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SUPREME COURT

COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 2014-SC-000512-D

AEP INDUSTRIES, INC. APPELLANT

v.

B.G. PROPERTIES, INC. APPELLEE

BRIEF ON BEHALF OF APPELLEE, B.G. PROPERTIES, INC.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of this brief was this 9th day of September, 2015 served by first class U.S. mail, postage prepaid, on the following: Hon. Steve Wilson, Judge, Warren Circuit Court, Div. I, 1101 Center Street, Suite 404, Bowling Green, Kentucky, 42101; Mr. Samuel Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40602; Mr. Glenn A. Cohen, Seiller Waterman LLC, 462 S. Fourth Street, 22nd Floor, Louisville, Kentucky 40202; Mr. Paul Hershberg, Gray & White, 713 E. Market Street, Second Floor, Louisville, Kentucky 40202; and Mr. Jason Conti, Honigman, Miller, Schwartz and Cohn LLP, 2290 First National Building, Detroit, Michigan 48226.

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COUNTERSTATEMENT OF THE CASE

I.

BACKGROUND FACTS.

A. The Creation of the Relationship Between B.G. Properties, Inc. and AEP Industries, Inc.

Cello Bag Co., Inc. (hereinafter "Cello"), a company that operated an extrusion and flexible plastic packaging manufacturing business in Renton, Washington, decided to move its operations to Bowling Green, Kentucky. (R., p. 1269, ¶¶ 6-9). Cello's shareholders formed the Appellee B.G. Properties, Inc. (hereinafter "BGP") to obtain real estate, construct a special purpose facility to be used by Cello, and lease the facility to Cello. The acquisition of the real estate and construction of the manufacturing facility was financed in part through the Bowling Green-Warren County Industrial Foundation (hereinafter the "Foundation"). The land and improvements are hereinafter referred to as the "Premises." The Premises contained many unusual "special features and fixtures," discussed below, that made and continue to make the Premises particularly suited for use as an extrusion and flexible plastic packaging plant.

BGP leased the Premises from the Foundation and sub-leased them to Cello in 1991. A series of assignments and assumptions of the Sub-lease, not necessary to describe in detail, resulted in AEP Industries, Inc. (hereinafter "AEP"), assuming the Sub-lease under the same terms and conditions as Cello – AEP was thus required to comply with the terms of the original Lease from the Foundation to BGP and the Sub-lease from BGP to Cello. AEP and all interim Sub-lessees in privity with Cello have used the Premises solely for the same type of business: extrusion and manufacture of flexible plastic packaging.

B. The Sub-lease.

Of particular importance to the present litigation is a provision in the 1991 Sub-lease between BGP and Cello that requires the sub-lessee to maintain and repair the structural portion of the Premises, specifically including the roof, so as to keep the Premises in their original condition, *reasonable wear and tear included*, stating in relevant part:

> (a) Maintenance. Lessee covenants and agrees to keep and maintain the roof, parking lot and other exterior portions of the Premises and to make any additional structural repairs to the interior of the Leased Premises except due to damage arising by acts of the Lessor or those claiming under or through Lessor, but including repairs required by reasonable wear and tear. (Emphasis added).

R., p. 56.

This is an unusual provision – most leases except reasonable wear and tear from the maintenance duties of the lessee. Thus, all subsequent assignees of the Sub-lease, including AEP, assumed the obligation to keep the structural portion of the Premises, including the roof, in their original condition.

In a 2001 assumption of the Sub-lease by Mercury Plastics, Inc. (hereinafter "Mercury"), BGP granted Mercury an option to purchase the Premises at the end of the lease. (R., p. 76). AEP assumed Mercury's Sub-lease by virtue of an "Assignment and Assumption of Sublease" dated February 10, 2006. (R., p. 87). AEP thus became the holder of the option to purchase the Premises and bound itself to comply with the provisions of the Sub-lease from BGP to Cello requiring that the roof of the Premises be maintained in its original condition.

At the expiration of the sub-lease AEP had three options: allow the lease to expire and vacate the Premises; purchase the Premises; or renew the lease for five more years.

C. The Agreement Between BGP and AEP.

On September 21, 2010, BGP and AEP entered into an agreement entitled "Agreement Modifying Sublease and Option" (hereinafter the "Agreement"). (R., p. 89). This document notified BGP that AEP intended to exercise its option to purchase the Premises at the end of the then current lease term and obligated AEP to purchase the Premises subject only to an inspection period, which has expired. At the core of the instant case is the provision of the Agreement defining the purchase price. Regarding the definition of the purchase price, paragraph 4 of the Agreement provides as follows:

> The purchase price for the Premises shall be its fair market value based on its highest and best use, *plus* the value of all special features and fixtures located therein *for AEP's use* as an extrusion and flexible packaging manufacturing facility. (Emphasis added).

R., p. 92.

Thus, the purchase price as defined in the Agreement is not simply the "fair market value" of the property using the ordinary meaning of that term, *i.e.*, a willing buyer and seller, neither acting under compulsion. Rather, the fair market value of the Premises was merely the *starting point* in determining the purchase price. Under the Sublease and the Agreement, the purchase price was to include the following elements: (1) the fair market value of the Premises located in Bowling Green based on its highest and best use (2) in its original condition (3) to be *augmented* by the value of all special features and fixtures that make the Premises an "up and running" extrusion and plastic packaging plant, (4) and further *augmented* by the unique value to AEP of retaining uninterrupted possession of the Premises upon exercising its option to purchase. Augmentation element (4) requires that value be assigned to the benefit, unique to AEP, of exercising its option. The Premises are uniquely suited to AEP's needs as a manufacturer utilizing fragile, toxic, and regulated chemical materials. By exercising its option,

AEP avoided suffering loss of business during relocation as well as the expense of moving, repairing the Premises, and modifying a new facility by installing the "special features and fixtures" located on the Premises. These four elements (hereinafter the "Price Elements") are *all* to be considered in determining the purchase price according to the Agreement.

The Agreement not only specifies the Price Elements, it provides a methodology for determining the purchase price, described as follows. First, the parties would attempt to negotiate the purchase price. If negotiations proved unsuccessful, BGP was to obtain an appraisal. If AEP disagreed with the appraisal obtained by BGP, it would obtain its own appraisal. If BGP disagreed with the appraisal obtained by AEP, a third appraiser would be chosen by BGP's appraiser and AEP's appraiser; the third appraisal was to be final and binding on the parties according to paragraph 2 of the option to purchase that was granted to Mercury and later assigned to AEP. (R., p. 79). All three appraisers were tasked with determining the purchase price taking into account *all* Price Elements. (See R. p. 92). The appraisers were not to render an appraisal merely of the value of an "as is" vacant building located anywhere within the region to a "hypothetical" willing buyer and willing seller with no consideration being given to the special features and fixtures that made the Premises particularly suited to AEP's use. The Agreement also expressly provides that all appraisals be made in accordance with the Uniform Standards of Professional Appraisal Practice (hereinafter "USPAP").

Another feature of the Agreement that is important to the issues in the instant case is the requirement that rent be paid by AEP through the very day of closing. The Agreement provides at paragraph 8, in relevant part:

> In order to facilitate the extension of time for closing…the term of the Sublease BG and AEP agree that the term of the Sublease is hereby extended from the current Sublease Expiration Date (i.e. August 31, 2011) <u>to and including the Closing Date upon the same terms and conditions as such Sublease presently</u>

exists, including the rental payable which is the sum of $58,283.92 per month… (Underlined emphasis added).

R., p. 235.

D. AEP's Breach of the Agreement.

Purchase price negotiations failed in 2011. BGP thereafter timely obtained an appraisal of the Premises by Harold Brantley (hereinafter "Brantley"); Brantley's appraisal was submitted to AEP on December 30, 2011. Brantley is a well-known and respected Bowling Green real estate appraiser; he valued the Premises at $7,500,000. (R., p. 167). AEP rejected Brantley's appraisal without giving any reason for doing so and obtained its own appraisal by CBRE, Inc. (hereinafter "CBRE") dated January 9, 2012, which placed the value of the Premises at $3,550,000 after deducting $641,000 as a "deferred maintenance" credit due to the poor condition of the roof, on the premise that AEP would need to repair or replace the roof after purchase. (R., pp. 148-150). This "deferred maintenance" credit becomes significant in the following discussion.

CBRE's appraisal did not include all of the Price Elements and was otherwise non-compliant with the Agreement for the following reasons. First, CBRE appraised the wrong estate. Brantley's appraisal had appraised the leased fee interest held by BGP. CBRE, however, appraised a fee simple interest in the Premises in their "as is" condition as if the Premises consisted of a vacant general purpose building and the transaction were between an unrelated willing buyer and willing seller. There was no reference to or attempt to assign value to augmenting Price Elements (3) and (4). CBRE did not attempt to assign *any* value to the special features and fixtures of the Premises (Price Element 3) nor to the benefit to AEP of purchasing the Premises that were already specially equipped for the operation of its business and on which is was already conducting its business (Price Element 4). CBRE merely appraised the fair

market value of the Premises in their "as is" condition according to the ordinary, hypothetical "willing buyer, willing seller" scenario which, as pointed out above, was merely the *starting point* for determining the purchase price. Finally, CBRE's appraisal is fatally flawed because it reduced the value of the Premises by $641,000, representing a "deferred maintenance" credit due to the condition of the roof, a clearly inappropriate deduction since AEP was required by the Sub-lease to maintain the structural components, expressly including the roof of the Premises, in their original condition, including ordinary wear and tear.

On receipt of the CBRE appraisal BGP immediately advised AEP that it was in breach of both the Sublease's requirement that the roof be maintained "... including repairs required by reasonable wear and tear ..." and its duty to obtain an appraisal consistent with the terms of the Agreement that included all of the Price Elements required by the Agreement. BGP demanded that AEP cure both breaches immediately. (R., pp. 361-365). AEP did not attempt to cure its defaults. Instead, AEP commenced this declaratory judgment action seeking an order requiring BGP to instruct its appraiser, Brantley, to participate with CBRE in selecting a third appraiser.

Thus, when AEP Filed its Complaint on August 12, 2012, it was in continuing default of the Agreement and had made no attempt to cure its defaults. AEP has never contended that CBRE's appraisal complied with the requirements of the Agreement by including all of the Price Elements and has never submitted any proof by way of either affidavit or testimony to that effect.

II. THE PROCEEDINGS IN THE TRIAL COURT.

A. AEP's Lawsuit and BGP's Counterclaim.

AEP's April 12, 2012, Complaint (R., p. 1) sought an order requiring that BGP instruct Brantley to forthwith participate with CBRE in selecting a third appraiser to determine the purchase price of the Premises.

BGP filed an Answer and Counterclaim (R., p. 104) asserting: (1) AEP was in continuing breach of the Agreement, (2) CBRE's appraisal failed to include the value of all of the Price Elements specified in the Agreement, (3) the deduction of $641,000 from the appraised value of the facility due to the poor condition of the roof was in violation of the Agreement and the Sub-lease, and (4) AEP was in continuing breach of its obligation of good faith and fair dealing. (R., p. 104).

B. The Trial Court Requires a Third Appraiser.

After the pleadings had been completed, the trial Court by order entered September 12, 2012, granted AEP's motion by rendering an interlocutory summary judgment directing that the parties agree on a third appraiser. (R., p. 630). It should be noted that BGP agreed to this order only as to its form, not its substance, lest the argument be made that BGP agreed to the appointment of a third appraiser. The trial Court's order required that the parties select a third appraiser and in specifying the property to be appraised the Court recited, verbatim, part of the Price Elements of the Agreement by tracking the language of the Agreement as to the definition of the purchase price of the Premises, stating that the appraisal should determine the "... fair market value based on its highest and best use, plus the value of special features and fixtures located therein for AEP's use as an extrusion and flexible plastic packaging manufacturing facility." Thus, the trial Court's interlocutory judgment required that the third appraisal include Price Elements 3 and 4. The trial Court also directed that the appraisal be conducted in accordance with USPAP. The trial Court did not provide any construction or interpretation of the contractual language defining the Price Elements despite BGP's request that the trial Court do so. (R., p. 448).

The parties, in compliance with the trial Court's order, selected G. Herbert Pritchett ("Pritchett) to conduct the third appraisal. AEP is incorrect in stating BGP insisted that Pritchett be selected as the third appraiser and AEP acquiesced as a demonstration of good faith; rather BGP simply suggested Pritchett and AEP agreed. There is no proof in the record to support AEP's statement that BGP insisted on Pritchett as the appraiser. AEP's description of events surrounding Pritchett's visit to the property accompanied by counsel is not supported by any proof in the record and should, therefore, be ignored by the Court.

Pritchett submitted an Appraisal Report dated September 30, 2012, (R., p. 672) opining that the value of the Premises was $3,834,000.

C. AEP's Motion for Summary Judgment.

After Pritchett's appraisal was submitted, AEP filed a motion for partial summary judgment (R., p. 662), asking that (1) the Court compel BGP to sell the Premises to AEP at the price stated by Pritchett and (2) that AEP be allowed a "rent credit" against the purchase price equal to the amount of rent it had paid between June 1, 2012, and the closing date to be established by the trial Court's judgment. Actual closing eventually occurred on December 31, 2012.

D. The Erroneous Nature of Pritchett's Appraisal.

BGP, believing Pritchett's appraisal did not comply with the Court's order entered September 12, 2012, or the Agreement, took his deposition before responding to AEP's motion for summary judgment. Contrary to AEP's statement in its brief that Pritchett complied with the trial Court's order in appraising the property, Pritchett testified that, he *did not include all fixtures and equipment* in his appraisal and *did not include the full value of some of the included items*, stating:

Q. I saw that. Okay. I want to ask you to turn over to page 2 of the letter and it says here, the value of opinions do not include the value of any furniture or any furniture, fixtures or equipment, is that accurate, sir?

A. Yes.

Q. So it would be accurate to say that in your appraisal you did not include the value of any fixtures?

A. Correct.

Depo., Pritchett, p. 11.

***

Q. Information was provided to you this facility was specifically constructed for a manufacturing and printing of flexible packaging; is that accurate?

A. I believe that's accurate, yes.

Q. And that there were fixtures and special features which you have appraised that were added to the facility specifically to accommodate that process?

A. Yes.

Q. Other than what you have indicated on page 33 and 34 of your appraisal did you try to value any of the other – any of those fixtures or special features that add value to this facility for use as a flexible packaging facility?

A. Over and above those that would normally be in the manufacturing real estate, no.

Q. What do you mean by normally find?

A.. I wanted to make sure – I wanted to make sure that I included things – well, for instance, I included the first 29 feet of high bay area in the normal real estate related items, I included a portion of the cost of the solvent room and the real estate related items in the preceding pages of the report.

Q. But over and above what's indicated on page 33 and 34 you did not make any kind of calculation as to the additional value or to the value that would add to a flexible packaging manufacturing facility?

A. Correct. (Emphasis added).

Depo., Pritchett, pp. 11, 76.

After Pritchett was deposed, BGP, in responding to AEP's motion for partial summary judgment, submitted to the trial Court the affidavit of David Hartman (hereinafter "Hartman"), one of the shareholders of BGP. Hartman's affidavit is *uncontroverted* and describes the special features and fixtures of the Premises as including:

(1) a 52 ft. by 250 ft. bay that is 64 ft. high to accommodate special extrusion machinery;

(2) 16 150 sq. ft. silo foundation pads 2 ½ ft. deep;

(3) a 3700 ft. rail spur to allow for the off-loading of polyethylene pellets directly into the storage silos;

(4) 16 silos to store polyethylene pellets;

(5) a 50 ft.by 50 ft. solvent storage room with explosion-proof fixtures required due to the presence of explosive solvents;

(6) a special fire sprinkler system with a retaining facility to retain water from the sprinkler system that might include toxic solvents;

(7) two 60 ft. tall steel towers to hold the specialized extruders;

(8) a compressor room and special compressors along with the infrastructure necessary to move the polyethylene pellets to work stations;

(9) special electrical systems for the extruders and other equipment;

(10) special lighting systems;

(11) incinerator systems to incinerate toxic byproducts of the manufacturing process; and

(12) the infrastructure that connects all of the various systems with piping and electrical current throughout the Premises.

Hartman Affidavit, paragraph 28, R., p. 1269.

The Pritchett Appraisal is at R., p. 672. Comparing the list of special features and fixtures on the Premises according to Hartman's uncontroverted affidavit with Pritchett's list of special features and fixtures he included as set forth at pp. 33-34 of his appraisal reveals that Pritchett failed to include:

(1) 16 silos to store polyethylene pellets (Pritchett included only the value of the silo foundations);

(2) two 60 ft. tall steel towers to hold the specialized extruders;

(3) a compressor room and special compressors along with the infrastructure necessary to move the polyethylene pellets to work stations;

(4) special electrical systems for the extruders and other equipment;

(5) special lighting systems;

(6) incinerator systems to incinerate toxic byproducts of the manufacturing process; and

(7) the infrastructure that connects all of the various systems with piping and electrical current throughout the Premises.

In addition to *totally omitting* the value of the special features and fixtures described in the list immediately above, Pritchett admitted that he *did not include the full value* of some of the special features and fixtures that he included in his appraisal. Pritchett admits in the above quotations from his deposition that he included only the first 29 feet of the high bay area that is 64 feet tall; he included the value of only one silo foundation, whereas according to the uncontroverted Hartman affidavit there are 16 silo foundations; Pritchett included only 950 feet of the rail spur, whereas the uncontroverted Hartman Affidavit states the rail spur is 3700 feet long; and Pritchett

stated in his deposition quoted above that he included only part of the value of the solvent room and the other fixtures located on the Premises.

It is apparent, based on Pritchett's appraisal and his deposition, that he did not comply with the trial Court's order directing him to appraise the Premises, as Pritchett admitted at pages 14 and 15 of his deposition. Furthermore, Pritchett admitted he believed he was not asked to compute the specific value of the Premises to AEP (Depo., Pritchett, pp. 62-63), despite the fact that the trial Court's order directing his appraisal required just exactly that in providing that the appraisal should take into account "...the value of all special features and fixtures located therein *for AEP's use as an extrusion and flexible packaging manufacturing facility*" (Emphasis added). Finally, Pritchett admitted that he arbitrarily "determined" the square footage of the building located on the Premises. The square footage of the building set forth in Brantley's appraisal and CBRE's appraisal differed, so Pritchett simply *picked a number in between* (Depo., Pritchett, p. 70). Despite AEP's status as a tenant in possession, Pritchett deducted "lease up" costs from the appraised price of the Premises, disguised as a "market period." (R., pp. 676, 698-699). Pritchett also failed to consider loss of business and the costs of relocation and repair of the Premises that AEP would necessarily incur in setting up a vacant building elsewhere to meet its special needs.

BGP submitted additional affidavits in addition to the Hartman affidavit in response to AEP's motion for partial summary judgment; these additional affidavits were not controverted by AEP and included the affidavits of Robert D. Taylor and Jerry Wood, which are discussed as follows.

1. The affidavit of Robert D. Taylor.

Robert D. Taylor (hereinafter "Taylor"), an imminently qualified appraiser, conducted a review of Pritchett's appraisal. As a result of that review Taylor submitted an affidavit (R., p. 1298), that describes the many ways in which Pritchett's appraisal fails to comply with the trial Court's order. Taylor summarized his conclusions as follows:

> Pritchett did not follow the Court's instructions, appraised the wrong real property interest, and his report contains a number of material errors and unsupported adjustments and unfounded opinions. Some of the report's basic conclusions are unsupported or are inadequately or erroneously developed. The valuation process of the Pritchett report contains serious errors relating to the omission of important data and flawed analyses of other information. The combined effect of these errors and omissions is a report that is not credible or reliable and is in violation of *USPAP*. The credibility of the report is further undermined by the testimony of Mr. Pritchett in his November 9, 2012 deposition.
>
> ***
>
> ... the Pritchett report violates ... Standards Rule 1-1(c) – not render appraisal services in a careless or negligent manner, such as making a series of errors that, although individually might not significantly affect the results of the appraisal, in the aggregate affects the credibility of those results. (Underlined emphasis added).

Taylor Affidavit, p. 15.

Specifically, Taylor related the following errors in Pritchett's report:

(1) Pritchett failed to follow the Court's instructions to value the special features and fixtures (R., p. 1302);

(2) Pritchett did not evaluate the correct estate in real property. The correct estate to be valued is a "leased fee" interest, not the fee simple interest Pritchett valued (R., p. 1304);

(3) Pritchett utilized an inappropriately low number in calculating the replacement cost of the Subject Property. Pritchett utilized a per square foot cost of $28.17, whereas the Marshall Valuation Service, a generally recognized valuation guideline, provides for a per square foot cost of $47.00 (R., p. 1304)

(4) Pritchett improperly deducted external depreciation cost in valuing the Subject Property. This deduction was based on a transaction in Henderson, Kentucky that was a sale and lease-back transaction, which is a financing mechanism, not an arm's length sale as assumed by Pritchett. If this deduction were ignored, the value of the Premises would increase by approximately $1.2 million (R., p. 1305);

(5) Pritchett erroneously adjusted the sale of an allegedly comparable property downward by $5.00 per square foot (R., p. 1311);

(6) Pritchett lacked basic knowledge about the nature of the property (R., p. 1312);

(7) Pritchett's appraisal is not in conformity with USPAP. (R., p. 1315);

(8) Pritchett's appraisal is contrary to the Court's September 12, 2012, Order (R., p. 1315); and

(9) Pritchett's appraisal is professionally "negligent" as negligence is defined under USPAP. (R., p. 1315).

2. The affidavit of Jerry Wood.

Wood is a shareholder in both BGP and Cello, is an engineer, oversaw the original construction on the Premises, and managed the manufacturing plant for the first several years of its operation, so that he is intimately familiar with the special features and fixtures that make the facility especially suited to AEP's business. Woods' affidavit is based on a report from Gray Construction and a report from Continental Machinery. The affidavit of Jerry Wood (R., p. 1325) established that the replacement value of the special features and fixtures of the Premises is $3,983,983.

Wood's affidavit also established that the cost to AEP of removing, transporting, and reinstalling the removable fixtures and equipment would be $4,525,000. This information is relevant because the price to be paid for the facility is to reflect its value to AEP of its uninterrupted use of the Premises (Price Element 4). This Price Element requires the appraiser to determine and assign value to the fact that the Premises constitute an established, operating plant

that meets AEP's ongoing special requirements, thus saving AEP the cost of relocating and refurnishing another facility so as to create a functioning similar facility. Woods' affidavit assigns a value to Price Element 4 based on a reasonable and informed analysis. Pritchett's appraisal included *no* value for this price element, which Woods determined to be $4,525,000.

E. The Trial Court Granted AEP's Demand For Specific Performance (Sale of the Premises Based on the Price Stated by Pritchett) Despite the Fact that AEP Was in Continuing Breach of the Agreement.

The trial Court granted AEP's motion for summary judgment by order entered December 19, 2012, which was made final and appealable. (R., p. 1332). The only proof before the Court throughout the entire proceeding below established that when AEP was seeking to require BGP to sell AEP the Premises for an obviously inadequate price, AEP was in continuing breach of the Agreement (1) by failing to maintain the Premises, including specifically the roof of the facility and (2) by submitting the CBRE appraisal which clearly failed to comply with the terms of the Agreement by failing to value and include Price Elements 3 and 4 in determining the purchase price of the Premises and by deducting $641,000 from the value of the Premises as a "deferred maintenance" credit. Nonetheless, the trial Court ordered BGP to convey the Premises to AEP for $3,834,000 minus a "rent credit" of $407,987.37,[1] for a final purchase price of $3,426,012.63. The trial Court ordered that the sale take place no later than December 31, 2012 and awarded AEP the requested rent credit although there was not one iota of proof, either by way of testimony or affidavit, establishing that the alleged delay in the sale of the property was the fault of BGP or the amount of damages AEP sustained by reason of the delay.

[1] The trial Court's summary judgment entered December 19, 2012 granted AEP's request for a credit against the purchase price of the Premises equal to the rent AEP paid during the months of June – December, 2012, resulting in the reduction of the purchase price contained in the Pritchett appraisal by $407,987.37. During the period for which the rent credit was granted by the trial Court, AEP was in actual possession and occupancy of the Premises and was actively operating its business on the Premises.

The trial Court overruled AEP's motion to dismiss BGP's counterclaim, which is still pending, so that it will be necessary to resolve BGP's counterclaim (1) that AEP is in breach of the Agreement by failing to maintain the Premises and by submitting the CBRE appraisal that is not in conformity with the Agreement and (2) that AEP breached it's obligation of good faith and fair dealing.

F. BGP Notified AEP that by Conveying the Premises to AEP in Compliance with the Court's Judgment BGP was not Waiving Any of Its Rights.

Two days after the trial Court's summary judgment was entered, BGP filed a document on December 21, 2012 entitled "Motion for Approval of Deed Form and for Entry of an Order Preserving Claims." BGP's December 21, 2012, motion notified AEP that by complying with the trial Court's December 19, 2012, summary judgment, BGP did not intend to waive any of its rights. This document is particularly important in view of AEP's argument in this Court that BGP, by complying with the trial Court's summary judgment, somehow waived its rights so that this appeal is moot. BGP's December 21, 2012, motion stated, in relevant part:

> BGP hereby serves notice on all parties that it does not intend that its execution of a deed in compliance with this Court's December 19, 2012 Order will waive or operate as a merger with respect to any of its rights, claims or defenses in this action ... .

One of the rights BGP had at the time of its December 21, 2012 motion was filed was the right to appeal the trial Court's judgment.

BGP filed a timely Notice of Appeal 25 days later on January 15, 2013.

IV. THE KENTUCKY COURT OF APPEALS' DECISION.

The case was briefed to the Kentucky Court of Appeals and oral argument was held. The Court of Appeals, Judge Taylor writing for the Court, held the trial Court erred when it granted AEP's motion for summary judgment because when the summary judgment was

rendered there had been no determination as to whether, as BGP contended, AEP breached the Agreement. The Court of Appeals cited well established law to the effect that "... specific performance of a contract will only be granted where the party seeking same has complied with all terms of the contract." (Court of Appeals Opinion, p. 6).

Addressing AEP's argument that BGP's appeal is moot because BGP complied with the trial Court's summary judgment, the Court of Appeals held that a party may comply with a judgment and take an appeal without posting a supersedeas bond; doing so does not render the appeal moot or waive the right to an appeal, citing Dreamers LLC v. Don's Lumber & Hardware, Inc., 366 S.W.3d 381 (Ky. 2011) and Kentucky Constitution § 115, which guarantees every litigant one appeal as a matter of right. Failing to file a supersedeas bond merely permits the prevailing party, if it desires to do so, to enforce the judgment before the appeal is resolved.

ARGUMENT

I.

BGP'S APPEAL WAS NOT AND IS NOT MOOT

AEP's first, and principal, argument is that BGP's appeal is moot because BGP elected to comply with the trial Court's summary judgment rather than post a supersedeas bond or risk a contempt citation. In support of its argument AEP first cites two Kentucky cases and then resorts to reliance on cases decided by the Courts of other states to support its theory that an appeal from a judgment ordering the sale of real property is moot if the party aggrieved by the judgment complies with the judgment rather than posting a supersedeas bond. An examination of AEP's two Kentucky cases reveals that they are distinguishable and an examination of foreign law reveals that the foreign cases AEP relies on represent the minority view that is contrary to Kentucky policy as expressed in Kentucky case law and the Kentucky Constitution. Before

addressing these issues, however, the Court should take notice of the policy of Kentucky law regarding appeals from summary judgments.

A. Kentucky Law Disfavors Summary Judgments and Favors the Right to Appeal.

It is elemental that in Kentucky summary judgment may not be granted unless it appears that it would be *impossible* for the non-moving party to prevail at trial. In its most recent published decision addressing this principle this Court stated, "Summary judgment is only proper when 'it would be impossible for the respondent to produce any evidence at the trial warranting a judgment in his favor.'" Charles T. Creech, Inc. v. Brown, 433 S.W.3d 345, 350 (Ky. 2014).

Another principle of Kentucky law is that appeals are favored – clear and decisive grounds are required in order to hold that an appeal has been waived or is moot. In writing the Opinion of this Court in Dreamers LLC, *supra*, Justice Noble, as recently as 2011, quoted Kentucky precedent and policy as follows:

> In addition, for over 60 years our highest court has held "the right of appeal is favored by the law, and it certainly should not, and will not, be held to have been waived except upon clear and decisive grounds." *Mercer v. Federal Land Bank of Louisville*, 300 Ky. 311, 188 S.W.2d 489, 491 (1945); see also *Hundley v. Hundley*, 291 S.W.2d 544, 546 (Ky. 1956) ("The right of appeal is favored by law and will not be held to have been waived except on clear and decisive grounds."). (Underlining added; italics in original).

366 S.W.3d at 385.

It is with these basic principles of Kentucky law clearly in mind that the Court should approach the issues presented in the instant case.

B. The Kentucky Cases AEP Cites are Distinguishable.

AEP cites two Kentucky cases for the proposition that when a judgment directs the sale of real property, a party aggrieved by that judgment must either post a supersedeas bond or comply with the judgment and thereby render any appeal moot. Of course, AEP's position is

contrary to well-established Kentucky law to the effect that posting a supersedeas bond is not a prerequisite to an appeal; rather, a party may choose to comply with the trial Court's judgment and appeal from that judgment; in the event the judgment is reversed the parties are to be placed in the same position as they were before the judgment was rendered. In Kentucky, a litigant who believes the judgment of the trial Court is erroneous has the choice of staying the enforcement of the judgment by posting a supersedeas bond or complying with the judgment and seeking relief by way of appeal, in which event the prevailing party may, at its option, enforce the judgment while the appeal is pending. In Fitch v. Kentucky-Tennessee Light & Power Co., 215 S.W.2d 91, 92 (Ky. 1948) the Court states:

> ... the law is well settled that, if an appellate court reverses a judgment, the party against whom the judgment originally was entered, and who thereafter satisfied it, is entitled to restitution ... .

In Drury v. Franke, 57 S.W.2d 969, 972 (Ky. 1933) the Court instructs that:

> The court is of the opinion that in the event of a reversal the right of the defendant to demand restitution exists, and that the trial court has ample authority to require the money collected under the judgments to be repaid. The rule requiring restitution in such cases is recognized by all the authorities. "When a judgment is reversed, restitution must be made of all that has been received under it." (Citations omitted).

The rule of restitution applies whether the judgment is paid voluntarily or involuntarily through execution on the judgment. In the words of the Drury case:

> We are unable to see that the situation here, if the judgments are reversed, is any different from the situation that would have existed had the defendant paid the judgments and then prosecuted an appeal and secured reversal. The same rule with reference to restitution should apply to both situations.

57 S.W.2d at 972.

AEP, however, contends the rule is different where a judgment of specific performance requiring the conveyance of real estate is concerned and that in such a case the conveyance of the

real estate in conformity with the trial Court's judgment places the real estate beyond the possibility of reversion to the grantor if the judgment is later reversed. AEP fails to take note of the distinction between the rights of one who is a *stranger* to the proceedings resulting in the conveyance and one who is a *party* to those proceedings.

The first case cited by AEP, Sedley v. Louisville Trust Co., 419 S.W.2d 531 (Ky. 1967), is clearly distinguishable from the instant case. In Sedley real estate was sold by a master commissioner pursuant to a judgment in a mortgage foreclosure case. There was no judicial sale of the property involved in the instant case and no order confirming such a sale as there was in Sedley. Most importantly, *the rights of a stranger to the litigation are not involved here*, as was the case in Sedley. The other case AEP cites, Rose v. Cox, 179 S.W.2d 871 (Ky. 1944), also involved a purchase of property at a judicial sale by a stranger to the litigation, as is made clear by reviewing the published case to which Rose v. Cox was a sequel, Rose v. Reese, 160 S.W.2d 614 (Ky. 1941). In fact, Rose v. Cox makes the distinction between a purchaser at a judicial sale who is a stranger to the litigation, whose title is good even though the judgment decreeing the sale is later reversed, and a purchaser who is a party to the litigation giving rise to the sale, whose title fails if the judgment is later reversed. The Court in Rose v. Cox states:

> Whilst we recognize the rule that a pendente lite purchaser of property which is the subject of litigation, either before or after the sale, is bound the same as one of the parties litigant by a reversal of the judgment, it has never been held that a person not a party to the litigation who purchases the property at a decretal sale, is a pendente lite purchaser. On the contrary, it uniformly has been held that such a purchaser is one in good faith, and that the purchase itself is a meritorious act giving efficacy to the conveyance. (Emphasis added).

179 S.W.2d at 460.

Significantly, Rose v. Cox cites with approval Webb v. Webb's Guardian, 198 S.W. 736 Ky. 1917), which makes it even clearer that while a *stranger* to litigation that results in a judicial

sale of real property who purchases the property at a judicial sale retains title even if the judgment requiring the sale is reversed, a *party* to litigation that results in the sale of real property does not retain title if the judgment pursuant to which the sale was made is reversed. A *party* to litigation who purchases property sold pursuant to a judgment is a *pendente lite* purchaser whose title fails if the judgment is reversed. The Court in Webb provides a fairly comprehensive explanation of the rules governing the rights of one who purchases real estate pursuant to a judgment that is later reversed, stating in part:

> The common-law rule was that a purchaser, under an execution sale which was fairly made, could not be divested of his title to the property purchased at such sale, although the judgment upon which the execution was issued should be, upon appeal, held to be erroneous and reversed.
>
> ***
>
> Further limiting the doctrine to the demands of public policy, it has been continuously held that when property has been obtained under the judgment of a court, without the intervention of a sale by a commission, the parties who obtain the property and their privies are pendente lite purchasers, and in the event of a reversal of the judgment may be required to return the property or its value to the owner. (Emphasis added).

198 S.W. at 739.

Numerous Kentucky and foreign cases recognize the same principles stated in Webb, placing those principles beyond cavil. *See* Elk Horn Coal Corp. v. Cheyenne Resources, Inc., 163 S.W.3d 408, 419-420 (Ky. 2005):

> A party, however, does not need to post a supersedeas bond to take an appeal from a judgment. The failure to post a bond, however, leaves the party who obtained the judgment free to execute on it, though the party who executes on a judgment during the pendency of an appeal of the judgment does so at his or her own risk because, if the judgment is reversed, any benefits obtained by virtue of the execution must be restored to the adverse party. (Emphasis added).

Rose v. Cox, *supra* at 462-463:

> Appellant's failure to execute the bond and stay the proceedings under the judgment did not prohibit her from appealing from the judgment of the Chancellor and obtaining a reversal effective as to the parties to the suit previous to the entry of the judgment, and as to their privies, either before or after the judgment. (Emphasis added).

Vaughn v. Brue, 16 So.2d 17 (Ala. 1943), quoting from Marks v. Cowles, 61 Ala. 299, 1878 WL 1048 (Ala. 1878):

> ... when a party becomes a purchaser of lands under an erroneous judgment or decree, rendered in his own favor, it is at the peril of having his title defeated by a subsequent reversal. (Emphasis added).

16 So.2d at 111.

Harjo v. Johnston, 104 P.2d 985 (Okla. 1940):

> It is well settled that a purchaser at a judicial sale who is not a party to the proceedings is not bound to look beyond the judgment. Pettis v. Johnston, supra. If the judgment was procured by fraud, but is regular and valid on its face, such purchaser cannot be charged with notice of irregularities in the procurement of the judgment except by proof that said purchaser had knowledge of such irregularities at the time of the purchase, but if the purchaser at the judicial sale is a party to the proceedings, a knowledge of the irregularities in the procurement of the judgment is imported to him because of the position he occupied in the action. The face of the record, which reveals that he was a party, establishes the fact that he is not an innocent purchaser. (Emphasis added).

104 P.2d at 996.

> The reason for this distinction is that the party to a suit is presumed to know of all the errors in the record, and cannot acquire any rights or interests based on such erroneous decree that will not be abrogated by a subsequent reversal or annulment of such decree. All titles acquired by parties to an erroneous record are held subject to be divested when such erroneous judgment is reversed or set aside. McJilton v. Love, 13 Ill. 486, 54 Am.Dec. 449; Chickering v. Failes, 29 Ill. 294; Cable v. Ellis, 120 Ill. 136, 11 N.E. 188; Aurora & Geneva Railway Co. v.

> Harvey, 178 Ill. 477, 53 N.E. 331; Ure v. Ure, supra [223 Ill. 454, 79 N.E. 153, 114 Am.St.Rep. 336]; Freeman on Judgments, § 4, p. 81. (Emphasis added).

104 P.2d at 997.

Crume v. Sherman, 215 S.W. 196 (Ky. 1919):

> Sherman, the purchaser, not being a party to the original suit, comes under the general rule that, where the court has jurisdiction of the parties and the subject–matter of the suit, and adjudges a sale by the commissioner, which is fairly made, and the sale is reported and confirmed, the purchaser of the property cannot be divested of it, because the judgment under which the sale was made was erroneous, and this although it be reversed upon appeal. A different rule prevails, if the purchaser was the plaintiff or a party to the suit, or an attorney engaged in the litigation, or an assignee of the judgment. (Emphasis added)

215 S.W. at 198.

Mills v. Laing, 177 P. 493, 494 (Cal.App. 1918) ("But where a party to the decree purchases he acquires a defeasible title only, which fails upon a subsequent reversal of the judgment."). (Emphasis added). Morton v. Wade, 194 S.W. 802 (Ky. 1917):

> … while the title of the second purchaser of the lands, he not being a party to the suit nor an attorney in it, is not affected by the result of the appeal from the order setting aside the first sale, the rights of Morton as the purchaser at the first sale are not concluded by a second sale of the lands, if the first sale should turn out to be the one which the court should have confirmed. (Emphasis added).

194 S.W. at 804.

The rule thus described is an ancient one, recognized and explained in terms that are now somewhat archaic, but nonetheless authoritative, in Clark's Heirs v. Farrow, 49 Ky. 446 (Ky. 1850).

Thus, AEP, as a party to the proceedings below, is not protected in its claim of title to the Premises conveyed to it by BGP under compulsion of the Warren Circuit Court's judgment – AEP is a *pendente lite* purchaser charged with full and complete knowledge of any and all errors

in the trial Court's judgment and its title to the Premises is subject to divestment on reversal of that judgment.

C. Compliance With a Judgment Granting Specific Performance Does Not Render the Judgment Moot.

In support of its argument that BGP rendered its appeal moot by complying with the Warren Circuit Court's judgment compelling the transfer of the Premises to AEP, AEP cites only foreign cases. Kentucky and foreign case law establish that the rule relied upon by AEP and the cases AEP cites is the minority rule that is not consistent with the policy of Kentucky law.

One of the jurisdictions cited by AEP is Kansas. In Almack v. Steely, 230 P.3d 452 (Kan.App. 2010) the Kansas Court of Appeals recognized that the rule followed in Kansas is the *minority* rule, stating:

> We believe Kansas currently falls in line with the minority of jurisdictions that have adopted a rule that prevents an appeal if the party takes any action inconsistent with the right of review—successful or not. These jurisdictions treat such inconsistent behavior as a tacit acceptance of the benefits of the judgment. (Emphasis added).

230 P.3d at 458.

The fact that the rule set forth in the foreign cases cited by AEP is the minority rule is apparent from an examination of E. H. Schopler, Comment Note – *Defeated party's payment or satisfaction of, or other compliance with, civil judgment as barring his right to appeal*, 39 A.L.R.2d 153 (Originally published in 1955; updated as of 2015). § 20[a] of that Comment Note deals with the effect of compliance with a judgment granting specific performance of an agreement to convey real property. § 20[a] cites nine cases holding that compliance with a judgment of specific performance requiring the conveyance of real estate does *not* render an appeal from the judgment moot. Only two cases are cited for a contrary holding; those two cases

were decided by the Courts of Kansas, a state that follows the *minority* rule according to its own appellate Court.

The reasoning behind the majority rule is that the conveyance in such circumstances is not voluntary because non-compliance with the judgment would subject the non-complying party to a charge of contempt of Court, and only *voluntary* compliance with a judgment is capable of rendering an appeal therefrom moot. As stated in Yeon Street Partners v. Environmental Consulting Service, 828 P.2d 477 (Or.App. 1992), citing several cases:

> Compliance with a judgment does not preclude a party from maintaining an appeal, unless it appears that compliance "was voluntary, not coerced, and made with the view of settlement." (Emphasis added).

828 P.2d at 254.

Or, as the Court of Appeals of Maryland stated in Leisure Campground and Country Club Ltd. Partnership v. Leisure Estates, 372 A.2d 595 (Md.App. 1977):

> The general rule is that the right of a purchaser to receive property acquired at a judicial sale cannot be affected by the reversal of an order ratifying the sale where a bond has not been filed, [Citations omitted].
>
> ***
>
> ... a second exception exists when 'a mortgagee purchases at his own sale and exceptions are taken to that sale, (in that) an appeal from the overruling of such exceptions does not require the posting of a supersedeas bond.' Scott & Wimbrow, Inc. v. Calwell, 31 Md.App. 1, 7, 354 A.2d 463, 467 (1976). This is so because a mortgagee who buys at a foreclosure sale does not free himself from the underlying dispute to which he is a party, and with the land in his hands, there is no reason why he should not be bound by a decision of the court requiring delivery of the property.

372 A.2d at 598.

It is also worth noting that in Kentucky, refusing to comply with a judgment of specific performance directing the conveyance of real estate would not only create a risk of being

punished for contempt of Court, but the property could be conveyed to the party who was successful in the trial court despite the losing party's non-compliance. CR 70 provides, in relevant part:

> If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party.

Thus, if BGP had refused to convey the property to AEP pending its appeal without posting a supersedeas bond, in addition to risking punishment for contempt of Court, the property would have been conveyed to AEP anyway and the parties would be in the same position they now occupy, with the exception that BGP would have been subject to contempt proceedings.

So where does Kentucky law stand? Does Kentucky follow the minority view espoused by the foreign cases cited in AEP's brief, or does Kentucky follow the majority view that compliance with a judgment does not constitute a waiver of the right to appeal because such compliance is not voluntary, but compelled? Clearly, Kentucky follows the majority rule.

As early as 1939 Kentucky's highest Court held that compliance with a judgment for a specific act (there an order that a fiscal court allow a court reporter's claim) is not a voluntary act such as will render an appeal from the judgment moot. Such was the holding in Marcum v. Robinson, 130 S.W.2d 826 (Ky. 1939) where the Court said:

> The involuntary payment by the appellee to the appellants is not a bar to their appeal. In the case of Pond Creek Coal Company v. Runyon, 199 Ky. 539, 251 S.W. 841, there was an involuntary payment under a judgment to defeat the more drastic alternative of having a deed canceled. In that case it was held that, since the payment was not voluntary, the right to an appeal existed. (Emphasis added).

130 S.W.2d at 828.

A few years later in 1948 Kentucky's highest Court had before it a case in which the plaintiffs in the trial Court sought a partition sale of real property owned by several co-owners. In Lowery v. Madden, 214 S.W.2d 592 (Ky. 1948) the plaintiffs were successful in the trial Court and the property was sold by the master commissioner; the purchaser filed exceptions to the master commissioner's report of sale which were overruled. The purchaser appealed and the appellees, who were the plaintiffs in the trial Court, contended the appeal was moot because after his exceptions to the master commissioner's report were overruled, the purchaser complied with the orders of the trial Court by refusing to post a supersedeas bond and paying the purchase money into Court. The Kentucky Court of Appeals, then Kentucky's highest Court, disagreed with the argument that the appeal was moot and held that a party in a case involving the Court-ordered sale of real estate may perform the Court's judgment, refuse to post a supersedeas bond, and pursue an appeal without having the appeal dismissed as moot because the party complied with the judgment. The instant case is on all fours with Lowery and the same rule should be applied.

The policy of Kentucky law as expressed in Dreamers LLC, *supra*, clearly indicates that Kentucky follows the majority rule that compliance with a judgment does not waive the right to an appeal in the absence of evidence of a clear expression of intent to settle and compromise the matter. The Court stated:

> Because this Court concludes that paying a judgment in full, absent clear evidence of a settlement and compromise, does not extinguish a right to appeal, the judgment below is reversed and this matter is remanded to the Court of Appeals to hear the merits of the appeal. (Emphasis added).

366 S.W.3d at 382.

The Court went on to state:

> ... the obligation must be on the party seeking an end to the appeal to secure evidence that such was the intent of the parties. Otherwise, there is no proof of settlement, or satisfaction and accord. (Emphasis added).

366 S.W.3d at 385.

Finally, the proposition that the policy of Kentucky law is in accord with the majority of states that hold compliance with a judgment does not impair a right of appeal in the absence of an intent to settle and compromise the matter is supported by Kentucky Constitution § 115, which guarantees all litigants one appeal as a matter of right in the following language:

> In all cases, civil and criminal, there shall be allowed as a matter of right at least one appeal to another court, except that the Commonwealth may not appeal from a judgment of acquittal in a criminal case, other than for the purpose of securing a certification of law, and the General Assembly may prescribe that there shall be no appeal from that portion of a judgment dissolving a marriage. Procedural rules shall provide for expeditious and inexpensive appeals. Appeals shall be upon the record and not by trial de novo. (Emphasis added).

Since the law of Kentucky is the same as the majority rule that compliance with a judgment for specific performance requiring the sale of real estate does not render an appeal from that judgment moot in the absence of proof that the appealing party intended to settle and compromise the matter by complying with the judgment, the question becomes whether AEP has provided any evidence that BGP intended to settle and compromise the matter by complying with the trial Court's December 19, 2012, judgment. Clearly there was no such intent on BGP's part. As the Court will recall from the discussion above in the Counterstatement of the Case, BGP, just two days after the judgment was entered, placed AEP on notice that BGP "... does not intend that its execution of a deed in compliance with this Court's December 19, 2012 Order will waive or operate as a merger with respect to any of its rights, claims or defenses in this action." In the terms Justice Noble used in Dreamers LLC, there was no intent on BGP's part, either actual or implied, to effect a settlement or compromise of the dispute between BGP and AEP –

indeed BGP explicitly stated otherwise in a document filed just two days after the judgment for specific performance was entered.

AEP bemoans its current situation, attempting to bring into the case matters that are not of record that occurred after the appealed judgment and asserting it installed fixtures on the Premises subsequent to the appealed judgment. This Court rejected AEP's attempt to inject such inappropriate references to facts that occurred after the appealed judgment into the case when it overruled AEP's motion to supplement the record. The Court should likewise reject any consideration of the references to extra-record facts that are sprinkled throughout AEP's brief in violation of basic principles of appellate law and procedure. AEP created its current situation by taking actions based on the assumption that because BGP executed a deed as mandated by the trial Court's judgment, AEP would retain title to the Premises regardless of what might happen on an appeal of that judgment. AEP, however, has only itself to blame for its current position. AEP was notified, just two days after the judgment was entered and well before the deed was executed and delivered, that BGP was insisting on its rights, which included the right to an appeal from the judgment which might result in reversal of the judgment and remand of the case to the trial Court, as in fact occurred. In view of BGP's warning and the long established principles of law discussed above, AEP cannot claim any right to sympathy based on its alleged reliance on the trial Court's judgment that, to this very day, is *not* final and to which AEP was a party. Any alleged difficulty in "unwinding" the conveyance of the Premises to AEP at this point was created by the trial Court and AEP in derogation of BGP's rights. Certainly, BGP's legal rights cannot simply be tossed aside because of a situation created by the actions of others and over BGP's strenuous objection.

The trial Court will be required to deal with AEP's alleged difficulties on remand as it is an equity Court of original jurisdiction; equity requires a hearing to determine the facts – this Court is not a finder of facts or a holder of evidentiary hearings.

II.

THE COURT OF APPEALS WAS CORRECT IN HOLDING THE TRIAL COURT ERRED IN ENFORCING THE AGREEMENT WITHOUT MAKING A FINDING AS TO WHETHER AEP WAS IN BREACH THEREOF.

A. The Court of Appeals Correctly Held the trial Court Erred when it Granted the Remedy of Specific Performance While Ignoring the Issue Whether AEP Was In Breach of the Agreement.

It is undeniably the law in Kentucky that a party who has breached a contract is not entitled to the remedy of specific performance of that contract. As early as 1932 Kentucky's highest Court held in Williamson v. Ingram, 49 S.W.2d 1005 (Ky. 1932), citing two earlier Kentucky cases, that,

> The remedy of specific performance rests in sound judicial discretion, and will not be awarded to one who is himself in default respecting the covenants of the contract. (Emphasis added).

49 S.W.2d at 1005.

The same principle was reiterated the following year in Faulkner v. Denniston, 63 S.W.2d 286 (Ky. 1933) in the following language:

> It is also the general rule that a party seeking specific performance must show that he has performed or offered to perform or is ready, able, and willing to perform all the essential acts required by the contract. (Emphasis added).

63 S.W.2d at 288.

In Kuntz v. Peters, 150 S.W.2d 665 (Ky. 1941) the Court quotes with approval the following language:

> "It is a universal rule that one who asks for specific performance must be in a condition to perform himself, and a decree for a specific performance will not ordinarily be made in favor of a party who has himself been in default, or who has willfully violated his part of the contract, whereby the defendant has been deprived of a substantial benefit under it. Hence it is that a party seeking to enforce specific performance usually has the burden of proving that he has complied with its terms, or that he is ready, able, and willing to perform his obligations under the contract, in their entirety, and to do whatever has been made a condition precedent on his part." (Emphasis added).

150 S.W.2d at 667.

In West Ky. Coal Co. v. Nourse, 320 S.W.2d 311 (Ky. 1959) the Court states:

> In addition, in matters of specific performance, one rare incident is afforded where the equitable maxim of 'clean hands' has not been ignored and the remedy is denied to one who has himself been in default. It is a fundamental principle in the law of contracts that before one may obtain the benefits the contract confers upon him, he himself must perform the obligation which is imposed upon him. (Emphasis added).

320 S.W.2d at 314.

The Court in Jabbour v. Bassatne, 673 A.2d 201, 203 (D.C.App. 1996), a case cited by the Court of Appeals in it's opinion in the instant case, held that failure to furnish an appraisal in compliance with the requirements of a contract to convey real estate is a breach of contract that will preclude specific performance, stating, "Jabbour's compliance with the requirement that each side furnish a market value appraisal was a 'condition precedent' to his right to seek specific performance."

Not only must the party seeking specific performance be free from default before that remedy is available, the party must be in *strict compliance* with the contract because the remedy of specific performance is an extraordinary one. The Nourse Court went on to say:

> The courts have been careful to exercise the extraordinary and delicate right of specific performance only in cases that are entirely free from fraud, illegal or

inequitable conduct and, in addition, they have required strict compliance with all terms of the contract by those who request its exercise. (Emphasis added).

320 S.W.2d at 314-315.

This Court, like the Court of Appeals, will search the record in vain for any finding of fact by the trial Court relating to BGP's contention, asserted from the beginning of the case, that AEP was in breach of the Agreement and that until AEP cured its breach, further performance by BGP was not required. As demonstrated above in the Counterstatement of the Case, AEP was in breach of the Agreement because the appraisal by CBRE failed to comply with the requirements of the Agreement by (1) deducting $641,000 representing a "deferred maintenance" credit because of the poor condition of the roof of the Premises despite the fact that AEP was required to maintain the roof, reasonable wear and tear *included*, and (2) failing to include in the appraisal the value of the "... special features and fixtures located therein for AEP's use as an extrusion and flexible packaging manufacturing facility."

B. AEP's Argument that the trial Court Ruled on the Issue of AEP's Breach of the Agreement is Erroneous.

AEP's contention at page 28 of its brief that the trial Court did, in fact, rule on BGP's argument that AEP was in breach of the Agreement is incorrect. What actually occurred, as is established by an examination of the record, is that when AEP filed its motion for summary judgment seeking the appointment of a third appraiser, the trial Court decided to do an "end run" around BGP's allegations that AEP was in breach of the Agreement; the trial Court accomplished its "end run" by simply ignoring the first two appraisals and attempting to "cure" whatever defects were in AEP's appraisal by requiring the parties to appoint a third appraiser. The trial Court's order requiring the parties to appoint a third appraiser was entered September 12, 2012, (R., p. 630) and contains absolutely no finding of fact whatsoever and absolutely no

mention of BGP's allegation, by way of both defense and counterclaim, that AEP was in breach of the Agreement and, therefore, further performance by BGP was not required. If the trial Court had made a ruling with respect to AEP's non-compliance with the Agreement, that ruling would have been included in the trial Court's September 12, 2012, order granting AEP's motion.

The trial Court's statement during a hearing on AEP's motion for summary judgment requiring BGP to sell the Premises based on Pritchett's appraisal, quoted at page 28 of AEP's brief, does not establish otherwise. The trial Court's quoted statement occurred in December after the third appraisal had been made by Pritchett in September; the statement was made when the trial Court was considering AEP's motion to require BGP to convey the Premises for the price stated by Pritchett (less a "rent credit"). The trial Court did not state in December that the issue of AEP's compliance had been determined back in September, but merely wondered out loud whether or not the issue of AEP's compliance had been ruled on by the Court back in September – a review of the September 12, 2012, order makes it clear that the trial Court had not ruled on the issue of AEP's compliance in its September 12, 2012, order; otherwise an explicit finding to that effect would have been included in the order.

C. AEP's Allegation that BGP Breached the Agreement is Untimely and Irrelevant.

In an attempt to avoid the effect of the clear legal principle preventing one in breach of contract from obtaining specific performance of that contract, AEP alleges, erroneously, that BGP was also in breach of the Agreement because BGP's appraiser, Brantley, did not include the value of "special features and fixtures" in his appraisal. This argument is of no benefit to AEP for three reasons (1) AEP did not timely raise the argument and introduced absolutely no proof, by way of testimony or affidavit, to establish that Brantley failed to appraise the special features and fixtures of the Premises (2) whether BGP breached the Agreement is irrelevant, and (3) AEP

has waived such an argument by insisting, after receiving BGP's appraisal, that the parties proceed with the process of determining the purchase price of the Premises by selecting a third appraiser irrespective of whether BGP's appraisal conformed to the requirements of the Agreement.

AEP's allegation that BGP's appraisal does not conform to the requirements of the Agreement makes its first appearance in AEP's brief to this Court. Such an allegation was not made in the trial Court or in the Court of Appeals. This Court is not the place to raise an argument for the first time, or as the Court stated in Henson v. Commonwealth, 20 S.W.3d 466 (Ky. 1999) quoting from Kennedy v. Commonwealth, 544 S.W.2d 219 (Ky. 1977), "The appellants will not be permitted to feed one can of worms to the trial judge and another to the appellate court." Since AEP has not previously alleged that BGP's appraisal does not comply with the Agreement, and indeed there is no proof in the record to support such an allegation, it is too late to do so now.

Even if BGP's appraisal were deficient under the Agreement, that fact would be irrelevant. The case law relied on by the Court of Appeals and the case law referred to above does not require the party *opposing* specific performance (*i.e.*, BGP) to have complied with the contract; rather the requirement of strict and explicit compliance with the contract lies with the party *seeking to enforce* specific performance of a contract (*i.e.*, AEP). In Jabbour v. Bassatne, *supra*, the Court explicitly held, in the context of the failure of a party seeking specific performance to submit an appraisal complying with the contract

> Thus, it is beside the point whether, as Jabbour repeatedly questions, Bassatne fulfilled his end of the bargain. Id. at 23–24 (buyers were not entitled to specific performance owing to failure to pay as contract required, although sellers failed to comply with another provision requiring conveyance free of housing code

violations); see also In re Hoffman, 63 N.J. 69, 304 A.2d 721, 727 (1973); 5A CORBIN, CONTRACTS § 1175, p. 294–95, § 1183, p. 339 (1964).

673 A.2d at 203.

Finally, AEP has known the contents of Brantley's appraisal since BGP sent a copy to AEP. Yet, AEP did not object to Brantley's appraisal at any time before the Complaint was filed. Indeed, AEP came into Court seeking, not an order requiring BGP to submit an appraisal compliant with the Agreement, but seeking to proceed to the third step in the process of determining the purchase price for the Premises: appointment of a third appraiser. Under these circumstances, AEP has clearly waived any complaint it might have about the Brantley appraisal's compliance with the Agreement.

D. Whether AEP Breached the Agreement and Whether Its Breaches Were Material Are Not Proper Issues for This Court.

AEP argues, in the final alternative, that even if the trial Court rendered summary judgment granting AEP specific performance of the Agreement without resolving issues of fact as to whether AEP breached the Agreement by submitting an appraisal that does not comply with the requirements of the Agreement, still it should prevail because (1) the issues of fact must be resolved in its favor and (2) its breaches were not material.

This Court is not the place to seek resolution of issues of fact and whether AEP did, in fact, breach the Agreement is an issue of fact. Whether a breach of contract exists is a classic issue of fact for a jury, not this Commonwealth's highest Court. Scott Farms, Inc. v. Southard, 424 S.W.2d 574 (Ky. 1968); Schmidt v. Schmidt, 343 S.W.2d 817 (Ky. 1961).

AEP's argument that its breaches of contract were not material is of no avail in view of the holding in West Ky. Coal Co. v. Nourse, *supra*, that specific performance may not be granted unless the party seeking it has *strictly complied* with the contract. Even a non-material breach of

a contract precludes a determination that there has been *strict compliance* with the contract so as to support the extraordinary remedy of specific performance. Besides, whether a breach of contract is material is an issue of fact to be determined in the first instance by a jury, not this Court. Hodak v. Madison Capital Management, LLC, 348 Fed. Appx. 83 (6th Cir. 2009).

E. AEP's Argument Concerning the $641,000 "Deferred Maintenance" Credit is Disingenuous; There are Facts from which a Jury Could Find AEP Guilty of Bad Faith.

Throughout its brief AEP brands as defective BGP's argument that CBRE's appraisal was defective because in determining the appraised value of the Premises CBRE gave AEP a $641,000 credit for "deferred maintenance." AEP posits that BGP's argument is defective because the person who came up with the idea that the roof might need as much as $641,000 in repairs (Mark Sobek) stated, in an affidavit obviously solicited by AEP, that he did not intend his inspection report to be read as stating that the roof was actually in need of such extensive repair. Of course, AEP's argument ignores the fact that it does not really matter what Mr. Sobek *intended* as the import of his report – what matters is that, regardless of what Mr. Sobek intended, CBRE did, in fact, deduct $671,000 from the appraised value of the Premises as a "deferred maintenance" credit.

Moreover, the facts indicate AEP knew that the roof needed $641.000 in repairs before exercising its option and deferred the repairs in hopes of reducing the appraised value, an objective it achieved. BGP served interrogatories and requests for production of documents on AEP requesting that AEP produce documents pertaining to the roof. The email exchange between AEP's chief financial officer, Paul Feeney, AEP's treasurer, James Rafferty, and AEP's manufacturing director, Jim Mahoney explains exactly what transpired. The documents responsive to BGP's request for production (see BGP's Response to Motion to Place Rent in

Escrow filed on August 23, 2012) demonstrate AEP's scheme pertaining to the roof. The following timeline establishes what occurred:

- October 31, 2011: Jim Mahoney, manufacturing director for AEP, emailed Mark Hornek stating that he (Mahoney) is having more problems with the roof. Rather than fix the roof as required by the lease with BG Properties, Hornek stated in response, "This may be a good time to have a consultant do an evaluation (on the roof). Also, I understand that the building lease is up in December. Information from the roof evaluation may be good info for negotiating the lease." 20 minutes later Mahoney asked if he should bring "Mark Sobeck in on the Bowling Green roof." (Emphasis added).

- November 1, 2011: Paul Feeney stated in an email, "The reason for the meeting is to discuss AEP's purchase of the facility. I expect that the transaction will happen after June '12. The transaction will be priced at 'market' and I'd like 'market' to include the cost of replacing the roof. I expect AEP will replace the roof after we buy the building. P.F." (Emphasis added).

- November 1, 2011: Responding to Feene's email, Jim Mahoney states, "Paul – our roof consultant would be able to prove a very accurate assessment of the condition of the roof and an estimate of the cost to assess any problems that he found in his assessment. That estimate could then be used to aid in establishing the 'market' price. Recommend that we retain Mark Sobeck to perform an evaluation of the Bowling Green roof and provide us with his findings, recommendations, an estimated cost of those recommendations. He has performed this service for us in just about every roof we have in the company. May I retain his services?" (Emphasis added)

- November 28, 2011: Paul Feeney emailed Jim Mahoney regarding Sobek's inspection of the roof, stating, "Jim, any chance of accelerating the preparation of the subject estimate??? The valuation process has started. P.F." (Emphasis added).

- December 12, 2011: Mark J. Sobeck Roof Consultant, Inc. issued its report.

- December 13, 2011: James Rafferty from AEP emailed Ron Neyhart of CBRE, "Ron – a signed engagement letter and check for $5,500 payable to CBRE, Inc. has been forwarded to you today by overnight mail (FedEx). I have also attached a roof inspection report which we received yesterday for your review and consideration. The roof at the facility apparently needs some extensive repair work. I would like also to speak to you regarding this specific property data request attached to your engagement letter." (Emphasis added).

- January 9, 2012: CBRE issued its summary appraisal report. The cover page states, "The client provided us with a copy of a recently completed roof inspection report (prepared by Mark J. Sobeck Roof Consultant, Inc.) which indicated that the subject's immediate roof repair and replacement have an estimated $641,648 cost to cure. The needed roof repair/replacement is considered to be an item of deferred maintenance. For the purpose of our analysis, we have relied upon the estimate of cost noted within the aforementioned report. The deferred maintenance expense has been deducted within our analysis in order to arrive at our "as is" market value estimate of the subject." (Emphasis added).

These emails and documents conclusively establish that AEP conjured up the Sobeck report for the specific purpose of providing an appraisal that completely negated AEP's good faith in the process for determining the purchase price for the Premises.

F. AEP's Argument Is Based on Extra-Record Facts to the Effect It Has Spent $12 Million Improving the Premises.

AEP attempts to place itself in the position of a party deserving of the Court's sympathy, stating that it has spent $12 million improving the Premises, so that it would be unfair to now rescind the deed conveying the property. In response, BGP makes the following points.

First, the argument is based on facts not appearing in the record and should, therefore, be ignored. Wemyss v. Coleman, 729 S.W.2d 174 (Ky. 1987); American Druggists' Ins. Co. v. Natural Resources and Environmental Protection Cabinet, 687 S.W.2d 555 (Ky. 1985). Although a motion to strike AEP's brief might be in order, in the interest of expeditiously concluding this appeal BGP has chosen to refrain from filing such a motion, relying on the Court's ability to ignore references to extra-record facts.

Second, should the Court find itself unable to ignore the extra-record references of AEP, it should be noted that AEP allegedly spent the funds to which it refers after the conveyance in compliance with the trial Court's judgment, knowing full well that the trial Court's judgment was not final and in spite of notice by BGP given two days after the judgment AEP allegedly

relied upon that BGP was insisting on its rights, which included its right to an appeal. AEP took a calculated risk. If AEP spent the funds alleged and now regrets doing so, it has no one to blame but itself and it is due no sympathy from this Court.

Third, even if the Court should find itself unable to ignore the extra-record statements in AEP's brief and should believe it would be too difficult to "unwind" the transaction whereby BGP conveyed the Premises to AEP, BGP submits that it is always possible that it could be made whole, insofar as the purchase price is concerned, through the payment of damages by AEP in an amount representing the difference between the price AEP paid and the price as properly determined under the Agreement plus rent due from the time BGP was deprived of rent (June, 2012 to the date of a new judgment). Web, *supra*, provides that in the event it is not appropriate to require reconveyance to the grantor after a judgment is reversed, a remedy that may be applied is the requirement that the grantee pay the grantor the value of the property, stating that a *pendente lite purchaser* such as AEP, "... in the event of a reversal of the judgment may be required to return the property or its value to the owner." 198 S.W. at 739. In answer to AEP's anticipated argument that it was entitled to know the purchase price before it exercised its option, BGP answers that AEP made its own bed by insisting that the trial Court order a sale based on an obviously flawed appraisal. As made apparent in the discussion of legal principles above, AEP is chargeable with knowledge of all flaws and errors in the proceedings before the trial Court.

III.

THE TRIAL COURT'S ACCEPTANCE OF PRITCHETT'S FLAWED APPRAISAL IS REVERSIBLE ERROR.

Because the Court of Appeals reversed the trial Court's judgment based on the trial Court's award of specific performance in the absence of any determination as to whether AEP

was in compliance with the Agreement, that Court found it unnecessary to examine the remainder of BGP's arguments. Those arguments are relevant before this Court, however, under the rule that the decision of a lower Court (here the Court of Appeals) will be affirmed if the result reached is correct, even if the correct result was reached for the wrong reason. Emberton v. GMRI, Inc., 299 S.W.3d 565 (Ky. 2009). The Court of Appeals' result (reversal and remand) is correct for both the reasons the Court of Appeals gave for its decision, discussed in detail above, and for the additional reason that the trial Court erred in relying on Pritchett's flawed appraisal, which is discussed immediately below.

A contract must be construed as a whole and effect must be given to all of its provisions. City of Louisa v. Newland, 705 S.W.2d 916 (Ky., 1986) *See also* Cantrell Supply, Inc. v. Liberty Mut. Ins. Co., 94 S.W.3d 381 (Ky.App. 2002) which quotes from Newland.

The four corners of the Agreement contain both a substantive and a procedural requirement applicable to the determination of the purchase price of the Premises. The procedural requirement is the procedure whereby the purchase price will be determined, *i.e.*, negotiations, appraisal by BGP, appraisal by AEP, and appraisal by an appraiser selected by BGP's appraiser and AEP's appraiser. The substantive requirement is that the purchase price be calculated based on *all* of the Price Elements set forth in the Agreement. The trial Court's order directing that the Pritchett appraisal take place failed to define the Price Elements for Pritchett.

In the instant case the trial Court simply ignored the substantive requirement of the Agreement. The trial Court held the parties were bound by the purchase price established by the Pritchett appraisal regardless of whether Pritchett complied with the trial Court's order to establish the purchase price using all Price Elements and in accordance with USPAP. In fact, as set forth above in the Counterstatement of the Case, Pritchett admitted that he did not make his

appraisal in conformity with the trial Court's order of September 12, 2012, and did not include in his appraisal all of the special features and fixtures on the Premises or the value to AEP of continuing in uninterrupted possession of the Premises that were specially suited to its requirements. BGP notes that to the extent there is a conflict between the portions of Pritchett's testimony cited by BGP and the portions cited by AEP, an issue of fact exists as to which portion of Pritchett's testimony, if any, is credible – this issue of credibility is an issue of fact for a jury.

In addition to Pritchett's own admissions quoted and referenced in the Counterstatement of the Case, the uncontroverted affidavits submitted by BGP, *i.e.*,. the affidavits of David Hartman, Robert Taylor, and Jerry Wood discussed in the Counterstatement of the Case, establish that Pritchett's appraisal is in compliance with neither the trial Court's order nor the Agreement.

Because the trial Court failed to enforce the substantive requirements of the Agreement with respect to the inclusion of *all* Price Elements in the value of the Premises, the result reached by the Court of Appeals is correct. At the very least, the unrebutted affidavits submitted by BGP created genuine issues of material fact as to whether Pritchett complied with the trial Court's order and the Agreement given that Pritchett failed to address all of the Price Elements in setting the purchase price, did not comply with USPAP, and was negligent.

Whether AEP acted in good faith in submitting CBRE's appraisal, knowing that it did not address all of the Price Elements set forth in the Agreement, and pursuant to a scheme to "game" the process in order to hold the purchase price down, is another issue of fact. Generally, whether a party acted in good faith is an issue of fact. Beverage Warehouse, Inc. v. Commonwealth, Dept. of Alcoholic Beverage Control, 382 S.W.3d 34, 46 (Ky.App. 2011); Ingram v. Cates, 74 S.W.3d 783, 788 (Ky.App. 2002).

Under CR 56, summary judgment cannot be granted unless there is *no* genuine issue as to *any* material fact. In fact, the law is that summary judgment may not be granted unless it appears that it would be *impossible* for the non-moving party to prevail at trial. Pearson ex rel. Trent v. National Feeding Systems, Inc., 90 S.W.3d 46, 49 (Ky. 2002); Pinkston v. Audubon Area Community Services, Inc., 210 S.W.3d 188, 189 (Ky.App., 2008). The trial Court in the instant case violated this rubric of Kentucky law.

The Agreement as well as the trial Court's order of September 12, 2012, required that Pritchett's appraisal be conducted in accordance with USPAP standards. As stated in the Taylor affidavit, Pritchett's appraisal was not credible or reliable and was in violation of USPAP standards. Further, Taylor clearly states that Pritchett's appraisal was negligent as negligence is defined in USPAP. Negligence, as here documented and asserted by the Taylor appraisal review, is a factual issue under Kentucky law. Henson v. Klein, 319 S.W.3d 413 (Ky. 2010), as is whether Pritchett complied with USPAP. The trial Court also ignored the genuine issue of material fact consisting of whether or not Pritchett negligently made his report.

IV.

THE TRIAL COURT ERRED IN GRANTING AEP'S REQUEST FOR A "RENT CREDIT."

The trial Court allowed AEP a "rent credit" from the time the closing on the sale of the Premises was to take place under the Agreement (had AEP complied with the appraisal requirement) until the Premises were actually conveyed to AEP. There is no basis in law or equity for granting AEP a rent credit. The rent AEP paid was due under the terms of the Agreement and the Sub-lease it assumed. There is no support for the statements in AEP's brief that the rent provided in the Agreement was above market – in fact review of the Agreement discloses to the contrary: the Agreement states that the rent to be paid under the Agreement was

the same as the rent that AEP was paying under the Agreement at the time. The Agreement specifically requires that rent in the amount specified be paid until the actual closing. The trial Court retroactively allowed AEP to utilize the facility for the conduct of its business rent-free for a period of seven months. There is no equity in such a decision.

Moreover, the award of a rent credit is in direct contravention of the Agreement which provides for the payment of prorated rent until the date of closing. (R., p. 235).

In effect, the trial Court imposed liquidated damages in the absence of a provision in any of the applicable documents for such a penalty – no hearing was conducted to determine what damages, if any, AEP actually sustained. The trial Court allowed AEP a credit for all of the rent it paid, not recognizing that if AEP had purchased the property during the period it paid rent there would have been offsetting expenses, and not recognizing that if AEP had rented an alternative facility it would have been required to pay rent for that facility. Even in cases where there is a provision for liquidated damages there must be a hearing to determine the issues of fact: whether there was a breach and the extent of the non-breaching party's damages are classic issues of fact.

In support of its motion for a final order granting damages equal to seven months rent, AEP offered no evidence on the issues of either liability or damages. The "rent credit" was thus awarded by the Court to AEP as, in effect, a CR 12.03 motion for judgment on the pleadings on the basis of AEP's bare allegation that BGP was solely at fault for and should be held liable for the delay in the Agreement's anticipated operative "Closing Date" of no later than June 1, 2012 by refusing to participate in the selection of a third appraiser. BGP, on the other hand, contended that the delay was caused by AEP's breach of the Agreement and the Sublease. The issue of

whether AEP breached the Agreement and the Sub-lease were genuine issue of material fact the trial Court simply ignored.

Further, despite the absence of a liquidated damages clause in the Agreement, AEP did not even proffer any evidence to support the amount of damages requested in its motion. AEP simply asked the trial Court to refund the $58,283.92 per month paid to BGP as rent for the seven months at issue. The trial Court agreed and awarded damages of $407,987.37. The trial Court erroneously dispensed with BGP's right to trial on the disputed issues of fact required to establish liability and the damages arising from the "rent credit" claim without so much as an affidavit in proof.

There was no determination of fact resolving the conflicting allegations of the parties as to which party's conduct resulted in delay of the closing. The issue whether the delay was caused by BGP or AEP was another issue of fact the trial Court ignored. The law of Kentucky is that when one party breaches a contract, further performance by the other party is not required. Blue Diamond Coal Co. v. Robertson, 31 S.W.2d 701, 703 (Ky. 1930); Dalton v. Mullins, 293 S.W.2d 470, 476 (Ky. 1956). Thus, if AEP first breached the Agreement, any subsequent delay was due to AEP's breach, not BGP's insistence that AEP's breaches be cured before the parties proceeded further with the process prescribed by the Agreement.

The trial Court punished BGP for asserting its legal rights. BGP had the right dating from the CBRE appraisal to condition its further performance under the Agreement on AEP's compliance with the Agreement. Punishing BGP in such a manner violates Kentucky Constitution § 1 which provides that everyone has an *inalienable* right "of applying to those invested with the power of government for redress of grievances or other proper purposes, by petition, address or remonstrance" and violates Kentucky Constitution § 14 which provides "All

courts shall be open, and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay."

AEP attempts to characterize itself as being faced with a Hobson's choice of either exercising the option pursuant to the trial Court's judgment or, at great expense, moving to another facility on which it had obtained an option. AEP fails to recall that it had a third option – it could have renewed the lease for a new five-year term. The Court should note that had AEP renewed the lease, the rent that would have been due from the date of the deed to AEP to the present time exceeds the purchase price AEP paid for the Premises.

Because the trial Court erred by granting payment to AEP the rent that was paid for seven months in the amount of $407,987.37 through a reduction in the purchase price, the Court of Appeals was correct in reversing the trial Court's judgment and remanding the case to the trial Court.

CONCLUSION

The trial Court erred when it required the parties to choose a third appraiser to render a binding appraisal of the Premises and when it required BGP to convey the Premises to AEP based on the third appraisal that was flawed because it was in violation of the Agreement, in violation of the trial Court's order directing that the third appraisal take place, in violation of USPAP, and negligent. There were numerous issues of fact that precluded the trial Court's summary judgment granting AEP's request for specific performance. Thus, the Court of Appeals was correct when it reversed the trial Court's erroneous judgment and remanded the case for further proceedings.

There is absolutely no merit to AEP's argument that BGP, by complying with the trial Court's judgment rather than posting a supersedeas bond or putting itself at risk of punishment

for contempt of Court, waived the errors the trial Court committed or rendered its appeal to the Court of Appeals moot. AEP relies on foreign law that represents the minority view of the applicable rule of law. Moreover, this minority view is in conflict with the policy of Kentucky law as expressed in Kentucky cases and the Kentucky Constitution.

AEP has no basis to complain that it has placed itself at a disadvantage because it acted in reliance on the trial Court's summary judgment by referring to extra-record unproven "facts" in violation of basic rules of appellate law and procedure. Well established law in Kentucky holds that if one is a party to proceedings below resulting in a judgment requiring the conveyance of real estate, as opposed to someone with no knowledge of the proceedings, that party is bound by any reversal of the judgment and must make restitution of what was obtained pursuant to the judgment if it is reversed. AEP was placed on notice by BGP two days after the judgment was rendered that by complying with the trial Court's judgment, BGP was not waiving any of its rights by virtue of BGP's December 21, 2012 "Motion for Approval of Deed Form and for Entry of an Order Preserving Claims." AEP recognized the likelihood that BGP would appeal in its response served, December 21, 2012, to BGP' motion stating, in part:

> If BG wants to further contest the Order and the final purchase price, then BG's sole legal remedy is to file and appeal to the Court of Appeals and seek a stay of the enforcement of the Order pending the disposition of the appeal.
>
> ***
>
> In order to obtain such a stay of enforcement of the Order BG also would have to post a sizeable (likely seven figure) supersedeas bond in order to cover AEP's costs and damages for delay.

Thus, AEP attempted to deter BGP from filing the expected appeal by threatening BGP with the specter of being required to post a large supersedeas bond "(likely seven figure)." AEP was well aware of the probability that BGP would take an appeal.

AEP's attempt to argue, based on extra-record "facts," that it would be too difficult to "unwind" the sale of the Premises is of no avail. AEP created the situation that will confront the trial Court. If the trial Court finds it would be too difficult to unwind the sale it is always possible to, as described by the Court in Web, *supra*, require AEP to pay damages so as to place the parties in their previous positions. What is not equitable is what AEP suggests: that BGP's rights should be ignored and tossed aside simply because AEP has placed itself in a difficult position by failing to consider the implications of well-established law relating to the binding effect of a reversal of a judgment directing the sale of real estate on one who is a party to the proceedings resulting in the judgment.

Moreover, AEP's argument that its' decision to improve the property *pendente lite* rests on the unspoken premise that the trial court is somehow without adequate equitable remedies to correct its' own error in issuing summary judgment for specific performance. This is not so. The trial court has a wide variety of tools with which to craft an equitable remedy. The Court of Appeals decision requires that the trial court order AEP to reconvey title to BGP and requires BGP to return the purchase price, less offset for rent payment of $58,283.92 per month retroactively. Should the court determine that AEP has a remaining right under the Agreement to exercise an option to purchase, it could direct AEP to obtain a contract compliant (re)appraisal by order interpreting the Agreement so as to clarify the Price Elements, which a fair appraisal would require, as argued by BGP's still pending breach of contract cause of action. While it is true that the trial court cannot modify a contract, a court sitting in equity and under order of the appellate court to reverse its' prior erroneous judgment of specific performance would have the legal authority and duty to accompany its recession decree with a money judgment, offset as may be appropriate, to return the parties to their prior financial positions.

The Court of Appeals correctly recognized that the trial Court was in error in granting specific performance of the Agreement without resolving the issue whether AEP was in breach of the Agreement; likewise, the Court of Appeals was correct in reversing the trial Court because there was an issue of fact as to whether AEP was in breach of its duty of good faith.

The Court of Appeals reached the correct result, regardless of its reasons for that result. The record makes it clear that there were numerous unresolved issues of fact when the trial Court rendered its final judgment relating to both AEP's breaches of the Agreement and its good faith, as well as the validity of Pritchett's appraisal and whether he complied with the substantive requirements of the Agreement. The Agreement required that the appraisal should establish the Premise's "... fair market value based on its highest and best use, *plus* the value of all special features and fixtures located therein for AEP's use as an extrusion and flexible packaging manufacturing facility." (Emphasis added). Pritchett admittedly failed to do so.

The result reached by the Court of Appeals is correct because the trial Court erred when it granted AEP a $407,987.37 rent credit; the rent credit related to a period of time during which AEP was occupying the property and operating its business thereon. Further, the rent credit failed to recognize that if AEP had moved its operation elsewhere it would have paid rent for substitute premises. One of the primary principles of real estate is that "you pay for the space you occupy" – under the trial Court's judgment, AEP did not pay for the space it occupied. The Agreement required that rent be paid until the actual closing of the sale of the Premises from BGP to AEP. Certainly there is no equity in allowing AEP to occupy the Premises rent-free for seven mon

WHEREFORE the Appellee, B.G. Properties, Inc., requests that the decision of the Court of Appeals be affirmed.

Respectfully submitted.

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