APPENDIX TABLE OF CONTENTS

**NON-PRECEDENTIAL DECISION –
SEE SUPERIOR COURT I.O.P. 65.37**

ALLAN J. NOWICKI JONATHAN NOWICKI Appellants	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	No. 2622 EDA 2021
CROWN FINANCIAL CORPORATION	:	

Appeal from the Judgment Entered November 19, 2021
In the Court of Common Pleas of
Bucks County Civil Division at No(s): 2017-02778

BEFORE: PANELLA, P.J., NICHOLS, J., and COLINS, J.*

MEMORANDUM BY NICHOLS, J.:

FILED AUGUST 31, 2022

Appellants Allan J. Nowicki and Jonathan Nowicki appeal from the order granting summary judgment in favor of Appellee Crown Financial Corporation. On appeal, Appellants argue that the trial court erred in granting Appellee's motion for summary judgment because there were genuine issues of material fact. Appellants also claim that the trial court erred by deciding credibility issues that should have been reserved for a jury and in relying on fraudulent and intentional misrepresentations by Appellee's counsel. We affirm.

---

* Retired Senior Judge assigned to the Superior Court.

We adopt the trial court's summary of the facts and procedural history underlying this matter. ***See*** Trial Ct. Op., 2/10/22; at 1-4. Briefly, the parties entered an agreement for a commercial land transaction in 2016. Ultimately, after Appellants failed to provide the agreed-upon $15,000 payment before the April 7, 2017 deadline, Appellee terminated the agreement and retained Appellant's initial deposit. Appellants subsequently filed a complaint raising breach of contract claims against *Appellee.* Both parties filed cross-motions for summary judgment in 2020 and renewed motions for summary judgment in 2021. Following a hearing on October 29, 2021, the trial court issued an order granting Appellee's renewed motion for summary judgment and denying the motion filed by Appellants.

Appellants filed a timely notice of appeal and a court-ordered Pa.R.A.P. 1925(b) statement. The trial court issued a Rule 1925(a) opinion addressing Appellants' claims.

On appeal, Appellants raise the following issues for review:

1. Did the [trial court] err in granting summary judgment to [Appellee] by deciding an issue of credibility that should have been presented to the jury?

2. Did the [trial court] err in granting summary judgment to [Appellee] when there were genuine issues of material fact?

3. Did the [trial court] err in granting summary judgment to [Appellee] by relying

> on fraudulent and intentional misrepresentations to the court at oral argument by [Appellee's] attorney[,] Gregory F. Cirillo?

Appellants' Brief at 6.

All of Appellants' claims challenge the trial court's order granting summary judgment in favor of Appellees. In reviewing this issue, we are guided by the following principles:

> Our standard of review is *de novo* and our scope of review is plenary. Summary judgment is appropriate where there is no genuine issue of material fact as to a necessary element of a cause of action that can be established by discovery or expert report. In reviewing an order granting a motion for summary judgment, an appellate court must examine the entire record in the light most favorable to the non-moving party and resolve all doubts against the moving party.

Liberty Mutual Grp., Inc. v. Pharmacy, LLC, 270 A.3d 537, 547-48 (Pa. Super. 2022) (citations omitted and formatting altered).

To establish a cause of action for breach of contract, the plaintiff must prove three elements: "(1) the existence of a contract, including its essential terms[;] (2) a breach of the contract; and, (3) resultant damages." ***Meyer, Darragh, Buckler, Bebenek & Eck, P.L.L.C. v. Law Firm of Malone Middleman, P.C.***, 137 A.3d 1247, 1258 (Pa. 2016) (citation omitted). Further, it is well settled that "[w]hen performance of a

duty under a contract is due, any nonperformance is a breach." ***McCausland v. Wagner***, 78 A.3d 1093, 1101 (Pa. Super. 2013) (citation omitted). "If a breach constitutes a material failure of performance, the non-breaching party is relieved from any obligation to perform; thus, a party who has materially breathed a contract may not insist upon performance of the contract by the non-breaching party." *Id.* (citation omitted).

Here, following our review of the parties' briefs, the relevant law, and the trial court's opinion, we affirm on the basis of the trial court's analysis of this issue. *See* Trial Ct. Op. at 6-10. Specifically, we agree with the trial court that there was no dispute that Appellants breached the parties' agreement by failing to "make a valid tender of $15,000 to Appellee by April 7, 2017." *Id.* at 8 (citation omitted). Therefore, "[pier the terms of the second amended [a]greement, Appellee was entitled to terminate the [a]greement and retain the full amount of deposit money paid by Appellants to Appellee in the event of Appellants' breach." *Id.* (citation omitted). Further, because the trial court's ruling "did not turn on any fact that was in dispute[,]" we agree with the trial court that there were no issues of material fact that required a determination from a jury, nor were there any credibility issues precluding the trial court from entering summary judgment in favor of Appellee. *See id.* at 9-10. Finally, we agree with the trial court that Appellants have failed to identify any specific statements by Appellee's counsel that were "intentionally fabricated, fraudulent, or misleading."

Id. at 9. Therefore, Appellants are not entitled to relief. Accordingly, we affirm.

Order affirmed.

Judgment Entered.

/s/ Joseph D. Seletyn
Joseph D. Seletyn, Esq.
Prothonotary

Date: 8/31/2022

ALLAN J. NOWICKI JONATHAN NOWICKI Appellants	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	No. 2622 EDA 2021
CROWN FINANCIAL CORPORATION	:	

Per Curiam

Comment: The "Appellant's Application For Reargument Before The Court En Banc" is hereby DISMISSED as untimely filed. See Pa. R.A.P. 2542(a)(1) (providing that an application for reargument shall be filed within fourteen days after entry of the judgment or order involved); 2542(b) (providing, inter alia, that the U.S. Postal Service Form 3817 certificate of mailing shall show the docket number of the matter in the court in which reargument is sought).

Filed Date: September 14, 2022

Disposition: Order Denying Application for Reargument

Disposition Date: September 30, 2022

IN THE COURT OF COMMON PLEAS OF BUCKS COUNTY, PENNSYLVANIA CIVIL ACTION - LAW

ALLAN NOWICKI and JONATHAN NOWICKI *Plaintiffs,*	)	
vs.	)	No. 2017-02778
CROWN FINANCIAL CORPORATION, *et al.* *Defendants.*	)	

OPINION

(Filed Feb. 10, 2022)

I. INTRODUCTION

Allan and Jonathan Nowicki (hereinafter, "Appellants") filed a Notice of Appeal from this Court's Decision and Order dated November 18, 2021, granting Crown Financial Corporation's (hereinafter, "Appellee's")[1] Renewed Motion for Summary Judgment and denying Appellants' Renewed Motion for Summary

[1] On June 7, 2017, Appellants filed a Complaint against multiple defendants. Numerous preliminary objections and amended complaints were filed. Since the filing of the Complaint, all defendants besides Crown Financial Corporation ("Appellee") were dismissed or released from the case. Appellants' Final Amended Complaint was filed on January 14, 2019, asserting multiple counts. However, at the time of the entry of the undersigned's November 18, 2021 Decision and Order, the only remaining count in the Final Amended Complaint was Breach of Contract together with the Implied Duty of Good Faith and Fair Dealing as against Appellee.

Judgment. This Court's Opinion is being filed as required by Pennsylvania Rule of Civil Procedure ("Pa.R.C.P.") 1925(a) and in compliance therewith. For the reasons stated below, the undersigned respectfully suggests the Appeal should be denied.

II. FACTUAL AND PROCEDURAL BACKGROUND

The essential facts in this case are uncontested and have been admitted to by the parties. On or about December 2016, Appellee owned 55 acres of unimproved real estate located in Tinicum Township, Bucks County, Pennsylvania (hereinafter, the "Property"). Notes of Testimony ("NT") Jan. 22, 2021 at 9:4-7; Exhibit D to Appellants' Original Complaint ("Ex. D"). The original commercial land transaction (hereinafter, the "Agreement") provided that Appellants would purchase the Property for $500,000 on December 15, 2016. NT Jan. 22, 2021 at 9:4-7; Ex. D. The Agreement further provided that if Appellants failed to purchase the Property by that date, Appellee would retain the $25,000 deposit that Appellants initially provided to secure the Agreement. NT Jan. 22, 2021 at 10:23-25; Ex. D.

Appellants attempted to secure financing, but failed to do so, and did not have the funds to purchase the Property on the agreed-upon date. NT Jan 22, 2021 at 10:10-12; 11:2-6. As a result, on December 15, 2016, the parties agreed to extend the closing date to March 15, 2017. Exhibit J to Appellants' Original Complaint

("Ex. J"). As part of this first amendment to the Agreement, Appellants transferred the $25,000 deposit held in escrow to Appellee, with the understanding that the deposit could be retained if Appellants failed to close by the new agreed-upon date. NT Jan. 22, 2021 at 11:2-6; Ex. J.

Appellants were again unsuccessful at securing financing to purchase the Property. NT Jan. 22, 2021 at 14:12-18. On March 18, 2017, the parties agreed to extend the closing date to April 18, 2017. Exhibit N to Appellants' Original Complaint ("Ex. N"). In consideration for this amendment to the Agreement, Appellants were to pay another $25,000 deposit by March 31, 2017, with $10,000 to be paid by March 18, 2017, and the remaining $15,000 to be paid by March 31, 2017. Ex. N. Appellants paid $10,000 toward the deposit on March 18, 2017. NT Jan. 2021 at 16:15-21. On March 29, 2017, Appellee contacted Appellants reminding them of the remaining $15,000 deposit and its due date. Exhibit P to Appellants' Original Complaint ("Ex. P").

On April 3, 2017, Appellee received a check dated March 31, 2017, for the remaining $15,000 owed. Ex. P. The check was given with a note saying that Appellants would inform Appellee when the funds were available in Appellants' account. Ex. P. Appellee stated in an email that a check with insufficient funds did not constitute timely delivery per the second amended Agreement, but that Appellants would have until April 7, 2017, to have the funds available. Ex. N. Appellee warned that failure to do so would result in

cancellation of the Agreement, and Appellee would retain the deposit pursuant to the terms of the parties' second amended Agreement. Ex. N.

On April 6, 2017, Appellee advised Appellants that Appellee would terminate the Agreement and retain the deposit if the funds were unavailable. Ex. N. Appellee learned via email that Appellants' check would not clear on April 7, 2017, but that Appellants had a meeting scheduled on the afternoon of April 7, 2017, about financing to complete the sale. Ex. N. Appellee again warned Appellants that Appellee would terminate the Agreement if the check did not clear. Ex. N. On April 7, 2017 at 8:56 AM, Appellants sent an email to Appellee which stated:

> Dave and Dick,
>
> As you are both aware my son and I are meeting with the Conservation entity at 2:00 pm today. They have already told me in a phone conversation on Wednesday of this week that they have a revolving fund that we can use as a "bridge loan" in order to complete the settlement. I understand that Crown is going to deposit the $15,000. today, I am requesting that they do not deposit the check this morning but wait until I can provide to you the results of the meeting at approximately 3:30pm this afternoon. Crown can still deposit the check today (at 4:00pm) or we can mutually agree to terminate the agreement of sale. Thank you for your consideration.
>
> Allan

Exhibit U to Defendant's Motion for Summary Judgment ("Ex. U"). After 4:00 PM that day, Appellants called Appellee and left a message asking for their call to be returned. NT Oct. 29, 2021 at 26:5-6; NT Jan. 22, 2021 at 35:9-11; 36:14-22.

On April 10, 2017, Appellee terminated the Agreement and retained the deposit. NT Jan 22, 2021 at 35:16-18; Exhibit Q to Appellants' Original Complaint ("Ex. Q"). On April 18, 2017, Appellee sold the property to Red Hill Barn, LLC. Exhibit R to Appellants' Original Complaint. Appellants called Appellee various times between the alleged breach until April 20, 2017, when they learned the property was sold. Exhibit S to Appellants' Original Complaint.

Appellants filed their initial Complaint on June 7, 2017. The parties filed cross Motions for Summary Judgment in August 2020 and September 2020, respectively. On May 20, 2021, Appellee filed a Renewed Motion for Summary Judgment, and on June 16, 2021, Appellants filed their Renewed Motion for Summary Judgment. The parties' Renewed Motions for Summary Judgment were the subject of an Oral Argument held on October 29, 2021, at which time the *pro se* Appellants confirmed on the record the facts previously stated herein. After the parties placed their positions on the record at this Oral Argument, the undersigned determined that there were no longer material facts in dispute. On November 18, 2021, the undersigned issued a Memorandum Decision granting Appellee's Renewed Motion for Summary Judgment and denying Appellants' Renewed Motion for Summary Judgment.

Appellants filed their Notice of Appeal of that Decision and Order on December 14, 2021.

III. STATEMENT OF MATTERS COMPLAINED OF ON APPEAL

On January 5, 2022, Appellants filed a Concise Statement of Matters Complained of on Appeal, which are set forth *verbatim* below:

1. The Trial Court erred in granting Summary Judgment to the Defendant by not viewing the evidence in the light most favorable to the non-moving party as to the evidence of a genuine issue of material fact.

2. The Trial Court erred in granting Summary Judgment to the Defendant because the pleadings and the transcript of oral argument clearly showed that there are disputed material facts.

3. The Trial court erred in granting Summary Judgment to the Defendant by making a decision that should have been submitted to the jury.

4. The Trial Court erred in granting Summary Judgment to the Defendant by relying on Crown Financial Corporation's Intentional Misrepresentations to the Court in their Renewed Motion for Summary Judgment and Memorandum of Law in Support.

5. The Trial Court erred in granting Summary Judgment to the Defendant by relying on Fraudulent and Misleading statements made

to the Court at oral argument by Defendant's Attorney Gregory F. Cirillo.

6. The Trial Court erred in granting Summary Judgment to the Defendant by relying on Crown Financial Corporation's intentional Fabrication of Evidence in their Renewed Motion for Summary Judgment and Memorandum of Law in Support.

7. The Trial Court erred in granting Summary Judgment to the Defendant by relying on Crown Financial Corporation's Fraud Upon the Court.

8. The Trial Court erred in granting Summary Judgment to the Defendant by deciding that the Defendants never received the second deposit in the amount of $15,000 from the Plaintiffs.

9. The Trial Court erred in granting Summary Judgment to the Defendant by deciding that Plaintiffs' proposed terms for deposit was at best a "conditional tender", a fact for a jury determination.

10. The Trial Court erred in granting Summary Judgment to the Defendant by deciding that Plaintiffs breached their second amended agreement with Defendants by failing to make a valid tender of $15,000. by April 7, 2017.

11. The Trial Court erred in granting Summary Judgment to the Defendant because it prevented the credibility of testimony, which is a matter for the jury.

12. The Trial Court Judge Robert O. Baldi erred by not recusing himself before granting Summary Judgment to the Defendant after participating in a settlement conference with the parties.

IV. DISCUSSION

For ease of discussion, this Court will consolidate and address Appellants' arguments that summary judgment was improperly granted, followed by Appellants' contention that Appellee fabricated evidence and committed fraud upon the court, and lastly that the undersigned should have recused himself from further proceedings after participating in a settlement conference with the parties.

A. Summary Judgment

Summary judgment is governed by Pa.R.C.P. 1035.2, which provides that "[a]fter the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment." Summary judgment is properly granted when "the record clearly demonstrates that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Summers v. Certainteed Corp., 997 A.2d 1152, 1159 (Pa. 2010) (quoting Atcovitz v. Gulph Mills Tennis Club, Inc., 812 A.2d 1218, 1221 (Pa. 2002)).

A motion for summary judgment is granted when "the pleadings, depositions, answers to interrogatories,

and admissions on file, together with any affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Albright v. Abington Mem. Hosp., 696 A.2d 1159, 1165 (Pa. 1997) (citing Pa.R.C.P. 1035.1-1035.4). The record is viewed in the light most favorable to the non-moving party, and all doubts as to the presence of a genuine issue of material fact must be resolved against the moving party. Pa. State Univ. v. Cnty. of Centre, 615 A.2d 303, 304 (Pa. 1992). The non-moving party is also entitled to the benefit of all reasonable inferences. Elder v. Nationwide Ins. Co., 599 A.2d 996, 998 (Pa. Super. Ct. 1991).

The Pennsylvania Superior Court in Botkin ex rel. Banes v. Metro. Life Ins. Co., 907 A.2d 641, 642 (Pa. Super. 2006), referred to Pa.R.C.P. 1035.2 and explained:

> [w]hen a party seeks summary judgment, a court shall enter judgment whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense that could be established by additional discovery. A motion for summary judgment is based on an evidentiary record that entitles the moving party to a judgment as a matter of law.

When responding to a motion for summary judgment, the opposing party is required to provide the Court with "evidence of facts essential to the . . . defense which, in a jury trial, would require the issues to be submitted to a jury." Pa.R.C.P. 1035.2(2). The adverse party cannot simply rest on the allegations or denials

of the pleadings but must file a response within 30 days after service of the motion identifying where there are issues of material fact. Pa.R.C.P. 1035.3(d). The nonmoving party must affirmatively prove, by citing to "depositions, answers to interrogatories, admissions or affidavits, that there is a genuine issue for trial." Washington Fed. Say. & Loan Ass'n v. Stein, 515 A.2d 980, 981 (Pa. Super. 1986).

Tender of a contractual obligation to pay requires the "relinquishment of control over the money by the debtor and the receipt of funds by the creditor." 1 Corbin on Pennsylvania Contracts § 67.07 (2021). Generally, a tender must be absolute and unconditional to be valid. 48 P.L.E. Tender § 5 (2021) (citing Osterling v. Rose, 133 A. 374, 375 (Pa. 1926) ("A check tendered in payment of an indebtedness, to be effective, must be like the old rule as to a negotiable note, 'a courier without luggage")) In other words, a tender, including in the form of a check, "must not be accompanied by any condition to which the creditor has a right to object." Schaeffer v. Herman, 85 A. 94, 97 (Pa. 1912).

Here, the relevant facts were not disputed. The parties agreed that this case turns on written communications between the parties, and that those communications are unambiguous. NT Jan. 22, 2021 at 11:12-22; 12:5-11. The parties agreed that Appellants were obligated to tender $15,000 to Appellee by April 7, 2017 per the terms of the second amended Agreement. NT Jan. 22, 2021 at 20:16-25; 22:1-24; 37:18-24.

Discovery has determined, and Appellants have conceded, that at no time relevant to this lawsuit were there sufficient funds in Appellants' checking account to cover the check for $15,000. NT Jan. 22, 2021 at 16:15-21; 21:15-25; 22:1-4; 24:20-22; 34:5-8. Indeed, Appellants explicitly agreed that the second check for $15,000 "was insufficient [from a legal standpoint] because [Appellee] could not use it . . . [or] get any money out of it. [And that Appellants] handed [the check] to [Appellee] conditionally." NT Jan. 22, 2021 at 21:23-25; 22:1-4.

Appellants agreed that had Appellee deposited the check at any time between April 3, 2017 and April 7, 2017, Appellants would have had to take some additional actions for funds to pass to Appellee beyond the mere depositing of Appellants' check. NT Oct. 29, 2021 at 17:20-25;18:16. Appellants contended that had Appellee attempted to deposit the check, Appellants would have covered the insufficient funds. NT Oct. 29, 2021 at 17:13-15. Appellee argued that discovery has shown that Appellants did not have sufficient funds in any of their accounts to cover the check. NT Oct. 29, 2021 at 20:4-9. Appellants countered that they had sufficient cash on hand to cover the check, and therefore, the check would have been honored. NT Oct. 29, 2021 at 17:13-15. Appellee argued that Appellants' most recent statements about how the check would have been covered are inconsistent with their prior statements. NT Oct. 29, 2021 at 15:22-25; 16:1-6.

Notwithstanding any alleged inconsistencies with evidence proffered by either party, it is undisputed that

Appellants were required to make a valid tender of $15,000 to Appellee by April 7, 2017. NT Jan. 22, 2021 at 20:16-25; 22:1-24; 37:18-24. It is undisputed that Appellants never validly tendered this amount and Appellee never received the second installment of the deposit, in the amount of $15,000 from Appellants. NT Jan. 22, 2021 at 16:15-21; 21:23-25; 22:1-25; 24:2022; 34:5-8. It is undisputed that Appellee terminated the second amended Agreement on April 10, 2017. NT Oct. 29, 2021 at 28:20-24; 29:15-20. Per the terms of the second amended Agreement, Appellee was entitled to terminate the Agreement and retain the full amount of deposit money paid by Appellants to Appellee in the event of Appellants' breach. Ex. D.; Ex. N.

Thus, the undersigned appropriately determined that even when viewing the evidence in the light most favorable to Appellants, there is no genuine issue of material fact which requires a jury determination, and Appellee is entitled to judgment as a matter of law.

B. Fraudulent Statements

A fraud upon the court is defined as "[i]n a judicial proceeding, a lawyer's or party's misconduct so serious that it undermines or is intended to undermine the integrity of the proceeding." Black's Law Dictionary (9th ed. 2009). Pennsylvania courts have not created a legal definition for fraud upon the court, and the Third Circuit has only recently passed upon the topic, **noting** that "[t]he concept of fraud upon the court challenges the very principle upon which our judicial system is

based: the finality of a judgment." HSBC Bank USA v. Mid County Resources, 2014 Pa. Dist. & Cnty. Dec. LEXIS 281, at **6-7 (Monroe Ct. Cm. Pl. Jan. 22, 2014) (citing Herring v. United States, 424 F.3d 384, 386-87 (3d Cir. 2005)). In Herring, the Third Circuit articulated a demanding test to determine whether fraud had been committed upon the court:

> [i]n order to meet the necessarily demanding standard for proof of fraud upon the court we conclude that there must be: (1) an intentional fraud; (2) by an officer of the court; (3) which is directed at the court itself; and (4) in fact deceives the court. We further conclude that a determination of fraud on the court may be justified only by the most egregious misconduct directed to the court itself, and that it must be supported by clear, unequivocal and convincing evidence.

424 F.3d at 386-87 (internal quotations omitted).

Here, Appellants have not identified any specific statements which were intentionally fabricated, fraudulent, or misleading. Moreover, the Court was not deceived by any allegedly misleading statements because the undersigned's Decision did not turn on any fact that was in dispute. Instead, the Court relied upon the uncontested facts in the record and the plain language of the parties' second amended Agreement to determine, as a matter of law, that Appellants breached the second amended Agreement by failing to make a valid tender of $15,000 by April 7, 2017.

C. Recusal

There is no general presumption that participation in settlement discussions precludes a judge from later ruling on motions arising from the same matter under either the Pennsylvania Code of Judicial Conduct ("Pa.C.J.C.") or Pennsylvania case law. See Deluca v. Mountaintop Area Joint Sanitary Authority, 234 A.3d 886, 897-98 (Pa. Cmwlth. 2020); Pa.C.J.C. 2.6 Comment 3. Moreover, a party is required to request a judge's recusal "at the earliest possible moment, *i.e.*, when the party knows of the facts that form the basis for a motion to recuse." Lomas v. Kravitz, 170 A.3d 380, 390 (Pa. 2017). If a party does not move promptly to recuse the assigned judge upon learning the facts relevant to recusal, that party waives the issue. Id. This is so because jurists "may properly assume that the lack of objection by the litigants reflects the appropriateness of his or her participation." Goodheart v. Casey, 565 A.2d 757, 764 (Pa. 1989). Moreover, the Pennsylvania Supreme Court has expressed its disapproval of the "unconscionable and reprehensible tactic of laying in the grass, waiting until the decision [is rendered] and then raising the disqualification issue only if [dissatisfied therewith.]" Id. at 763.

Here, the *pro se* Appellants were aware that the undersigned had been involved in settlement discussions with the parties well before the Oral Argument held on October 29, 2021. At Oral Argument, the Court also reminded the parties that they had previously participated in an off-the-record settlement conference with the undersigned. NT Oct. 29, 2021 at 2:19-22.

Appellants did not raise the issue of the undersigned's recusal at Oral Argument, choosing instead to wait until after the Decision was entered in favor of Appellee. Therefore, Appellants have waived the issue of the undersigned's disqualification.

V. CONCLUSION

It is respectfully submitted that each of the alleged errors raised on appeal have been addressed by the Court, and the Court did not err in its findings. The undersigned's Decision and Order entered on November 18, 2021 properly granted Appellee's Renewed Motion for Summary Judgment and denied Appellants' Renewed Motion for Summary Judgment. Thus, the instant Appeal should be denied.

BY THE COURT:

2/10/22 /s/ Robert O. Baldi
DATE ROBERT O. BALDI, J.

**IN THE COURT OF COMMON PLEAS,
BUCKS COUNTY, PENNSYLVANIA
CIVIL ACTION – LAW**

ALLAN NOWICKI, et al.	:	**NO.: 17-2778**
v.	:	
CROWN FINANCIAL CORP., et al.	:	

DECISION WITH ACCOMPANYING ORDER

(Filed Nov. 18, 2021)

Before the Court are the parties' renewed Motions for Summary Judgment. On October 29, 2021, the parties appeared before the undersigned for Oral Argument, at which time the parties stipulated to certain facts which were discussed within the context of the renewed Motions for Summary Judgment. The parties initially filed Motions for Summary Judgment on August 27, 2020 and September 24, 2020, which the undersigned ruled upon after oral argument held on January 22, 2021. During the oral argument on the initial Motions for Summary Judgment, the parties agreed that their positions revolved around a very narrow issue of fact, which at the filing of the initial Motions for Summary Judgment was contested.

Fundamental facts are not presently in dispute and have been admitted during both oral arguments. It should be noted that Plaintiffs are not lawyers and are acting pro se. Allan Nowicki, a Plaintiff in this matter, has repeatedly appeared before the undersigned,

and has conducted himself in a gracious and candid fashion. To his credit, he has conceded facts which are not reasonably in dispute and has on each occasion, before me, articulated his legal position without reservation in an unguarded fashion. On occasions I have disagreed with one of his legal conclusions, and I have explained the basis for my decision. Defense counsel has been equally candid, and therefore, the issue before the Court has been narrowly drawn.

The underlying dispute is based upon a real estate transaction that was terminated by Defendants based upon events which have been established by deposition testimony and admissions of the parties. Defendants owned approximately 55 acres of unimproved real estate located in Tinicum Township. An agreement of sale was entered into between Plaintiffs and Defendants, wherein Plaintiffs would settle on the property on or before December 15, 2016. The contract stated that if Plaintiffs failed to purchase the land by that date, Defendants would retain a $25,000 deposit that Plaintiffs provided to secure the contract.

As of December 15, 2016, Plaintiffs were not able to proceed to closing, and as a result, on December 15, 2016, the parties contracted to extend the closing date to March 15, 2017. As part of this first amendment to the contract, Plaintiffs transferred the $25,000 deposit, held in escrow, to Defendants, with the understanding that the deposit could be retained by Defendants if Plaintiffs failed to close by the new agreed upon date.

Plaintiffs were again unable to proceed to settlement as of March 15, 2017, and on March 15, 2017, the parties agreed to extend the closing date to April 18, 2017. In consideration for the second amendment to the agreement, Plaintiffs agreed to pay another $25,000 total deposit to Defendants by March 31, 2017, with $10,000 to be paid by March 18, 2017, and the remaining $15,000 to be paid by March 31, 2017. The second amendment to the agreement specified that time was of the essence.

The parties do not contest any controlling fact with respect to the obligations of one another. In accordance with the second amendment to the agreement, Plaintiffs paid the first installment of $10,000 on March 18, 2017. On March 29, 2017, Defendants contacted Plaintiffs reminding them of the second installment of the deposit and its due date.

On April 3, 2017, Defendants received Plaintiffs' check dated March 31, 2017, for the remaining $15,000 owed. Plaintiffs' check was accompanied by a note advising Defendants that Plaintiffs would contact them when sufficient funds would be available in Plaintiffs' checking account to cover the check.

Between April 3, 2017 and April 6, 2017, the parties exchanged emails, and on April 6, 2017, Defendants advised Plaintiffs that Defendants intended to deposit Plaintiffs' check on April 7, 2017, and that if there were still insufficient funds in Plaintiffs' checking account at that time, Defendants would terminate

the agreement. On April 7, 2017, Plaintiffs' sent Defendants an email which read:

> Dave and Dick,
>
> > As you are both aware my son and I are meeting with the Conservation entity at 2:00 pm today. They have already told me in a phone conversation on Wednesday of this week that they have a revolving fund that we can use as a "bridge loan" in order to complete the settlement[.] I understand that Crown is going to deposit the $15,000[] today, I am requesting that they do not deposit the check this morning but wait until I can provide to you the results of the meeting at approximately 3:30pm this afternoon. Crown can still deposit the check today (at 4:00pm) or we can mutually agree to terminate the agreement of sale. Thank you for your consideration.
>
> -Allan

Defendants never spoke with Plaintiffs on April 7, 2017. On April 10, 2017, Defendants notified Plaintiffs that they were terminating the agreement and retaining Plaintiffs' deposit. Thereafter, Defendants sold the property to another purchaser.

It is undisputed that there were insufficient funds in Plaintiffs' checking account when they provided the check for $15,000 to Defendants on April 3, 2017. It is undisputed that the parties did not have any further communications that materially altered the terms of their second amended agreement. Discovery

has determined, and Plaintiffs have conceded, that at no time relevant to this lawsuit were there sufficient funds in Plaintiffs' checking account to cover the check they provided Defendants on April 3, 2017. Plaintiffs agree that had Defendants deposited the check at any time between April 3, 2017 and April 7, 2017, Plaintiffs would have had to take some additional actions. for funds to pass to Defendants beyond the mere depositing of Plaintiffs' check.

Plaintiffs contend that had Defendants attempted to deposit the check in their account, Plaintiffs would have covered the insufficient funds. Defendants argue that discovery has shown that Plaintiffs did not have sufficient funds in any of their accounts to cover the check. During oral argument, Plaintiffs argued that they had sufficient cash on hand to cover the check, and therefore, the check would have been honored. Defendants argued that Plaintiffs' most recent statements about how the check would have been covered are inconsistent with their prior statements.

Notwithstanding any alleged inconsistencies with evidence proffered by either party, it is clear and undisputed that Plaintiffs were required to tender $15,000 to Defendants by April 7, 2017. It is undisputed that Plaintiffs. never tendered this amount and Defendants never received the second installment of the deposit, in the amount of $15,000, from Plaintiffs.

Tender of a contractual obligation to pay requires the "relinquishment of control over the money by the debtor and the receipt of funds by the creditor." 1 Corbin on Pennsylvania Contracts § 67.07 (2021). For a tender to be valid, it "must not be accompanied by any condition to which the creditor has a right to object." Schaeffer v. Herman, 85 A. 94, 97 (Pa. 1912).

Payment by personal check "occurs upon receipt of a check, with the condition that it be honored." Romaine v. Workers' Comp. Appeal Bd. (Bryn Mawr Chateau Nursing Home), 901 A.2d 477, 482 (Pa. 2006) (referencing Douglass v. Grace Building Company, Inc., 383 A.2d 937 (Pa. 1978)). However, tender of a check with insufficient funds or that is otherwise unredeemable does not constitute performance of an obligation to pay under a contract. See Atiyeh v. Bear, 690 A.2d 1245, 1251 (Pa. Super. 1997); See also DIA-Pa. Invs. Inc. v. Greth, 23 Pa. D&C 4th 572, 573 (C.C.P. Berks Cty. 1993).

Plaintiffs' check, which Plaintiffs repeatedly informed Defendants was drawn from an account with insufficient funds, and Plaintiffs' accompanying note with proposed terms for deposit thereof, was at best a conditional tender that was insufficient as a matter of law. Plaintiffs breached their second amended agreement with Defendants by failing to make a valid tender of $15,000 by April 7, 2017. Accordingly, Defendants had the right to terminate their second amended agreement with Plaintiffs and retain Plaintiffs' deposit,

and Defendants were not obligated to sell the property to Plaintiffs.

BY THE COURT:

/s/ Robert O. Baldi 11/18/2021
ROBERT O. BALDI, J.

IN THE COURT OF COMMON PLEAS,
BUCKS COUNTY, PENNSYLVANIA
CIVIL ACTION – LAW

ALLAN NOWICKI, et al.	:	**NO.: 17-2778**
v.	:	
CROWN FINANICAL CORP., et al.	:	

ORDER

AND NOW, this 18th day of Nov, 2021, for the reasons set forth in the accompanying Decision, Defendants Motion for Summary Judgment is GRANTED. Summary Judgment is entered on behalf of Defendant Crown Financial Corp. and against Plaintiffs, Allan Nowicki and Jonathan Nowicki.

BY THE COURT:

/s/ Robert O. Baldi
ROBERT O. BALDI, J.

COURT OF COMMON PLEAS
OF BUCKS COUNTY

Allan J. Nowicki

Jonathan A. Nowicki

Plaintiffs — Case No.: 2017-02778

v.

Crown Financial Corporation,

Defendant — Jury Trial Demanded

ORDER

AND NOW this 7th day of Dec, 2021 upon consideration of Plaintiff's Motion for Reconsideration of the Order Granting Summary Judgment to Defendant Crown Financial Corporation together with Plaintiffs Supplemental Motion it is hereby ORDERED and DECREED that the Motion for Reconsideration ~~GRANTED~~. [Denied]

BY THE COURT:

/s/ Robert O. Baldi
Robert O. Baldi, Judge

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

ALLAN J. NOWICKI AND JONATHAN NOWICKI,	:	No. 515 MAL 2022
Petitioners	:	Petition for Allowance of Appeal from the Order of the Superior Court
v.	:	
CROWN FINANCIAL CORPORATION, ET AL,	:	
Respondent.	:	

ORDER

PER CURIAM

AND NOW, this 2nd day of May, 2023, the Petition for Allowance of Appeal is **DENIED**.