

**IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT INDEPENDENCE, MISSOURI**

SAMUEL K. LIPARI, et al.,)	
)	
Plaintiffs,)	
)	Case No: 0616-CV07421
vs.)	
)	Division 5
)	
GENERAL ELECTRIC COMPANY, et al.,)	
)	
Defendants)	

**SUGGESTION IN SUPPORT OF MOTION TO DISMISS
GENERAL ELECTRIC DEFENDANTS AFFIRMATIVE DEFENSES**

Comes now the petitioner, SAMUEL K. LIPARI appearing *pro se* and provides the following suggestion in support of the plaintiff's motion to dismiss GENERAL ELECTRIC COMPANY, GENERAL ELECTRIC CAPITAL BUSINESS ASSET FUNDING CORPORATION and GE TRANSPORTATION SYSTEM GLOBAL SIGNALING, L.L.C., (collectively the "GE defendants") assertions of affirmative defenses for failure to adequately state a defense at law.

I. THE PETITION SUFFICIENTLY PLEADS BREACH OF CONTRACT

The petition states a claim for breach of contract and damages resulting from the GE defendants' breach.

The petition meets the requirements of Rule 55.16 in that the plaintiff has asserted the performance of any conditions precedent and also provided reasons excusing the performance of any conditions precedent based on communications of the GE Defendants repudiating the contract.

Missouri Rule 55.16 Averments And Denial Of Conditions Precedent states:

“In pleading the performance or occurrence of conditions precedent, **it is sufficient to aver generally that all conditions precedent have been performed or have occurred.** A denial of performance or occurrence shall be made specifically and with particularity.” [Emphasis added]

II. THE GE DEFENDANTS ASSERT CONDITION PRECEDENT DEFENSES

In the GE Defendants’ initial reply to the petition, two affirmative defenses based on condition precedent were raised in a suggestion supporting a motion for dismissal of the plaintiff’s complaint. The GE Defendants asserted the plaintiff’s petition failed to allege that Medical Supply Chain, Inc. had obtained the approval of the City of Blue Springs for the use of the building as a corporate headquarters and had failed to obtain the approval of GE Capital for the mortgage to purchase the building.

The GE Defendants suggestion fails to meet the requirements under Missouri Rule 55.08 for stating an affirmative defense. Rule 55.08 Affirmative Defenses states:

“In pleading to a preceding pleading, a party shall set forth all applicable affirmative defenses and avoidances, including but not limited to accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, comparative fault, state of the art as provided by statute, seller in the stream of commerce as provided by statute, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, truth in defamation, waiver, and any other matter constituting an avoidance or affirmative defense. **A pleading that sets forth an affirmative defense or avoidance shall contain a short and plain statement of the facts showing that the pleader is entitled to the defense or avoidance.** When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court may treat the pleadings as if there had been a proper designation.” [Emphasis added]

III. THE GE DEFENDANTS ARE NOT ENTITLED TO MEDICAL SUPPLY’S CONDITIONS UPON FORMATION OF THE CONTRACT AS AFFIRMATIVE DEFENSES TO THE GE DEFENDANTS’ PERFORMANCE

The GE Defendants’ assertion of condition precedent affirmative defenses is an error at law. The complaint identifies the two conditions cited by the GE Defendants as

conditions to the formation of the contract authored by Medical Supply and communicated to the GE Defendants in the initial offer letter recited in the petition.

The petition avers the GE real estate manager accepted this offer on behalf of GE and its “business leaders.” The acceptance was in writing as an email also recited in the petition. No conditions preceding the GE Defendants’s performances are reserved in either the email or the accompanying voice mail message by the GE defendants’ agent, the GE corporate real estate manager. Instead the GE defendants clearly accepted the offer as written by Medical Supply and by doing so, the GE defendants promised to provide the mortgage. The GE defendants also accepted the condition of the City of Blue Springs approval as a protection of Medical Supply sought in the offer authored by Medical Supply.

In the clear and express language of the contract, Medical Supply Chain, Inc. negotiated for and obtained GENERAL ELECTRIC COMPANY’s commitment to finance the purchase through GE Capital or directly as GE Capital’s underwriter as part of the bargain MSCI sought.

“GE Capital or its underwriter would need to provide Medical Supply Chain, Inc. a twenty-year mortgage at 5.4% on the full purchase price of 6.4 million dollars, with a moratorium on the first full year of mortgage payments. The City of Blue Springs would be paid the balance of lease payments for the land (\$800,000.00) or in the alternative, the mortgage will include an escrow account to complete the lease and purchase of the land on its original terms. GE Capital can provide or designate the closing agent and would be required to provide 5.4 million dollars to Cherokee South, L.L.C. and your division’s check for the remainder of the lease payable to Medical Supply Chain, Inc. along with a bill of sale for the buildings furniture and equipment. This closing would need to be completed by June 15th, 2003.”

GE’s corporate real estate manager George Fricke as quoted in the petition clearly accepted this bargain on behalf of the GE defendants:

“I spoke to the business leaders and we will accept that transaction ah... let’s start the paper work ah... if you want to do some drafting of lease termination or if you would like us to do that, give me a holler 203-431-4452.”

In return for GE’s commitment to fund the purchase with a mortgage and to pay \$800,000.00 to the City of Blue Springs, Medical Supply Chain, Inc. promised to release GE Transportation from a ten year lease commitment of 5.4 million dollars, a deep discount that would otherwise have no rational explanation.

The duty to provide the mortgage financing was clearly General Electric’s duty under the terms of the contract, not Medical Supply’s. “[n]on-occurrence of a condition is not a breach by a party unless he is under a duty that the condition occur.” *Highland Inns Corp. v. American Landmark Corp.*, 650 S.W.2d 667 at 673 (Mo.App.1983).

The condition precedent of approval by the City of Blue Springs is clearly in favor of Medical Supply Chain, Inc. and for the protection of Medical Supply Chain, Inc. from purchasing a building for the intended use as a corporate headquarters for its hospital supply business. No protection is afforded the GE Defendants by the condition precedent. Therefore, the GE defendants cannot be excused from their duties under the contract by the failure of a party to obtain approval:

“A condition precedent is an act or event that must be performed or occur, after the contract has been entered into, before the contract becomes effective. In Missouri, it is well-settled law that a party to a real estate contract may waive any condition in that party's favor. *Fleischer v. McCarver*, 691 S.W.2d 930, 933 (Mo.App.E.D. 1985). **A party to a real estate contract may waive the occurrence of a condition precedent and enforce the other party's duty to perform if the condition was included in the contract for the sole benefit and protection of the party waiving it.** *Id.* (emphasis added). Whether a condition precedent is for the benefit of the buyer, or the seller, or both, must be determined under the facts and circumstances of each case and by the language of the contract entered into between the parties. *Id.* The test is whether the condition was intended by both parties to be included in the contract for the benefit of both parties, not whether the condition was in fact of a benefit to both parties. *Id.* If a condition is waived the

parties are subsequently bound to perform their duties under the contract. *Howard v. Youngman*, 81 S.W.3d 101, 111 (Mo.App.E.D. 2002).” [Emphasis added]

Pelligreen v. Wood, 111 S.W.3d 446 at pg. 30 of decision (Mo. App., 2003). As shown in *Pelligren* above, had the favored party been disputed, it would be an issue to be resolved by the finder of fact and ineligible for dismissal.

As a condition protecting MSCI with no effect on the GE defendant sellers, MSCI and now its successor the petitioner is entitled to waive this condition and enforce the contract against the GE defendants:

“Since this provision of the contract favoring the Buyers did not waive or affect the rights of Sellers, it was within Buyers' rights to waive. *Campbell v. Richards*, supra, at 505, *Koedding v. Slaughter*, 634 F.2d 1095, 1097 (8th Cir.1980).”

McDermott v. Burpo, 663 S.W.2d 256 at 261 (Mo. App.W.D., 1983).

CONCLUSION

The GE Defendants are not entitled to affirmative defenses based on conditions created by Medical Supply to protect Medical Supply from buying a building the City of Blue Springs might have prevented from being used as a corporate headquarters under *McDermott v. Burpo*, 663 S.W.2d 256 at 261 (Mo. App.W.D., 1983). The GE Defendants are also not entitled to affirmative defenses based on failure to perform the GE accepted duty of providing the mortgage under *Fleischer v. McCarver*, 691 S.W.2d 930, 933 (Mo.App.E.D. 1985). Whereas the GE Defendants have failed to assert valid defenses, the plaintiff respectfully requests the court dismiss the GE Defendants assertion of defenses based on condition precedent.

Respectfully Submitted,

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Pro se

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing instrument was forwarded this 14th day of June, 2006, by first class mail postage prepaid to:

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