IN THE SUPREME COURT OF THE STATE OF DELAWARE

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TITAN INVESTMENT FUND II, LP,	§	No. 213, 2012
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	§	Court Below: Superior Court of the State of Delaware, in and for New Castle County
Plaintiff Below, Appellant, Cross-Appellee,	§	
	§	C.A. No. 09C-10-259 WCC
v.	§	
	§	
FREEDOM MORTGAGE CORPORATION,	§	
	§	
Defendant Below, Appellee, Cross-Appellant.	§	

Submitted: November 7, 2012
Decided: December 5, 2012

Before **HOLLAND**, **JACOBS** and **RIDGELY**, Justices.

O R D E R

This 5th day of December 2012, upon consideration of the briefs of the parties, their contentions in oral argument, and the record in this case, it appears to the Court that:

1. Titan Investment Fund II, LP, the plaintiff-below ("Titan"), appeals from a Superior Court order and judgment in this breach of contract action. Freedom Mortgage Corporation, the defendant-below ("Freedom"), cross-appeals

from that same order. We AFFIRM in part, REVERSE in part, and REMAND for further proceedings in accordance with this Order.

2. Titan Capital Investment Group ("TCIG"), is a Delaware limited partnership that primarily manages real estate investments. Titan, a subsidiary fund of the TCIG and was created to implement the Titan-Freedom investment contract at issue in this dispute. TCIG is owned by William Peruzzi and two other partners, all of whom serve as Titan's managers.

3. Freedom is a mortgage bank that handles residential mortgage financing for persons buying new property, and for consumers refinancing an existing mortgage. Freedom does not maintain its necessary capital from any cash reserved from its customer deposits. Instead, Freedom relies upon lines of credit from institutional lenders such as J.P. Morgan. Freedom, which was controlled and headed by Mr. Stan Middleman, generates revenue by charging fees to its customers and by selling mortgages, mortgage-backed securities, and mortgage servicing rights to third parties.

4. By January 2009, in the wake of the national credit crisis, developments in the banking industry had significantly reduced the total amount of liquidity available for mortgage loans. But, by then, reduced consumer interest rates had also significantly increased demand for both new mortgages and refinancing existing mortgages. Freedom thus faced a potential decrease in its existing capital

supply, yet stood to gain a competitive advantage if it could access new additional capital to satisfy increased consumer demand.

5. On April 7, 2009, Freedom and Titan entered into a Letter Agreement and Term Sheet (collectively, the "Titan-Freedom Contract") that established a warehouse credit facility. The Titan-Freedom Contract obligated Titan to raise at least $25 million to be invested in Freedom. Titan's contractual obligation was "subject to," among other requirements, the execution of a credit agreement and other loan documents that were "mutually acceptable" to both Titan and Freedom.

6. After executing the Titan-Freedom Contract, Titan solicited and secured two investors for its contract with Freedom. The first investor, Context Capital Partners ("Context"), agreed to invest $5 million in the Titan-Freedom Contract directly through Titan. The second investor, LBC Credit Partners, Inc. ("LBC"), a middle-market financing company, agreed to invest $20 million in Freedom, not directly through Titan but instead as a "co-buyer" with Titan.

7. By July 2009, changes in the credit market enabled Freedom to increase its ability to secure credit from other lenders independent of its April 2009 contractual arrangement with Titan. That changed circumstance caused Middleman, on behalf of Freedom, to repudiate the Titan-Freedom Contract on July 22, 2009. In an email to Titan's principal, Mr. Peruzzi, Middleman stated, "I have spent a great deal of time trying to justify this [deal] in my mind (I would like

to) and can't seem to make it work for us, the cost is just too high. Therefore, I have instructed my staff to put this project on hold and to do no more work on the subject." Middleman added that "[s]peed to market was a driving force and we were not able to get this [deal] done quickly enough to take advantage of a short lived refinance boom that seemingly has run out of steam." Peruzzi immediately telephoned Middleman to discuss the email. According to Peruzzi, by the end of that discussion, Titan had "agreed to work on the commitment letters and [Middleman] would review the repurchase agreement" between Titan and Freedom in furtherance of their ongoing deal.

8. Two days later, on July 24, 2009, LBC issued to Titan a letter (the "LBC Commitment Letter") purporting to invest $20 million of LBC's funds in Freedom as a "co-buyer" with Titan in the Titan-Freedom deal. The LBC Commitment Letter stated that LBC's "proposed commitment" of $20 million was "subject to changes we have requested or which we may otherwise approve," and was also "expressly conditioned upon" LBC's receipt of various documents and payments that must all be "acceptable to [LBC] in [its] sole discretion." Lastly, the LBC Commitment Letter provided that "LBC may terminate its obligations under this letter if the foregoing assumptions . . . prove to [be] inaccurate . . . ." That same day, upon receiving both Context's and LBC's Commitment Letters from Titan, Middleman told a colleague at Freedom that Middleman was "going to

probably pass on the deal but string [Titan] out for a little while in case [Freedom] become[s] desperate."

9. On August 4, 2009, Freedom's counsel officially terminated the Titan-Freedom Contract, based on Context's and LBC's nonconforming and nonbinding Commitment Letters. As support for its conclusion that LBC's Commitment Letter was contractually invalid, Freedom's counsel relied upon, and expressly repeated, some of the above-quoted phrases from LBC's Commitment Letter.

10. In response, Titan brought a breach of contract action against Freedom in the Superior Court on October 28, 2009. After a bench trial, the Superior Court found in its March 27, 2012 order and judgment that: (i) the Contract between Titan and Freedom was legally enforceable; (ii) Middleman's July 22, 2009 email to Peruzzi constituted a repudiation by Freedom of that Contract; and (iii) Freedom, through its counsel, officially terminated that Contract on August 4, 2009.[1] The court further held, however, that (iv) even if Freedom had not breached the Contract, Titan had not presented evidence sufficient to establish that the deal would have closed.[2] The court cited, among other things, the nonconforming LBC Commitment Letter and the Titan-Freedom Contract provision that authorized Freedom to nullify the Contract if the credit agreement and other loan documents

[1] *Titan Inv. Fund II, LP v. Freedom Mortg. Corp.*, C.A. No. 09C-10-259 WCC, 2012 WL 1415461, at *6-7, *9 (Del. Super. Mar. 27, 2012).

[2] *Id.* at *10.

were not "mutually acceptable" to both Freedom and Titan.[3] The Superior Court found "it . . . obvious that this was a deal with no momentum which probably would not have come to a final conclusion."[4]

11. In calculating Titan's damages resulting from Freedom's breach of the Titan-Freedom Contract, the court found that Titan's potential lost profits were too speculative to merit an award for "expectation" (*i.e.*, benefit-of-the-bargain) damages.[5] The Superior Court held that Titan could recover only its "reliance" damages, which the court calculated as follows:

Titan's costs and expenses:	$135,425.68
Titan's 1% commitment fee upon closing the deal:	+ $250,000.00
Freedom's deposit to Titan for Titan's costs and expenses:	- $80,000.00
LBC's share of the 1% commitment fee:	- $100,000.00
Total "Reliance" Damages:	$205,425.68.[6]

Titan's appeal and Freedom's cross-appeal followed.

[3] *Id.* at *10-11.

[4] *Id.* at *11.

[5] *See id.* at *10-11.

[6] *See id.* at *11-12.

12. The first issue presented is whether the Superior Court reversibly erred by holding that Freedom repudiated, and thereby breached, the Titan-Freedom Contract when Middleman sent his email to Peruzzi on July 22, 2009. If that email constituted a breach, the issue then becomes whether Titan is legally entitled to any damages as a consequence, and if so, in what amount.

13. In a bench trial where a trial judge is the factfinder, an appeal from that judge's determination implicates both the facts and the law.[7] This Court reviews a question of law *de novo*, and reviews a factual finding under a "clearly erroneous" standard.[8] If a trial court's factual findings are sufficiently supported by the record and are the product of an orderly and logical reasoning process, we accept those findings unless they are "clearly wrong and the doing of justice requires their overturn . . . ."[9] On the other hand, if there is "sufficient evidence to support the findings of the trial judge," we must affirm.[10]

14. On its appeal, Titan claims that it was entitled to an award of its recoverable lost profits, based on the benefit-of-the-bargain measure of damages. On its cross-appeal, Freedom claims that the trial court erred by holding that

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[7] *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972) (citation omitted).

[8] *Bank of N.Y. Mellon Trust Co. v. Liberty Media Corp.*, 29 A.3d 225, 236 (Del. 2011); *Sci. Accessories Corp. v. Summagraphics Corp.*, 425 A.2d 957, 966 (Del. 1980).

[9] *Levitt*, 287 A.2d at 673.

[10] *Brittingham v. Am. Dredging Co.*, 262 A.2d 255, 257 (Del. 1970).

Freedom breached the Titan-Freedom Contract, for which reason Freedom should not have been held liable to Titan for any contract damages. Notably, both parties argue that the Superior Court incorrectly adjudicated the treatment of one component of its damages award—the 1% commitment fee that Titan would have received had the Titan-Freedom Contract, in fact, closed.[11]

15. We conclude that the Superior Court correctly determined that Freedom breached the Titan-Freedom Contract on July 22, 2009 by ceasing to continue negotiations with Titan in good faith. Freedom's email repudiation (in which Middleman informed Titan that Freedom would "do no more work" on the Titan-Freedom Contract) constituted a breach, and the trial court properly so held. Middleman's later email to a Freedom colleague explaining that Freedom was "going to probably pass on the deal but string [Titan] out for a little while" was, as the Superior Court properly found, simply a "business ploy" for Freedom to buy time to locate a legal escape route from the Titan-Freedom Contract. Middleman's later email was not, as Freedom argues, a legally valid retraction of Middleman's earlier repudiation of the Titan-Freedom Contract. That repudiation became final on August 2009, when Freedom's counsel formally terminated the Titan-Freedom Contract.

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[11] *See Titan Inv. Fund II, LP v. Freedom Mortg. Corp.*, C.A. No. 09C-10-259 WCC, 2012 WL 1415461, at *11 (Del. Super. Mar. 27, 2012).

16. On the damages issue, we agree with Freedom that the Superior Court erred in awarding Titan a 1% commitment fee. Because the trial court found that the contract would not have closed—even absent Freedom's breach—Titan was not entitled to receive the 1% commitment fee that presupposed the opposite conclusion, namely, that the deal would have closed. The court's finding that the deal would not have closed, and its 1% commitment fee award to Titan, were fatally inconsistent. Given Titan's inability to establish that the Titan-Freedom Contract would have closed but for Freedom's breach, Titan is not entitled to damages measured on a " benefit-of-the-bargain" basis. Rather, Titan was entitled only to its "reliance" damages, measured by its actually-incurred costs and expenses.

17. At this juncture, however, we find it difficult to review the determination of Titan's recoverable costs and expenses. The Superior Court, without citing to the trial record, established Titan's costs and expenses at $135,425.68, presumably by referring to (Trial) Court Exhibit No. 1. Although that document was admitted at trial as a demonstrative court exhibit, it was not, as the Superior Court recognized, "an official exhibit of the trial." There is an official trial exhibit, (Trial) Exhibit 383—which (Trial) Court Exhibit No. 1 cited in a footnote—but Exhibit 383 does not facially support the $135,425.68 damages figure. (Trial) Exhibit 383 contains several columns of dollar amounts, none of

which appear to add up to a damages award of $135,425.68. Without evidentiary support from either an admitted trial exhibit or from explanatory portions of the trial transcript, we are unable to discern how the $135,425.68 monetary award was derived. On the evidentiary record currently before us, we must conclude that the calculation of Titan's incurred costs and expenses of $135,425.68 is unsupported, and, therefore, clearly erroneous.

18. Accordingly, we affirm the Superior Court order and judgment insofar as it adjudicates that Freedom breached the Titan-Freedom Contract. We reverse outright the trial court's award of a 1% commitment fee to Titan. We also reverse the remaining damages award and remand for the trial court to determine Titan's actually-incurred costs and expenses based upon the evidence of record.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED in part**, **REVERSED in part**, and **REMANDED** for further proceedings in accordance with this Order.

BY THE COURT:

/s/ Jack B. Jacobs
Justice