IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

OCWEN ORLANDO HOLDINGS CORP., A FLORIDA CORPORATION,	**CASE NO.: 48-2007-CA-7054-O** **DIVISION: 43**
PLAINTIFF,	**COMPLEX BUSINESS LITIGATION COURT**

VS.

HARVARD PROPERTY TRUST, LLC, D/B/A BEHRINGER HARVARD, A DELAWARE LIMITED LIABILITY COMPANY,

DEFENDANT.

ORDER GRANTING DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

THIS CAUSE came to be heard by the Court on June 6, 2008, upon Defendant's Motion for Judgment on the Pleadings (the "Motion") filed by defendant, Harvard Property Trust, LLC ("Harvard"), seeking dismissal of the Amended Complaint filed by plaintiff, Ocwen Orlando Holdings Corp. ("Ocwen").

Upon consideration of the Motion, the parties' memoranda, the arguments of counsel, and otherwise being fully advised in the premises, the Court finds and decides as follows:

Procedural Background to Ocwen's Amended Complaint

1. On February 13, 2008, Ocwen filed its Amended Complaint asserting claims against Harvard in two counts: anticipatory repudiation (Count I) and breach of contract (Count II).

2. On April 1, 2008, Harvard filed its Amended Answer and Affirmative Defenses to the Amended Complaint. On April 16, 2008, Ocwen filed its Reply. The pleadings are now closed.

3. On May 5, 2008, Harvard filed the Motion.

Motion for Judgment on the Pleadings

4. A motion for judgment on the pleadings under Rule 1.140(c), Florida Rules of Civil Procedure, is governed by the same test as a motion to dismiss for failure to state a cause of action. A judgment on the pleadings may be granted only if a party is entitled to judgment as a matter of law based on the content of the pleadings. The trial court's consideration is limited to only the pleadings. The trial court must consider all well pled material allegations and fair inferences to be true. Domres v. Perrigan, 760 So.2d 1028, 1029 (Fla. 5th DCA 2000); Rule 1.140(h)(2).

5. The pleadings include attached exhibits. Rule 1.130(b), Florida Rules of Civil Procedure ("Any exhibit attached to a pleading shall be considered a part thereof for all purposes"). If there is an inconsistency between the general

allegations of material facts in the complaint and the specific facts revealed by an attached exhibit, they have the effect of neutralizing each allegation against the other, thus rendering the pleading objectionable. Hillcrest Pacific Corporation v. Yamamura, 727 So.2d 1053, 1056 (Fla. 4th DCA 1999).

6. A judgment on the pleadings may be entered against the plaintiff if the complaint and exhibits thereto show that the moving party is entitled to judgment as a matter of law. Shay v. First Federal of Miami, Inc., 429 So.2d 64, 65 (Fla. 3d DCA 1983).

The Amended Complaint and Exhibits

7. Ocwen's Amended Complaint consists of two breach of contract counts. Count I alleges that Harvard breached a real estate purchase and sale agreement ("Purchase Agreement") by anticipatorily repudiating the Purchase Agreement. Alternatively, Count II alleges that Harvard breached the Purchase Agreement by cancelling it in an unreasonable manner. In each count, Ocwen seeks benefit of the bargain damages or, in the alternative, liquidated damages as provided by the Purchase Agreement. There are fifteen (15) exhibits attached to the Amended Complaint.

8. The relevant allegations of the Amended Complaint[1] and the relevant exhibits to the Amended Complaint are set forth below.

(a) On April 27, 2007, Ocwen and Harvard executed a written Purchase Agreement (Exhibit 1) by which Ocwen agreed to sell and Harvard agreed to purchase real property (the "Property") in Orange County, Florida (¶¶ 3, 20 - 26).

(b) Section 11.2 of the Purchase Agreement states:

> Within three (3) business days of the Effective Date, Seller will make available to Purchaser the documents relating to the Property described in Exhibit "11.2" attached hereto ("the "Due Diligence Documents"). Purchaser may copy the Due Diligence Documents (at Seller's expense if copied at Seller's offices or at Purchaser's expense if copied outside Seller's offices) at 12650 Ingenuity Drive, Orlando, Florida, or such other location in Orlando, Florida specified by Seller in written notice to Purchaser delivered on or before such date. **If Purchaser is dissatisfied, for any reason and in Purchaser's exclusive judgment, with the result of Purchaser's investigations, then Purchaser may cancel this Agreement by providing Seller with written notice of such cancellation on or before 5:00 p.m. on the date which is the thirtieth (30th) day after the Effective Date (the "Investigation Deadline"), in which case the Initial Deposit shall be returned to Purchaser and both parties shall be released from all further obligations under this Agreement except as otherwise provided in this Agreement.** The period commencing on the Effective Date and ending on the Investigation Deadline is referred to herein as the "Investigation Period." (Emphasis added.)

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[1] The symbol "¶" refers to paragraphs in the Amended Complaint. The term "Exhibit" refers to exhibits attached to the Amended Complaint.

(c) The Effective Date of the Purchase Agreement, and the beginning date for the thirty day Investigation Period, was April 27, 2007 (¶ 21). The Investigation Period ended on May 27, 2007 (the "Investigation Deadline")(¶81).

(d) In mid-May 2007, prior to expiration of the thirty (30) day Investigation Period, in verbal and electronic communications, Harvard advised Ocwen that the Harvard vice president who dealt with Ocwen's broker mistakenly believed that adjacent undeveloped land was included in the Purchase Agreement (¶¶ 29-32) (Exhibit 6).

(e) Also, in mid-May 2007, prior to expiration of the Investigation Period, Harvard representatives advised third persons performing due diligence services for Harvard that Harvard was not going to purchase the Property (¶¶ 33-36) (Exhibits 7 and 8).

(f) Beginning on May 17 and continuing until May 23, 2007, Harvard attempted to renegotiate the transaction (¶¶ 37-53). The parties exchanged offers during this time period but none of the offers were accepted (¶¶ 37-53) (Exhibits 9, 10, 11, and 12).

(g) On May 25, 2007, Harvard sent written notice, within the Investigation Period, canceling the Agreement pursuant to Section 11.2 and requesting a return of its deposit (¶ 54) (Exhibit 13).

(h) In early June, 2007, Ocwen sent a letter to Harvard's CEO stating that the Harvard vice president's mistaken belief that the transaction included the adjacent undeveloped land was inconsistent with the parties' negotiations and the Purchase Agreement. Ocwen further stated that Harvard's attempts to renegotiate the transaction were not acceptable and Harvard's conduct and subsequent cancellation of the Purchase Agreement constituted lack of good faith (¶¶ 55 and 56).

(i) Harvard's CEO responded to Ocwen's letter by sending a letter (¶ 57) (Exhibit 15). The CEO's letter denied bad faith conduct and stated that, at most, Harvard was only "guilty of being a party to a genuine misunderstanding regarding the inclusion of the undeveloped property within the contemplated transaction" (¶ 58, Exhibit 15). Harvard's CEO further quoted the cancellation provision of Section 11.2 of the Purchase Agreement and concluded that, based on Section 11.2, Harvard "timely terminated the Agreement and is entitled to a return of the Initial Deposit" (Exhibit 15).

9. Based on these allegations, in Count I, Ocwen contends that Harvard's statements to Ocwen, made in mid-May 2007, during the thirty day Investigation Period, constituted an anticipatory repudiation and total breach of the Purchase Agreement which

discharged Ocwen from any further performance under the Purchase Agreement (¶¶ 72, 73, and 74).

10. Based on these same allegations, in Count II, Ocwen further contends that Harvard did not have the right to cancel the Purchase Agreement "for any reason" and in its "exclusive judgment" and concludes that Harvard's timely cancellation of the Purchase Agreement was "objectively unreasonable" (¶¶ 81-90). Ocwen alleges that "Section 11.2 created an ambiguity, because an unqualified right to cancel (1) was contrary to controlling law, (2) conflicted with specific controlling provisions of the Purchase Agreement, and (3) disregarded limitations on Purchaser's right to cancel contained in Section 11.1 of the Purchase Agreement"(¶82).

CONCLUSIONS OF LAW

Based on its review of the Amended Complaint, including the relevant exhibits, and consideration of the applicable law, the Court makes the following Conclusions of Law.

Count II of the Amended Complaint

Disposition of the Motion requires the Court to first determine the validity and meaning of Section 11.2. These issues are raised by Count II of the Amended Complaint. Therefore, the Court makes the conclusions of law set forth below as to Count II.

11. Contrary to Ocwen's allegation in paragraph 82 of the Amended Complaint, Section 11.2 is not ambiguous. The plain, unambiguous language of Section 11.2 granted Harvard the right, in its "exclusive judgment", to cancel the Purchase Agreement for "any reason" during the Investigation Period by giving written notice of cancellation. Section 11.2 did not require Harvard to state a reason for cancellation in its written notice.

12. Harvard had a unilateral and unqualified right to cancel the contract "for any reason" without liability by providing written notice in a timely manner. Snow v. Ruden, McClosky, Smith, Schuster, 896 So.2d 787, 792 (Fla. 2d DCA 2005); Avatar Dev. Corp. v. De Pani Constr., 834 So.2d 873, 875 (Fla. 4th DCA 2002).

13. Harvard was free to cancel the Purchase Agreement for any reason and in its exclusive judgment. Terranova Corporation v. 1550 Biscayne Associates Corp., 847 So.2d 529, 532 (Fla. 3d DCA 2003). ("We construe this to mean that either party was free to cancel this agreement for good cause, bad cause, or no cause. Given this expressed right of termination for any reason, we conclude that the implied covenant of good faith which would otherwise attach to a contract has no applicability to this dispute.") Snow v. Ruden, McClosky, Smith, Schuster, 896 So.2d 787, 792 (Fla. 2d DCA 2005. (The implied covenant of good faith

exists in virtually all contracts but the covenant of good faith can not be used to create a breach of contract where no breach of an express provision of the occurs.)

14. Ocwen's allegations that Harvard's actual reason for canceling the Purchase Agreement (the Property did not include the adjacent undeveloped land) are irrelevant as a matter of law unless an express provision of the contract is violated. Avatar Dev. Corp. v. De Pani Constr., supra at 876 ("Avatar complied with the terms of Article 67 in the Master Contract when it terminated De Pani. Avatar's ulterior motive for De Pani's termination has no relevance as Article 67 of the Master Contract provided Avatar with the right to terminate De Pani at any time…. Florida law required nothing more of Avatar.")

15. When a termination provision is clear and unambiguous, the court must specifically enforce it according to its terms. Avatar Dev. Corp. v. De Pani Constr.,supra at 876.

16. Ocwen has admitted that Harvard gave timely written notice of cancellation - i.e., before May 27, 2007, and has attached a copy of the cancellation notice to the Amended Complaint as Exhibit 13. The notice (Exhibit 13) stated on its face that notice was being given pursuant to Section 11.2.

17. Harvard's May 25, 2007, notice of cancellation complied with Section 11.2 and was effective as a matter of law.

18. Moreover, because Section 11.2 expressly granted Harvard the unilateral and unqualified right to cancel the Purchase Agreement "for any reason in Purchaser's exclusive judgment" by giving timely written notice, Ocwen's allegation in Count II that Harvard's right to cancel must be measured by an "objective standard of reasonableness" fails as a matter of law. Terranova Corporation v. 1550 Biscayne Associates Corp. supra at 532 ("Given this expressed right of termination for any reason, we conclude that the implied covenant of good faith which would otherwise attach to a contract has no applicability to this dispute."); Snow v. Ruden, McClosky, Smith, Schuster,supra at 792; Avatar Dev. Corp. v. De Pani Constr.,supra at 876.

19. Because Section 11.2 expressly granted Harvard the unilateral and unqualified right to cancel the Purchase Agreement "for any reason" in Harvard's "exclusive judgment" by providing timely written notice, Ocwen's allegations in Count II that Harvard's right conflicted with "specific controlling provisions" (Section 9.1) of the Purchase Agreement fail as a matter of law.

20. Likewise, because Section 11.2 granted Harvard the unilateral and unqualified right to cancel the Purchase Agreement "for any reason" in Harvard's "exclusive judgment" by providing timely written notice, Ocwen's allegations in Count II that

Harvard's right was limited by the provisions of Section 11.1 of the Purchase Agreement fail as a matter of law.

21. Ocwen's allegations that Harvard's right was controlled by or limited by Sections 9.1 and 11.1 of the Purchase Agreement are not supported by any language in the Purchase Agreement. In fact, Section 11.1.5 of the contract states that the purchaser shall have the right to make reasonable investigations…with regard to: "any and all other aspects of the P**roperty** which Purchaser deems appropriate." This Court is not permitted to rewrite the Purchase Agreement by inserting such terms. Jenkins v. Eckerd Corp., 913 So.2d 43, 52 (Fla. 1st DCA 2005); Sterritt v. Baker, 333 So.2d 523, 524 (Fla. 1st DCA 1976). Insertion of such unstated terms in the Purchase Agreement would render the operative phrase "for any reason in Purchaser's exclusive language" meaningless. Leisure Unlimited, Inc., v. Department 56, Inc., 1996 WL 684406 (D. Conn. 1996).

22. For these reasons, Ocwen's claim for breach of contract in Count II fails to state a cause of action as a matter of law.

Count I of the Amended Complaint

Having determined the meaning of Section 11.2, the Court makes the following conclusions of law as to Count I.

23. In Count I, Ocwen alleges that Harvard anticipatorily repudiated the Purchase Agreement prior to Harvard's cancellation of the Purchase Agreement.

24. Because Section 11.2 granted Harvard the unilateral and unqualified right to cancel the Purchase Agreement "for any reason" in Harvard's "exclusive judgment" by providing written notice before the Investigation Deadline, Harvard's alleged statements, made prior to Harvard's timely written notice of cancellation, did not repudiate the Purchase Agreement. Instead, these statements were consistent with Harvard's right to subsequently cancel the Purchase Agreement. New York Life Insurance Co. v. Viglas, 56 S.Ct. 615, 616 (1936) ("Repudiation there was none as the term is known to the law. Petitioner did not disclaim the intention or the duty to shape its conduct in accordance with the provisions of the contract. Far from repudiating those provisions, it appealed to their authority and endeavored to apply them."); Rochdale Village, Inc. v. Public Service Employees Union, 605 F.2d 1290, 1297 (2nd Cir. 1979).

25. Ocwen's allegations and exhibits in Count I also show that Ocwen requested Harvard to provide an "official notice of termination" (¶40; Exhibit 9). These allegations and exhibits conflict with and contradict Ocwen's theory of anticipatory repudiation.

26. At the time of Harvard's alleged repudiatory statements, Harvard was not under a present duty to close the purchase transaction as the Investigation Period had not expired and Harvard still had the unqualified right to cancel the Purchase Agreement pursuant to Section 11.2.

27. Existence of a present duty to perform is a fundamental element of an action for anticipatory repudiation. Alvarez v. Rendon, 953 So.2d 702, 709 (Fla. 5th DCA 2007). Section 11.2 granted Harvard an absolute right to cancel the Purchase Agreement on or before May 27, 2007. Harvard did not have an obligation before May 27, 2007, to close the purchase transaction. See Devotion Associates, Ltd., v. Allen, 86 F.3d 1149, 1996 WL 265990 (4th Cir. 1996)(unpublished opinion). Therefore, Harvard's alleged statements did not constitute an anticipatory repudiation of the Purchase Agreement as a matter of law.

28. For these reasons, Ocwen's claim for anticipatory repudiation of the Purchase Agreement in Count I fails to state a cause of action as a matter of law.

IT IS HEREBY ORDERED AND ADJUDGED:

Defendant Harvard Property Trust's Motion for Judgment on the Pleadings is **GRANTED** and Plaintiff's Amended Complaint is **DISMISSED with prejudice.**

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this 23rd day of June, 2008.

/s/ Honorable Frederick J. Lauten,
Circuit Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 23rd, 2008, I electronically filed the foregoing Order Granting Defendant's Motion for Judgment on the Pleadings with the Clerk of the Court by using the Electronic Case Filing (EC) system which will send a notice of electronic filing to the following:

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