the keys in the ignition in an area that had experienced a number of automobile thefts, the Defendant was not negligent because he could not have forseen the thief's actions. The Supreme Court distinguished the *Liney* and *Anderson* cases upon the grounds of forseeability. In *Anderson,* the Defendants could have forseen the fact that the car might be stolen by an incompetent and careless driver because juveniles were known to play in the area and only two days prior to the incident, keys had been stolen from one of the cars and no precautions had been taken to remove that car from the open and unattended lot. The facts in the case at bar are closer to those in *Liney,* and even then, they are not as severe. Here, the keys had not been left in the ignition and the area was not one that had experienced a number of thefts. The actions of William Anderson could not have been forseen by the Circus.

ORDER OF COURT

March 4, 1983, Plaintiff's motion to remove the nonsuit is dismissed.

FITTRY V. HOUPT, C.P. Franklin County Branch, No. A.D. 1982 - 174

Declaratory Judgment - Agreement of Sale - Mortgage Contingency - Return of Down payment - Time of Essence

1. The waiver of a contractual right must be clear, unequivocal and the decisive act of a party.

2. A provision declaring a contract null and void if mortgage arrangements are not completed by a certain date is a sufficient expression of intent of the parties to make the specified date the essence of the agreement.

3. A purchaser has the right to seek his own mortgage and cannot be compelled to accept the type of financing which the vendor happens to think reasonable.

Forest N. Myers, Esquire, Attorney for Plaintiff

Thomas B. Steiger, Esquire, Attorney for Defendant

solve and is winding up its business.

Ullman, Painter and Misner
10 East Main Street
Waynesboro, Pa. 17268

1-27, 2-3

NOTICE IS HEREBY GIVEN that on January 18, 1984, the Petition of Raymond Eugene Wetzel was filed in the Court of Common Pleas of the 39th Judicial District, Franklin County Branch, praying for a decree to change his name to Richard Eugene Manahan.

The Court has fixed Tuesday, the 28th day of February, 1984, at 1:30 o'clock P.M. as the time and place for the hearing of said Petition, when and where all persons interested may appear and show cause, if any they have, why the prayer of the said Petition should not be granted.

DiLoreto and Cosentino
326 Trust Company Building
Chambersburg, Pa. 17201

1-27

David W. Rahauser, Esquire, Attorney for Broker

OPINION AND ORDER

EPPINGER, P.J., June 9, 1983:

On February 18, 1982, Kurt D. Houpt, defendant, and Harold and Betty Fittry, plaintiffs, entered into and signed an agreement negotiated by Century 21 Lincoln Associates, Ltd., broker and additional defendant, for the purchase and sale of property owned by the Fittrys. Houpt deposited five thousand dollars ($5,000) with Century 21 as a down payment to be credited towards the purchase price. The agreement contains a mortgage contingency clause which states that the sale is not conditional or contingent upon the sale of other real estate nor subject to mortgaging or financing except as thereafter provided. The contingency clause provides that the buyer requires a twenty year, one year RRM conventional mortgage for fifty thousand dollars ($50,000) with an interest rate of fifteen percent (15%) with the commitment date for approval of the mortgage being March 12, 1982. The clause also provides that the loan application shall be made through the office of the Valley Bank and Trust Company and "... if said mortgage cannot be obtained, this agreement shall be NULL AND VOID and all deposit moneys shall be returned to the Buyer on or before settlement date as herein provided subject to..." certain instances which are not applicable in the case at bar. Settlement date was April 30, 1982.

Houpt filed an application with Valley Bank and Trust Company on February 19, 1982, requesting a mortgage under the terms and conditions set forth in the contract. On February 27, 1982, Houpt informed Century 21 that he would be unable to meet the commitment date for approval of the mortgage, March 12, 1982, due to the fact that the bank required additional paper work. The Fittrys through their agent, Century 21, orally granted an extension until the point in time when the bank accepted or denied the application. On March 24, 1982, Houpt received a letter from the bank denying his application, and within a few days notified Century 21 of this. Thereafter, Century 21 arranged a meeting between the parties during which the Fittrys offered to take back a purchase money mortgage for approximately thirty-five thousand dollars ($35,000) at an interest rate of twelve percent (12%). No agreement was reached. In late April, Houpt demanded his down payment be returned. The Fittrys brought an action for declaratory judgment.

A written contract that is clear and unambiguous must be strictly construed. *Robert F. Felte v. White,* 451 Pa. 137, 302 A.2d 347 (1973). When interpreting a contract, the intention of the parties must be determined, and in ascertaining that intent effect must be given to all the provisions of the contract. Id. The written agreement[1] and the intent[2] of the parties is clear and unambiguous. If the buyer should fail to obtain financing, he is entitled to a return of his down payment by the settlement date.

The parties have the right to make their own contract and it is not the function of the Court to rewrite it, or give it a construction in conflict with the accepted and plain meaning of the language used. Id.

A mortgage financing clause is an important condition in a written agreement of sale which must be given effect unless altered by the parties or specifically waived by the party in whose favor the condition runs. Id. The waiver of such a contractual right - the return of the escrow deposit - must be a clear, unequivocal and decisive act of the party. Id. There was no such waiver of this right by Houpt. Although the specified date was subsequently extended by oral agreement of the parties, this extension did not cause a waiver of the right of Houpt to the return of his down payment in the event that he complied with all terms of the agreement but was unable to obtain financing. Id.

Although the contract does not state that time is of the essence, it is necessarily implied from the language of the contract and from the clear action of the parties. *Tanenbaum v. Sears, Roebuck and Co.,* 265 Pa. Super. 78, 401 A.2d 809 (1979). The provision declaring the contract null and void if mortgage arrangements were not completed by a certain date is a sufficient expression of

[1]"Mortgage loan application shall be made through the office of Valley Bank and Trust Company who for purpose of negotiating for the said mortgage loan, shall be considered that agent for the Buyer, and if said mortgage loan cannot be obtained, this agreement shall be NULL AND VOID and all deposited moneys shall be returned to the Buyer on or before date for settlement as provided herein, subject however to the provisions in paragraph #4(e) and #4(f)."

[2]On page 6 of her deposition, Judith Harding, Agent for the Seller stated ". . . and I stated to him that if the contract was null and void, if he wasn't going to go through with it, then he would be entitled to his money back."

the intent of the parties to make the specified date the essence of the contract. *Shumaker v. Lear et al.;* 235 Pa. Super. 509, 345 A.2d 249 (1975).

By mutual consent, the parties to an unperformed contract may effectuate an extension of time for its performance. *Cosgrove v. Kappel,* 9 Chest. 343, affd. 403 Pa. 108, 168, A.2d 319 (1960). The buyer and the seller orally agreed to extend the time for approval of the mortgage. After the extended date passed, the Fittrys offered to take back a purchase money mortgage. Houpt was not bound to accept this offer.

A purchaser has the right to seek his own mortgage and cannot be compelled to accept the type of financing which the vendor happens to think is reasonable. *Tieri v. Orbell,* 192 Pa. Super. 612, 162, A.2d 248 (1960). *King v. Clark,* 183 Pa. Super. 190, 130 A.2d 245 (1957).

ORDER OF COURT

June 9, 1983, the prayer of Harold O. Fittry and Betty L. Fittry, Plaintiffs, for a Declaratory Judgment ordering that a $5000 deposit made by Kurt D. Houpt, defendant, to Century 21 Lincoln Associates, Ltd., Realtors to be held in escrow pursuant to a written agreement for the sale of Plaintiffs' real estate to Defendant, should be paid to Plaintiffs is denied and Defendants prayer that it would be returned to him is granted, and

IT IS ORDERED that a Declaratory Judgment be entered that Century 21 Lincoln Associates, Ltd. shall pay the said sum of $5,000 to Kurt D. Houpt, Defendant.

Costs shall be paid by Plaintiffs.

CLEVENGER V. WARRENFELTZ, C.P. Franklin County Branch, F.R. 1980 - 212-S

Support - Paternity - URESA - Jurisdiction of Pennsylvania Court

1. Where a support action was transferred to Maryland where defendant