IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

ANTHONY SAVARINO, *et al.*	)	**CASE NO: CV-09-691347**
	)	
Plaintiffs	)	**JUDGE JOHN P. O'DONNELL**
	)	
vs.	)	
	)	
SUNCARE I, LTD, *et al.*	)	**JOURNAL ENTRY**
	)	
Defendants	)	

John P. O'Donnell, J.:

The plaintiffs filed this lawsuit alleging a breach by the defendant[1] of a contract to purchase real estate.[2] The parties waived a jury trial and a bench trial was held on November 24, 2009. All three plaintiffs testified at trial, as did Kirt Frye, the owner of Sunnyside Toyota. North Olmsted planning commission director Kim Wenger was not available to testify at trial but the parties stipulated to certain facts about which she would have testified. Joint exhibits 1, 2, 5-16, 25-28, 29.1, 30, 31, 37, and 41-47 were admitted and this journal entry follows.

Mary[3] and Anthony Savarino have owned the property at 4877 Dover Center Road, North Olmsted, since 1973. For most of the years since then, the two-unit commercial building there housed a barber shop run by Anthony Savarino and a seamstress service operated by Mary Savarino. In 1997, the seamstress business was sold to Ruth White, who continued to occupy the premises on a month-to-month oral lease. Anthony Savarino retired as a barber in 2002 and sold

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[1] Defendant Sunnyside Automotive IV, LLC was dismissed prior to trial. By agreement of the parties, the identity of the defendant sued as "Suncare I, Ltd." was amended to "Suncare, Ltd." prior to trial.
[2] Plaintiff Frank Savarino alleges the defendant breached a contract to pay him $7,500 to relocate his barber shop from the property that is the subject of the real estate purchase agreement.
[3] This plaintiff is named in the second amended complaint as "Mary Savarino" but is identified in the purchase agreement, joint exhibit 2, as "Maria Savarino a/k/a Mary Savarino."

the business to his son Frank, who leased his portion of the premises under a written lease for $1,000.00 per month. That lease was set to expire in December, 2010.

The Savarinos' property is adjacent to the northwest portion of property occupied by the Sunnyside Toyota auto dealership. Sunnyside was under directions from its franchisor, the Toyota Motor Corporation, to expand its property to provide additional parking spaces for inventory and employees. In 2007, Kirt Frye, Sunnyside's owner, approached the Savarinos in hopes of purchasing their property. Negotiations were unsuccessful and no agreement was reached.

In September, 2008, Frye approached the Savarinos again. This time, the parties reached an agreement to sell the property to Suncare, Ltd.[4] for $437,500.

After the Savarinos and Suncare orally agreed on a purchase price, each side to the transaction retained lawyers to finalize a written contract covering all aspects of the sale. The contract included, among others, the following terms:

PURCHASE AGREEMENT

> THIS AGREEMENT is made this _____ day of September, 2008 (the "Effective Date") by and between **ANTHONY and MARIA SAVARINO a/k/a MARY SAVARINO**, husband and wife (hereinafter collectively referred to as "Seller"), and **SUNCARE I, LTD.** An Ohio limited liability company (hereinafter referred to as "Buyer").
>
> **WITNESSETH:**
>
> 1. Property. Seller hereby agrees to sell and convey to Buyer, and Buyer agrees to purchase from Seller certain real property, . . . owned by Seller located on Dover Center Road in North Olmsted, Ohio, . . .
>
> ***
>
> 3. Closing Date. Closing shall occur on a date which is not later than December 31, 2008 ("Closing Date"), or such earlier date as the parties may agree upon, time being of the essence.

[4] A corporation established for the purpose of holding real estate used by the Sunnyside auto group.

4. Inspection Period. Buyer shall have seventy five (75) days after the Effective Date ("Inspection Period") within which to (i) conduct all necessary due diligence and investigations of the property, including, without limitation, title examinations and environmental audits, and (ii) obtain the necessary approvals from the City of North Olmsted ("City") regarding Buyer's intended use of the Property. Seller agrees to cooperate with Buyer in obtaining such approvals from the City, including attending City meetings if requested by Buyer. The Inspection Period shall be automatically extended for such time as is necessary to obtain final City approval or rejection of Buyer's intended use of the Property. If for any reason Buyer deems the Property to be unsuitable for its needs, Buyer shall so notify Seller in writing within the Inspection Period, in which event this Agreement shall terminate and the Earnest Money shall be returned to Buyer. In the event that Buyer does not provide such written notice of termination of this Agreement to Seller prior to the expiration of the Inspection Period (unless automatically extended as set forth above), Buyer shall be deemed to have waived its right to terminate this Agreement. . .

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8. Possession Date/Leases. Seller shall vacate the Property and deliver possession of the Property to Buyer on the Closing Date. Seller and Buyer acknowledge that there are two (2) current tenants of the Property; namely: (i) Frank Savarino (son of Seller) and Ruth White, d/b/a Ruth's Alterations, a month-to-month tenant ("White"). On the Closing Date, Buyer and Frank Savarino shall enter into an amended and restated lease agreement, the form of which is attached hereto as **Exhibit "B"** (the "Lease") under the terms of which Frank Savarino shall pay to Buyer the sum of $800 per month for a period of time commencing on the Closing Date and terminating on March 31, 2009, or such earlier date as Frank Savarino may vacate the Property. Rent shall be prorated accordingly if the Closing Date or early termination date does not occur on the first day or last day of the applicable month, respectively. The Lease shall also provide that Buyer shall pay the sum of Seven Thousand Five Hundred Dollars ($7,500) to Frank Savarino at the end of the term for relocation expense. Seller agrees (with the cooperation of Buyer) to issue such notices to White as are required by law in order to terminate her month-to-month tenancy and cause her to vacate the Property prior to the Closing Date, however Seller shall have no obligation to send White any notices of termination of her tenancy until Buyer has received all necessary approvals from the City as to Buyer's intended use of the Property.

9. Conditions to Buyer's Performance. The obligations of Buyer hereunder are subject to the following conditions, . . .

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(c) Buyer and Frank Savarino shall have entered into the Lease;

(d) The tenancy of White shall have been terminated, and she shall have vacated the Property; and

(e) Buyer shall have received all necessary approvals from the City as to Buyer's intended use of the Property.

If all of the conditions set forth above shall not have been satisfied by the date set forth for satisfaction of such conditions, the Buyer shall have the right to terminate this Agreement by written notice to Seller and the Title Company, in which case the Title Company shall return the Earnest Money to Buyer and the parties shall be released from any further obligations hereunder, except those obligations which expressly survive termination of this Agreement.

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18. Entire Agreement. This Agreement shall be deemed to contain all of the terms and conditions agreed upon, it being understood that there are no outside representations or oral agreements.

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25. Remedies.

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(b) If, prior to Closing, Buyer breaches any of its . . . obligations and provided such breach has not been cured within three (3) days after written notice thereof, then Seller may declare this Agreement terminated, in which event Buyer shall pay all title and escrow charges incurred, the Title Company shall pay the Earnest Money to Seller, said sum being deemed liquidated damages and thereafter the parties shall be released from all obligations hereunder.

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The signed contract introduced into evidence at trial as exhibit 2 is not dated. However, the evidence shows that the contract was executed no earlier than September 5 and no later than September 18, with September 18 being the most likely date that it was fully executed. The

court therefore finds that September 18, 2008, is the "Effective Date" as that term is used in the contract and that the 75-day inspection period expired on December 2, 2008.

After the contract was signed, the defendant began to prepare a construction plan and to communicate with some of the municipal authorities who would be involved in approving or rejecting its plan. Frye testified that, based upon his past experience in dealing with city officials on a redevelopment project, a 75-day inspection period was a "tight timetable."

Suncare retained Pruitt Construction to prepare an initial site plan and budget. The first site plan would have created 105 parking spaces (of the 200 additional spaces that Sunnyside was under instructions by Toyota to create) and had a budget of $100,000.00. The budget included demolition of the existing building, creation and paving of the parking lot, landscaping, and related features.

Suncare then began discussions with some of the "important" members of the various commissions and boards that would be involved in approving its plan.

The initial site plan was sent to the city around November 6 in preparation for a "pre-submission conference" scheduled for November 24. Frye testified that the city raised several objections to that plan, including the need for more and different landscaping, a greater setback from the street and adjoining properties, and fewer parking spaces for inventory.

Frye testified that he became concerned about this "pushback" from the city and, therefore, telephoned Anthony Savarino and informed him that "there's a long way to go" before the sale would be finalized.

A revised site plan addressing some of the city's concerns was sent on November 11. The pre-submission conference on November 24 resulted in additional objections from the city, according to Frye, including: the need for an expensive revision of Suncare's lighting plan; the

inclusion of more expensive landscaping; a greater setback on each side of the property, resulting in less space for parking; a landscaping sprinkler system that would have to originate far away at the Sunnyside dealership; the need for a wider aisle in the parking lot, resulting in fewer parking spaces; the likelihood that trucks would be prohibited from leaving the new parking lot onto Dover Center Road; the likelihood that cars would be prohibited from turning left from southbound Dover Center Road into the parking lot; the need for a posted guard to oversee the parking lot; and the re-engineering of Suncare's proposed water retention plan.

Frye conceded that city officials, including the planning commission director Wenger, did not object to the proposed use as a parking lot. He also agreed that the pre-submission conference with Wenger and others was only preliminary in nature and did not result in final rejection or approval of any plan. The defendant further agreed that the full planning commission has discretion to accept or decline Wenger's recommendations.

Frye also testified that after the pre-submission conference he again communicated with Anthony Savarino by telephone to inform him that the approval process was not going as expected. The plaintiffs deny that any such call was ever made.

Based upon the city's observations at the pre-submission conference, the defendant asked its contractor to prepare a revised site plan and budget. In the meantime, by letter dated December 2, 2008, Suncare's counsel advised the Savarinos' counsel of the city's objections to the initial site plan. Because of that, Suncare's counsel advised that "the closing date for the referenced transaction will not be able to occur until February or March of next year." The letter went on to say:

> In addition to the timing factor, however, Sunnyside is working with its engineers to determine the additional costs for all of the unanticipated burdens imposed by the City, as well as how these matters may affect the intended use of the property.

> As far as where we stand from a transactional perspective, including the restructuring we propose, since the automatic extension of the inspection period has come into play under the existing purchase agreement, I suggest that we both have further discussions with our respective clients and update each other as soon as possible as to where we stand. Hopefully, we can ultimately move forward as planned.

The evidence at trial is that the letter was sent by regular mail on December 2 and that a courtesy copy was sent by e-mail to the Savarinos' counsel on December 3.

A week later, Suncare's contractor submitted a proposed budget of $239,000.00 based on a site plan that incorporated the planning commission director's proposed changes. Frye concluded that the project was now too expensive and that the property was, therefore, unsuitable for Suncare's needs. Hence, by letter dated December 17 from Suncare's counsel to the Savarinos' counsel, Suncare terminated the purchase agreement.

Mary and Anthony Savarino then filed this lawsuit alleging a breach of the contract. As a remedy, the Savarinos have demanded specific performance or, in the alternative, $41,520.00 in damages plus attorney's fees based upon bad faith. Frank Savarino is also a plaintiff. He has alleged that he is entitled to $7,500.00 in moving expenses.

Resolution of this case depends on the parties' intent in including an "automatic extension" of the inspection period in Section 4 of the contract. If that provision requires notice by Suncare within the initial 75-day inspection period that it is invoking the extension, then the extension was not properly triggered because notice was not given until after the 75-day period had expired, thereby binding Suncare to the contract. However, if the extension is "automatic" in the absence of "the necessary approvals from the City of North Olmsted" by the end of the 75-day inspection period, then the inspection period was properly extended and the defendant still had discretion on December 17 to terminate the contract.

The intent of the parties to a contract is presumed to reside in the language they chose to employ in the agreement.[5] In the contract at issue, the intent of the parties to extend the 75-day inspection period without notice is clear. The contract refers to the inspection period being "automatically extended" for final city approval or rejection of Suncare's proposed use of the property. "Automatic" refers, as an adjective, to the quality of being self-activated. In this case, the extension happens without the need for action by Suncare if the city hasn't made a final decision by the end of the 75 days. The extension was triggered – automatically, *i.e.* without notice by the defendant invoking it – when the inspection period ended and there was no final decision by the city. If the parties had intended that the defendant could only extend the inspection period by notice to the plaintiffs they would not have agreed that the period could be "automatically extended." Instead, they presumably would have reflected that intent by avoiding the term "automatically" and explicitly requiring notice to extend the inspection period.

Once the inspection period is extended, the terms of the contract do not require the defendant to proceed to a final decision by the city. Instead, the discretion the defendant has during the first 75 days to terminate "if for any reason Buyer deems the property to be unsuitable for its needs" remains in place if the inspection period is extended beyond 75 days. That discretion was exercised when, on December 17, the defendant, having found the property "unsuitable for its needs," notified the plaintiffs that the agreement was terminated.[6]

The court, therefore, finds in favor of the defendant on the plaintiffs' breach of contract claim.

The plaintiffs' claim for bad faith is also without merit. The plaintiffs allege that the defendant entered the contract in bad faith by submitting applications to the city that included a

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[5] *Kelly v. Medical Life Ins. Co.* (1987), 31 Ohio St. 3d 130, syllabus 1.

[6] Since the termination notice was made before the closing date of December 31, the plaintiffs' argument that the defendant never extended the closing date in writing is moot.

site plan not in accordance with city code requirements and by never informing the plaintiffs that the "intended use of the subject property would require site modifications inconsistent with city code."[7] Yet all parties agree that the intended use of the property as a parking lot was not generally opposed by the city. It was only some of the details of the original site plan that were unacceptable to the city, and there is no evidence in the case to support a finding that the defendant purposely submitted a non-conforming site plan so that it could back out of the purchase agreement.

The bad faith claim[8] essentially requires a finder of fact to conclude that Suncare never intended to go through with the purchase of the property, even before the contract was signed. That conclusion is at odds with Suncare's conduct after the purchase agreement was negotiated, including retaining a contractor, preparing a site plan, entering into discussions with appropriate municipal officials, revising the site plan based upon those discussions, having a further meeting with municipal officials resulting in further consideration of possible changes to the site plan, and regular correspondence through counsel to keep the plaintiffs informed of the status of plan approval. The plaintiffs point to Kirt Frye's knowledge that a 75-day inspection period was likely to be unrealistic as evidence supporting their contention that Suncare never anticipated closing the deal. However, the optimistic nature of that inspection period was implicitly recognized by both parties when they agreed to the automatic extension of the inspection period.

The court therefore finds in favor of the defendant on the plaintiffs' claim of lack of good faith.

The third claim in the second amended complaint is Frank Savarino's. He alleges a breach of the contract to pay him relocation expense of $7,500. The contract calling for that

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[7] See second amended complaint at paragraphs 33 and 34.
[8] The bad faith claim is really a fraudulent inducement claim. For a discussion of the differences, see *Metro Life Ins. Co. v. Triskett Illinois, Inc.* (1994), 97 Ohio App. 3d 228, at 235 and 238.

payment is a lease between Frank Savarino and Suncare that was signed at the same time as the real estate purchase contract and entered into evidence as exhibit 16. There is no doubt that when Frank Savarino signed this lease he was aware that the property was not Suncare's to rent. Because he also signed the real estate purchase agreement, there is no doubt that Frank Savarino knew that Suncare could unilaterally terminate the purchase agreement during the inspection period. As a result, the court finds that the parties intended that the lease be enforceable only in the event that Suncare became the owner of the property and that Suncare would have no obligation under the lease if it exercised its right to terminate the purchase agreement. Therefore, the court finds that once Suncare terminated within the inspection period the lease was inoperative and neither party ever had any rights or obligations under the lease.

For all of these reasons, judgment is hereby entered on the second amended complaint in favor of the defendant Suncare Ltd. and against the plaintiffs, at the plaintiffs' costs.

IT IS SO ORDERED:

Date: ____________________ ____________________________
JUDGE JOHN P. O'DONNELL

SERVICE

A copy of this Journal Entry was sent by regular U.S. mail, this ______ day of December, 2009, to the following:

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