAP for \$375,000.00 the Application for Letter of Credit No. 1-1731, Application for Letter of Credit No. 1-1732, Guaranties by Korotki, and the collateral mortgage on May 16, 2011. USAP was substituted as the Plaintiff in this case on June 17, 2011. Reserves and Korotki have obtained, through litigation against the Sussex County Council, a certain amount of control over the \$2,216,233.00.<sup>2</sup> Essentially, a process has been established where Reserves and Korotki will hire contractors to construct the roads and stormwater drainage and the Sussex County Council will pay the contractors' bills. Any money left over will be returned to the attorneys for Reserves and Korotki. Notwithstanding this, Reserves and Korotki do not want to repay the money they essentially borrowed to finish their development.

### **Standard of Review**

This Court will grant summary judgment only when no material issues of fact exist, and the moving party bears the burden of establishing the non-existence of material issues of fact.<sup>3</sup> Once the moving party meets its burden, the burden shifts to the non-moving

---

<sup>1</sup> The request for attorneys' fees is 10% of the principal amount due under the Letters of Credit.

<sup>2</sup> *The Reserves Development Corp. v. 30 Lots, Inc.*, Del. Ch., C.A. No. 4144-CC, Chandler, C (June 4, 2010).

<sup>3</sup> *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

party to establish the existence of material issues of fact.<sup>4</sup> The Court views the evidence in a light most favorable to the non-moving party.<sup>5</sup> Where the moving party produces an affidavit or other evidence sufficient under *Superior Court Civil Rule 56* in support of its motion and the burden shifts, the non-moving party may not rest on its own pleadings, but must provide evidence showing a genuine issue of material fact for trial.<sup>6</sup> If, after discovery, the non-moving party cannot make a sufficient showing of the existence of an essential element of the case, then summary judgment must be granted.<sup>7</sup> If, however, material issues of fact exist or if the Court determines that it does not have sufficient facts to enable it to apply the law to the facts before it, then summary judgment is not appropriate.<sup>8</sup>

### **Discussion**

USAP argues that WTC did what it was obligated to do under the Letters of Credit and that USAP, as the assignee of WTC, is therefore entitled to be repaid in accordance with the provisions of the Applications and Guaranties. The Applications required Reserves pay to WTC all amounts that WTC paid under the Letters of Credit to the Sussex County Council, together with interest, expenses, attorneys' fees, and court costs. The Guaranties obligated Korotki to pay to WTC all amounts owed by Reserves to WTC under

---

<sup>4</sup> *Id.* at 681.

<sup>5</sup> *Id.* at 680.

<sup>6</sup> Super. Ct. Civ. R. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

<sup>7</sup> *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991), *cert. den.*, 112 S.Ct. 1946 (1992); *Celotex Corp.*, 477 U.S. 317 (1986).

<sup>8</sup> *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

the Applications. WTC paid \$2,216,233.00 to the Sussex County Council pursuant to the two Letters of Credit. USAP has been substituted for WTC as the Plaintiff in this case. Therefore, according to USAP's line of reasoning, Reserves and Korotki are obligated to pay USAP \$2,216,233.00, together with interest, expenses, attorneys' fees, and court costs.

Reserves and Korotki have raised two defenses to USAP's claims. They argue that (1) WTC should have only paid to the Sussex County Council the amount of money that was "as reasonable as necessary" to complete the construction of the roads and stormwater drainage, and (2) the request for attorneys' fees is unconscionable.

### **1. The Letters of Credit**

The Defendants' first argument is based on the following language that appears in both of the Letters of Credit:

Performance must be completed by the Developer by the Expiration Date of this Letter of Credit. If satisfactory performance has not occurred by the Expiration of this Letter of Credit, Sussex County Council shall be entitled to draw funds from this Letter of Credit, as reasonable as necessary to complete construction or to procure others to perform the work in accordance with the approved construction plans on file with the Sussex County Engineer. **(Emphasis added.)**

I have rejected the Defendants' first argument because they (a) have no standing to raise it, and (b) waived it in the Applications and Guaranties.

#### **a. Standing**

A letter of credit is an undertaking made by a bank to a beneficiary at the request of the bank's customer to honor drafts or demands for payment made by the beneficiary

upon compliance with the conditions specified in the letter of credit.<sup>9</sup> As such, a letter of credit is a contract between the bank and the beneficiary of the credit that is separate and distinct from the contract or arrangement between the beneficiary and the bank's customer.<sup>10</sup> This is known as the "independence principle."<sup>11</sup> It states that the bank's obligations to the beneficiary are independent of the beneficiary's performance on the underlying contract.<sup>12</sup> The letter of credit is not tied to or dependent upon the underlying contract or arrangement and in determining whether to pay, the bank looks only at the letter of credit and the documentation the beneficiary presents to determine whether the documents meet the requirements of the letter of credit.<sup>13</sup>

A letter of credit transaction typically includes three separate commitments: (1) the applicant's agreement with the bank, which obligates the bank to issue the letter of credit and obligates the applicant to reimburse the bank; (2) the bank-beneficiary relationship, i.e., the letter of credit itself; and (3) the applicant-beneficiary relationship, i.e., the underlying contract.<sup>14</sup> The letter-of-credit transaction is essentially an independent contract

---

<sup>9</sup> 6 *Del.C.* § 5-102 (a)(10); 1 Willston on Contracts §2.23 (4<sup>th</sup> ed.).

<sup>10</sup> *Southern Energy Homes, Inc. v. AmSouth Bank of Alabama, et. al.*, 709 So.2d 1180, 1185 (Ala. 1998).

<sup>11</sup> 3 WS-UCC § 26-2.

<sup>12</sup> *Id.*

<sup>13</sup> 6 *Del.C.* § 5-108(F)(1), which states that an "issuer is not responsible for the performance or nonperformance of the underlying contract, arrangement, or transaction."

<sup>14</sup> *Southern Energy Homes, Inc.* 709 So.2d at 1185.

between the issuer and the beneficiary.<sup>15</sup> In these transactions, the issuer must honor the drafts or other demands for payment upon compliance with the terms of the letter of credit, which exist independently from the underlying transaction. These principles are set forth in the Uniform Customs and Practice for Documentary Credits (“UCP”).<sup>16</sup> The UCP provides:

“A. Credits, by their nature, are separate transactions from the sales or other contract(s) on which they may be based and banks are in no way concerned with or bound by such contract(s), even if included in the Credit. Consequently, the undertaking of a bank to pay, accept and pay Draft(s) or negotiate and/or to fulfil any other obligation under the Credit, is not subject to claims or defenses by the Applicant resulting from his relationships with the Issuing Bank or the Beneficiary.” **(Emphasis added.)**

“B. A beneficiary can in no case avail himself of the contractual relationships existing between the banks or between the Applicant and the Issuing Bank.”<sup>17</sup>

There is no contractual relationship between the applicant and the beneficiary of a letter of credit.<sup>18</sup> Once the issuer has paid under the letter of credit, the applicant’s obligation to reimburse the issuer is governed by the reimbursement contract between the applicant and the issuer. Because this contract is separate and independent from the letter of credit, courts and commentators sometimes apply normal contract standards of substantial compliance to the performance of this transaction. Because the issuer-

---

<sup>15</sup> *Id.*

<sup>16</sup> International Chamber of Commerce, Publication No. 500, Uniform Customs and Practices for Documentary Credits, Art. 3 (1993).

<sup>17</sup> *Id.*

<sup>18</sup> *One Step Up, Ltd. v. Webster Business Credit Corp.*, 925 N.Y.S.2d 61 (N.Y. App.Div. 2011).

applicant relationship is governed by the reimbursement agreement, the language of that agreement often determines the issuer's liability to the applicant for wrongful honor.<sup>19</sup> These legal principles regarding letters of credit govern the issues and arguments raised by Reserves and Korotki.

Reserves had to construct the roads and stormwater drainage in its development to the satisfaction of the Sussex County Council. In order to ensure that this would be done, the Sussex County Council required Reserves to obtain letters of credit that the Sussex County Council could call upon if Reserves did not meet its obligations. Reserves had WTC issue the Letters of Credit to the Sussex County Council. When Reserves did not build the roads and stormwater drainage, the Sussex County Council demanded that WTC honor the Letters of Credit and pay over the \$2,216,233.00, which WTC did.

There are three separate agreements here. One, there is the agreement between Reserves and the Sussex County Council regarding the roads and stormwater drainage. Two, there are the Applications and Guaranties between WTC and Reserves and Korotki, respectively. Three, there are the Letters of Credit between WTC and the Sussex County Council. Reserves and Korotki are not parties to the Letters of Credit. Generally, only parties to a contract and intended third-party beneficiaries may enforce an agreement's provisions.<sup>20</sup> Since Reserves and Korotki were not parties to the Letters of Credit or beneficiaries of them, they have no standing to raise any defenses regarding WTC's

---

<sup>19</sup> 3 WS-UCC § 26-10.

<sup>20</sup> *Amirsaleh v. Board of Trade of the City of New York, Inc.*, 2008 WL 4182998 (Del.Ch. Sept. 11, 2008).

payments under the Letters of Credit to the Sussex County Council.<sup>21</sup> Reserves and Korotki must instead rely on the Application and Guaranties for any defenses. Moreover, the Sussex County Council was the only party under the Letters of Credit charged with determining how much money was “as reasonable as necessary” to construct the roads and stormwater management. WTC was not charged with making this determination, which is typical in these situations.<sup>22</sup> It only had to make sure that the documents presented to it by the Sussex County Council were in conformity with the Letters of Credit. WTC’s sole obligation was to pay the amount set forth in the sight drafts submitted by the Sussex County Council, which it did.

**b. Waiver**

In addition to not having standing to challenge WTC’s payments under the Letters of Credit, Reserves and Korotki waived all of their defenses to WTC’s actions under the Letters of Credit. USAP’s claims against Reserves and Korotki are based on the Applications and Guaranties. The parties to those contracts are WTC and Reserves and Korotki. Reserves and Korotki agreed in the Applications and Guaranties that WTC’s only obligation under the Letters of Credit was to pay sight drafts. WTC had no obligation to make an independent determination of how much should be paid. The applicable language in the Applications states, in part, that:

---

<sup>21</sup> *Amirsaleh*, 2008 WL 4182998, at \*4; *Rash v. Equitable Trust Co.*, 157 A. 839, 840 (Del.Super. 1931); *One Step Up, Ltd.*, 925 N.Y.S.2d at 69.

<sup>22</sup> *Newvector Communications Inc. v. Union Bank of Fort Dodge*, 663 F.Supp. 252, 255 (D. Utah 1987) (Determination of a bank’s duty of performance depends only upon “the presentation of conforming documents and not upon the factual performance or non-performance by the parties to the underlying transaction.”).

“ . . . nor shall Bank have any liability or responsibility other than to pay Sight Draft(s) when presented to Bank by drawee under the Credit, without any duty or right of Bank to inquire as to the right of drawer to such funds.” (**Emphasis added.**)

Korotki was not a party to the Applications, making him further removed from WTC’s actions pursuant to the Letters of Credit. His obligations to WTC are governed by the Guaranties. The applicable language in the Guaranties states, in part, that:

The Undersigned further waives and agrees not to assert or claim at any time any deductions to the amount guaranteed under this Guaranty for any claim of setoff, counterclaim, counter demand, recoupment or similar right, whether such claim, demand or right may be asserted by the Debtor, the Undersigned, or both.

Quite simply, Reserves and Korotki waived all of the defenses to WTC’s payments under the Letters of Credit in the Applications and Guaranties, respectively.

## **2. Attorneys’ Fees**

The Applications and Guaranties have provisions requiring Reserves and Korotki, respectively, to pay WTC’s attorneys’ fees. Reserves and Korotki argue that they should not have to pay because (a) these provisions are unconscionable, (b) the amount claimed is unreasonable, and (c) there is no basis to include WTC’s attorneys’ fees.

### **a. Unconscionability**

Contract terms are considered to be unconscionable when there is an absence of meaningful choice and the terms unreasonably favor one of the parties.<sup>23</sup> To declare a clause in a contract to be unconscionable, a court must find that the party with the superior

---

<sup>23</sup> *Tulowitzki v. Atl. Richfield Co.*, 396 A.2d 956, 960 (Del. 1978).

bargaining power used that power to take unfair advantage of his weaker counterpart.<sup>24</sup> Reserves and Korotki argue that the attorneys' fees provisions are unconscionable because only USAP can recover its attorneys' fees.

There was no absence of a meaningful choice here. Reserves and Korotki were under no obligation to obtain letters of credit from WTC. There are many other banks that issue letters of credit. If Reserves and Korotki did not like WTC's terms, then they could have gone to another bank more to their liking.

The attorneys' fees provisions do not unreasonably favor WTC given the nature of the transaction here. WTC honored the Sussex County Council's demand for payment under the Letters of Credit. It is now out \$2,216,233.00. WTC received only a small fee for doing this.<sup>25</sup> WTC will now have to incur substantial attorneys' fees to force Reserves and Korotki to pay. It seems appropriate that only WTC, now that it has done what it committed itself to do, should recover from Reserves and Korotki the attorneys' fees that it incurs in forcing them to do what they committed to do.

WTC did not have superior bargaining power and did not use the bargaining power it did have to take unfair advantage of Reserves and Korotki. All of the parties to these agreements are sophisticated business people. WTC has been making commercial loans to real estate developers for many years. Korotki is a lawyer and the President of Reserves. Reserves is the developer of a large real estate project in Sussex County.

---

<sup>24</sup> *Progressive International Corp. v. E.I. DuPont de Nemours and Co.*, 2002 WL 1558382, at \*11 (Del. Ch. July 9, 2002).

<sup>25</sup> According to the Application for Letter of Credit No. 1-1731, the annual service charge for the credit is one half of one percent of the credit amount.

Reserves and Korotki fully understood the terms of the agreements they were entering into with WTC. Indeed, Reserves and Korotki were able to convince WTC to substitute a mortgage on lots in Reserves' development for the certificates of deposit. If anything, they seem to have gotten the best of WTC in these negotiations because it is going to be much harder for USAP, as the assignee of WTC, to foreclose on the mortgage and turn the lots into cash than it would have been to have simply taken the certificates of deposit.

The parties who enter into a contract have the opportunity during the course of their negotiations to add to the contract any provision appropriately bargained for which would place the responsibility for payment of attorneys' fees on any party who either breaches the contract or fails to perform in accordance with the terms of the contract. Delaware law and equity courts routinely enforce provisions of a contract allocating costs of legal actions arising from the breach of a contract.<sup>26</sup> Reserves and Korotki, having accepted all of the benefits of the Applications and Guaranties, can not now complain about their perceived inequities.

**b. Reasonableness**

Reserves and Korotki argue that attorneys' fees of 10% of the amount due under the Letters of Credit are unreasonable. In determining the reasonableness of a request for attorneys' fees, the Court shall consider several factors outlined in the Delaware Rules of Professional Conduct. Specifically, Rule 1.5 indicates that the Court shall consider:

1. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
2. The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

---

<sup>26</sup> *Knight v. Grinnage*, 1997 WL 633299, at \*3 (Del. Ch. Oct. 7, 1997).

3. The fee customarily charged in the locality for similar legal services;
4. The amount involved and the results obtained;
5. The time limitations imposed by the client or by the circumstances;
6. The nature and length of the professional relationship with the client;
7. The experience, reputation, and ability of the lawyer or lawyers performing the services; and
8. Whether the fee is fixed or contingent.

I will resolve USAP's claim for attorneys' fees by having it submit an affidavit covering its actual attorneys' fees, expenses, the applicable interest rate, and court costs and then considering its request in light of the applicable factors. USAP will submit its affidavit within ten (10) days of the date of this decision. Reserves and Korotki will have ten (10) days to comment on the USAP's affidavit. I will then issue a Final Order of Judgment covering the principal amount owed, attorneys' fees, expenses, the applicable interest rate, and court costs.

**c. WTC's Attorneys' Fees**

Reserves and Korotki argue that USAP should not be able to recover the attorneys' fees incurred by WTC. The Applications and Guaranties had provisions requiring Reserves and Korotki, respectively, to pay WTC's attorneys' fees. USAP acquired all of WTC's rights and obligations when it took an assignment of the Applications and Guaranties. Those rights include the attorneys' fees and expenses incurred by WTC in this matter, making the recovery of them by USAP, as the assignee of WTC, appropriate.<sup>27</sup>

**Conclusion**

I have, for the reasons set forth herein, granted US Acquisition Property XIV, LLC's

---

<sup>27</sup> *Madison Fund, Inc. v. Midland Glass Company, Inc.*, 1980 WL 332958, at \*2 (Del. Super. Aug. 11, 1980) (It is a rudimentary principle of contract law that the assignee takes the assigned claim subject to all defenses of the obligor against the assignor).

Motion for Summary Judgment.

**IT IS SO ORDERED.**

Very truly yours,

/S/ E. Scott Bradley

E. Scott Bradley