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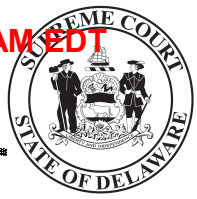

IN THE

Supreme Court of the State of Delaware

LEWES INVESTMENT COMPANY, L.L.C., Plaintiff-Below, Appellant, v. THE ESTATE OF FRANCES B. GRAVES, THE FRANCES B. GRAVES REVOCABLE TRUST DATED JUNE 14, 2002, WILLIAM D. GRAVES, ANN BAR STUBBS, MAHLON H. GRAVES, and DEAN M. GRAVES, Defendants-Below, Appellees.	No. 156,2013 APPEAL FROM THE COURT OF CHANCERY OF THE STATE OF DELAWARE C.A. No. 2893-VCG

DEFENDANTS-BELOW, APPELLEES' ANSWERING BRIEF

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Dated: June 5, 2013

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NATURE OF THE PROCEEDINGS

In this case, Lewes Investment Company ("Lewes Investment") claims that it is entitled to a return of monies spent on a struggling development project because the sellers did not cure a title defect prior to a closing that, in any event, would not have been able to occur. In short, this case is about a company's attempt to recoup costs spent on a development project that did not pan out as expected.

In July 2004, Lewes Investment's predecessor-in-interest entered into an Agreement of Sale with William D. Graves, Ann Barr Stubbs, Mahlon Graves, Jr., Dean Graves, and the estate and trust of Frances B. Graves ("the Graves") to purchase of two parcels of land in Sussex County, Delaware for $13 million (the "Agreement"). In accordance with the Agreement, Lewes Investment provided the Graves with a $650,000 deposit and informed the Graves of a title defect pertaining to 1/8 interest of one of the parcels. Lewes Investment, as allowed by the contract, extended the original closing date from January 26, 2006 to July 26, 2006.

Less than a month before the July 26 closing date, Lewes Investment was still experiencing financing and regulatory problems with the Property and sought, but did not finalize, a one- to three-year extension of the closing date. By letter dated July 25, 2006, Lewes Investment, although unprepared for closing,

demanded that the Graves resolve the title defect within 30 days (the "July 25 Letter"). Lewes Investment was still unable to settle at the end of the 30-day period, failed to schedule closing, and continued to negotiate for a three-year extension under the Agreement so it would have more time to develop the Property. The Graves resolved the title defect in February 2007 and demanded that Lewes Investment go to closing.

In response, Lewes Investment filed suit against the Graves in the Court of Chancery, seeking money damages or rescission for breach of the Agreement and breach of the duty of the duty of good faith and fair dealing. The Graves answered the Complaint and counterclaimed for breach of contract. On March 3, 2010, the Honorable Master Kim Ayvazian issued a draft oral report granting Lewes Investment's motion for summary judgment. After the Graves took exceptions to the report, Master Ayvazian withdrew it and allowed the parties to go to trial in August 2011. Prior to trial, Lewes Investment abandoned its request for rescission, stating in the Pretrial Order that it only sought money damages.

In September 2012, Master Ayvazian issued a final report in favor of Lewes Investment. The Graves filed exceptions and oral argument was held by the Honorable Vice Chancellor Sam Glasscock, III on the exception. By Opinion dated February 12, 2013, Vice Chancellor Glasscock rejected the Master's report ("Opinion" or "Mem. Op."). In doing so, Vice Chancellor Glasscock held, *inter*

alia, that the Graves did not breach the Agreement because: (1) Lewes Investment was neither ready nor willing to close on July 26, 2006, (2) time was not of the essence in the Agreement, and (3) Lewes Investment did not make time of the essence with its July 25 Letter, as it was not willing or able to perform within the 30-day time frame. The Court further held that Lewes Investment breached the Agreement when it failed to perform after the Graves cured the title defect and demanded that Lewes Investment go to closing. A Final Order was entered on February 25, 2013.

Lewes Investment appealed the Opinion and filed its Opening Brief on May 10, 2013. Notably, in its Opening Brief, Lewes Investment does not dispute any of Vice Chancellor Glasscock's factual findings. Instead, it appeals the very narrow issue of whether Vice Chancellor Glasscock applied the correct legal standard in holding that Lewes Investment did not make time of the essence with its July 25 Letter, and proposes that a different standard should have applied.

Simply put, Lewes Investment posits that, had the Court of Chancery applied a different standard, it would have concluded the July 25 Letter made time of the essence. The legal standard advanced by Lewes Investment is of no consequence to this case, and its application would still result in a holding in favor of the Graves.

This is the Graves' Answering Brief.

SUMMARY OF ARGUMENT

1. Denied that the Court of Chancery erred in determining that Lewes Investment's July 25 Letter did not make time of the essence as to the Agreement. The legal standard Lewes Investment proposes is inapplicable, as the July 25 Letter fails to fix a reasonable time for completion of the Agreement and to definitively state an intention to terminate the Agreement if it was not completed within the specified time. Even if the standard applied, it would not change the outcome of this case. Lewes Investment waived any right to insist on forfeiture when, after August 2006, it continued to negotiate an extension of the Agreement, have its engineering and design consultants work on the Property's development project, and failed to object to counsel for the Graves' assertions as to the validity of the Agreement and Lewes Investment's status as a "contract purchaser."

It is further denied that the Court of Chancery erred in holding that the Graves are entitled to retain Lewes Investment's deposit as liquidated damages. After the Graves resolved the title defect within a reasonable time, Lewes Investment was obligated to go to settlement on the Property but, instead, filed suit against the Graves, thereby breaching the Agreement. Rescission is not an appropriate remedy because Lewes Investment abandoned its request for such relief on the eve of trial. In addition, and contrary to Lewes Investment's assertion, the Agreement did not come to an end in August 2006. Neither party was required

to complete its obligations at that time and Lewes Investment continued to operate as though the Agreement was still valid, thus waiving any ground for rescission.

COUNTER-STATEMENT OF FACTS

On July 26, 2004, Lewes Investment's predecessor-in-interest, Ivy Partners III, LLC ("Ivy Partners"), entered into a contract whereby it agreed to purchase two parcels of land (Parcel 176 and Parcel 177) from the Graves for $13 million. The parcels of land comprise approximately 88.4 acres in Sussex County, Delaware, 3.32 acres in Parcel 176 and over 85 acres in Parcel 177. A18.[1]

Under the Agreement, closing was set for January 26, 2006. A19. However, Lewes Investment could opt to extend closing for up to six months in exchange for a $25,000 per month fee. *Id.* Time was of the essence only with respect to these extension payments. *Id.* At closing, the sellers were required to render good and marketable title to the Property and the buyer was obligated to deliver the purchase price. *Id.*

In October 2004, Ivy Partners assigned its interests in the Agreement to Lewes Investment. A208-09.

A. The Agreement Permits The Graves To Retain The Deposit If Lewes Investment Breaches The Agreement

Pursuant to the Agreement, Lewes Investment was required to pay a deposit to the Graves in two installments, $10,000 upon execution of the Agreement, and an additional $640,000, which was due before the end of its 90-day due diligence period. A18-19, 22.

[1] Citations to Lewes Investment's Appendix are identified by numbers with the prefix "A." Citations to the Graves' Appendix are identified by numbers with the prefix "B."

The Agreement provided for the Graves to retain the $650,000 deposit as liquidated damages in the event that Lewes Investment defaulted on the Agreement. A25. Conversely, Lewes Investment was entitled to the return of its deposit and out of pocket expenses if the Graves could not deliver good title at the time of closing. *Id.*

Lewes Investment paid the Graves both deposit installments and also notified them that a title search revealed that the Graves only retained 7/8 interest in Parcel 176, with another family owning 1/8 interest in the parcel. A222. The title issue was not raised again between October 2004 and May 2006. A264-65, 379-80, 392.

B. In October 2005, Lewes Investment Extended The Closing Date From January 26, 2006 To July 26, 2006

Lewes Investment planned to develop the Property into a place for commercial businesses and high-density residential housing. A213. To do so, Lewes Investment had to re-zone the Property from agricultural to mixed-use zoning, which required arrangements with the Delaware State Housing Authority ("DSHA"), and the resolution of "a number of issues" with the Delaware Department of Transportation ("DelDOT"). A212-13.

In light of these development hurdles, Lewes Investment realized that the January 26, 2006 closing date was unrealistic and, in October 2005, postponed settlement until July 26, 2006:

Q: Take a look at Tab 10. What is that document?

A: This is a document by which we exercised our right to extend the settlement date to July 26, 2006.

Q: The date of this letter is October 2005. What's the occasion on which you asked for the extension? Why did you need it?

A: Well, we had concluded that the particular development path that we were headed down was going to be somewhat longer and more convoluted than we might have hoped. And in that regard, we knew that more time prior to settlement would be helpful to us.

A235-36 (testimony of Lewes Investment's principal, Rick Stout); B1.

C. In June 2006, Lewes Investment Attempted To Again Extend The Closing Date Due To Continuing Development Problems, And Proposed A One- To Three-Year Extension

Lewes Investment was still "in the middle of getting approvals" as July 26, 2006 neared. A238-39. Lewes Investment's principal, Rick Stout, testified that he "continu[ed] to meet with various agencies at both the County and the State and tr[ied] to resolve outstanding issues related to each of the agencies concerned. And there were several in both DSHA and DelDOT." A237. The development project for the Property would not have been approved until late 2007, early 2008 or later. B160-62. Moreover, the formal re-zoning process had not yet started in July 2006 and would take 15 or 16 months to complete. B214.

As a result, on June 29, 2006 – less than one month before closing – Stout met with the Graves family with the primary objective of getting another extension[2]:

> Q: Did you, before closing, have the opportunity to discuss – to meet with the Graves family?
>
> A: Yes, I did.
>
> Q: Tell me about that conversation.
>
> A: It was a long conversation.
>
> Q: What were your objectives?
>
> A: *My objective at the time was to find a way to extend our purchase agreement* and make sure that we had other issues that might still be on the table resolved with the Graves. . . .
>
> Q: Why did you want more time?
>
> A: *Developers always want more time. The simplest answer is that with more time the capital that we would put at risk would likely be reduced. And the further we could go with the approval process, the lower the risk in the transaction would be.*

A242-43 (emphasis added). At this meeting, Stout admitted that Lewes Investment did not have the financial resources to close on July 26, 2006. A117-18, 299-300. Accordingly, Lewes Investment requested a one- to three-year extension. A269-70.

[2] The June 29 meeting was only one of several instances in which Lewes Investment requested to extend the July 26 closing date. *See* A268 (Stout admitted to repeatedly asking the Graves family – in letters and at the June 29 meeting – to extend settlement so that Lewes Investment would have more time to develop the Property).

When asked what his response would be if the Graves held it to the July 26 closing date, Stout stated that Lewes Investment would probably cancel the contract altogether. A104. To further persuade the Graves that the best thing to do was to extend the contract, Stout informed the Graves that Lewes Investment had walked away from three deposits in the past two years. A106. The Graves informed Stout that they would not force Lewes Investment to go to settlement on July 26. A168. When asked if he was relieved, Mr. Stout responded:

> Somewhat. You know, the fact is, I've done enough sweating over this for the last 90 days that I said to someone coming out here, I said, look, it's going to – you know how when you're at the end, you're just at the end.

A168-69. He even expressed appreciation to the Graves for not pressing to go to settlement on July 26 because "[i]t would have been a difficult transaction to complete." A307.

A small amount of time was spent discussing the title defect.[3] Indeed, Stout indicated that the title defect was insignificant by stating that Lewes Investment could find a way to work around it ***if*** it gets to be a "real problem":

> Well, what I was going to say is, this is all – this page, if it really is a problem, there might be a way for us – we're not – we haven't -- we haven't worked around it because we've just assumed when we sent the concern and we

[3] Approximately 130 pages of the transcript for the June 29 meeting were dedicated to Lewes Investment detailing the status of the project and requesting more time to settle. A302. The title issue was only raised in the last five or six pages. *Id.* Mr. Stout agreed that the title issue was a "modest" part of the discussion in terms of time spent. A302-03.

> didn't get an answer, that it was something that you could solve, but this – *this is something we might be able to find a way to simply work around.* We're going to have a trapped up piece here. . . . But the fact is, there could be – *I think we might be able to find a way to work around that if it gets to be a – a real problem.*

A175-76, 324-27 (emphasis added). Counsel for the Graves referred to the title defect as a "hiccup" and Stout did not dispute his characterization. A314.

Although the parties left the meeting with the understanding that the July 26 closing would not occur, an extension was never finalized.

D. On July 25, 2006, Lewes Investment Demanded That The Graves Cure The Title Issue Within 30 Days, Despite Lewes Investment's Inability To Perform Under The Contract At The End Of That Time Period

Despite Lewes Investment's June 29 admission as to its inability to close on July 26, 2006, counsel for Lewes Investment, Wayne Tatusko, Esquire, wrote to counsel for the Graves on July 25, 2006, demanding that the Graves cure the title defect as to Parcel 176 in 30 days. A184-86. The July 25 Letter also stated that "time [was] not of the essence for the closing of the purchase and sale of the property."[4] A185, 297-98.

Lewes Investment did not make any preparations for closing, or indicate that it was able to close, in July or August 2006. No date for closing was ever set.

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[4] Stout characterizes counsel's statement that time was not of the essence as an error but admitted that no one ever corrected it. A297-99.

E. Lewes Investment Continued To Treat The Agreement As In Force And Experience Problems With Financial Approvals For The Property

On August 28, 2006, Tatusko again wrote to counsel for the Graves, stating that the 30-day period had expired without the title defect being cleared. A188-89. Tatusko concluded the letter by expressing Lewes Investment's desire to work out a solution and reserve its rights under the Agreement:

> In light of Seller's failure to meet the requirements of the Agreement, Purchaser must put on hold its efforts to obtain the entitlements necessary for the development of the Property. Purchaser cannot continue its negotiations with the relevant governmental agencies nor resume any expenditure of additional sums of money unless it can agree with Sellers on a mutually acceptable course of action for the purchase and development of the property.
>
> Purchaser would still like to negotiate a mutually acceptable agreement with Sellers for the purchase of the property, but any agreement between Purchaser and Sellers will have to take into account all factors currently affecting the property. Accordingly, *while Purchaser reserves all rights under the Agreement*, Purchaser will likely contact Sellers directly to try to find a mutually acceptable business solution in the current environment.

A189 (emphasis added). Lewes Investment's actions thereafter further indicated that it believed the Agreement was still valid.

On September 19, 2006, Stout met with the Graves to "try[] [] to work out an extension and avoid litigation." A258. Throughout that meeting – and consistent with his notion that an extension was possible – Stout spoke in terms of

continuing, not terminating, the contract. In particular, Stout stated that Lewes Investment would want its money returned ***if*** a title bust occurred:

> There's an issue here of what happens in our contract, and obviously our letters speak for themselves of saying, "Gee, if this cannot be resolved at some point," you know, we got a title bust, "then we want to have our money back." At some point you have to make the decisions about where, you know, what you do, and of course, the consequence of what you do make a big difference.

B31; A348-49.

In addition, when asked what the Graves' monetary incentive was to give Lewes Investment a three-year extension, Stout responded that the alternative would be to cancel the contract and pursue litigation:

> Well, because you're – here's your incentive – I hope this will go over all right. Your incent – your choice is otherwise – I mean if you were simply to say, "Look, we think the contract's over," we'd end up in a legal fight. So that's probably not good for either of us, but it's something you could choose.

B38-39; A277.

Stout even asked the Graves if the parties still had a contract. Counsel for the Graves responded in the affirmative and Stout did not dispute his assertion. B21; A346-47. Stout also did not challenge counsel for the Graves when he called Stout a "contract purchaser." B7. Further, Lewes Investment's engineering and design consultants continued to work on and bill for the development project

through March 2007, and Stout continued to meet with state officials regarding the Property in September 2006 and possibly later. B17, B164-65.

The September 2006 meeting also revealed that Lewes Investment was still having problems financing the development project. Indeed, the Court noted that "[b]ased on the record, sometime between the June and September Meetings, Lewes Investment found out that its Toll Brothers deal – which contemplated that Lewes Investment would resell the Graves' Property to Toll Brothers for $30 million – had fallen through." Mem. Op. at 27.

F. The Graves Cured The Title Defect And Demanded That Lewes Investment Go To Closing

By letter dated February 12, 2007, the Graves informed Lewes Investment that they cleared the title defect. A190. On April 2, 2007, the Graves sent Lewes Investment another letter demanding closing within 30 days. A191-92.

G. Lewes Investment Filed Suit Against The Graves And Abandoned Its Request For Rescission On The Eve Of Trial

On April 12, 2007 – ten days after the Graves sent a letter demanding closing – Lewes Investment filed suit against the Graves in the Court of Chancery, seeking money damages or rescission based on the claim that the Graves materially breached the Agreement by not delivering good and marketable title on July 26, 2006. B57-127. The Graves answered the Complaint counterclaimed for breach of

contract, asserting that any potential breach was cured within a reasonable time and seeking to retain the $650,000 deposit as liquidated damages. B128-36.

On March 3, 2010, the Honorable Master Kim Ayvazian issued a draft oral report granting Lewes Investment's motion for summary judgment. After the Graves took exceptions to the report, Master Ayvazian withdrew it and allowed the parties to go to trial in August 2011.

Prior to trial, Lewes Investment abandoned its request for rescission, stating in the Pretrial Order that it only sought money damages:

> **A Statement of the Relief Sought By Each Party**
>
> **By Plaintiff:**
>
> Plaintiff seeks the return of its $650,000 deposit, extension payments totaling $150,000, its out of pocket expenses totaling $148,775.79, plus pre-and post-judgment interest and costs.

B137.

H. The Court Of Chancery's February 12, 2013, Memorandum Opinion In Favor Of The Graves

In September 2012, Master Ayvazian issued a final report in favor of Lewes Investment. A515-535. The Graves filed exceptions and, on February 12, 2013, the Honorable Vice Chancellor Sam Glasscock, III, issued a Memorandum Opinion that rejected the Master's report. Op. Br. at Ex. A. In doing so, Vice Chancellor Glasscock held, *inter alia*, that the Graves did not breach the Agreement because:

(1) Lewes Investment was neither ready nor willing to close on July 26, 2006, (2) time was not of the essence in the Agreement, and (3) Lewes Investment did not make time of the essence with its July 25 Letter, as it was not willing or able to perform within the 30-day time frame. Mem. Op. at 31-43. The Court further held that Lewes Investment breached the Agreement when it failed to perform after the Graves cured the title defect within a reasonable time. Mem. Op. at 44-49.

Pertinent to this appeal is the Court's analysis with respect to whether Lewes Investment made time of the essence with its July 25 Letter. On this issue, the Court used 15 Williston on Contracts § 46:16 for guidance. The Court noted that, where time is not of the essence in contracts for the sale of real property – as was the case here – it can be made of the essence "by a performance or tender of performance by one party and a demand of the other, or by a demand by a party not in default who is ready to perform." Mem. Op. at 38. Because Lewes Investment did not perform or tender performance, the Court applied the second principle and concluded that time was not made of the essence because Lewes Investment was not willing or able to close within the 30-day period stated in the letter. Mem. Op. at 38-39. Unable to perform, Lewes Investment could not require counter-performance by the Graves within the stated time. Thus, the Graves did not breach the Agreement.

A Final Order was entered on February 25, 2013. Op. Br. at Ex. B.

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY HELD THAT LEWES INVESTMENT DID NOT MAKE TIME OF THE ESSENCE AS TO PERFORMANCE

A. Question Presented

Lewes Investment posits that the Court of Chancery would have concluded the July 25 Letter made time of the essence as to performance if it applied a different standard. Namely, that time can be made of the essence when a party fixes a reasonable time for the completion of the contract and gives notice to the other party of an intention to abandon the contract unless it is completed within the stated time. Lewes Investment's July 25 Letter demands that the Graves clear title to the Property within 30 days, and states that Lewes Investment will seek to negotiate an extension of the Agreement if the deadline is not met. Lewes Investment was unwilling and unable to go to closing on the Property within that 30-day period. Did the Court of Chancery correctly hold that the Graves were not required to deliver good and marketable title by the end of the time stated?

B. Scope Of Review

This Court reviews questions of law and interprets contracts *de novo*. *Estate of Osborn v. Kemp*, 991 A.2d 1153, at 1158 (Del. 2010).

C. Merits Of Argument

1. The Standard Set Forth By Lewes Investment Is Inapplicable And, Even If Applied, Would Still Result In The Conclusion That Lewes Investment's July 25 Letter Did Not Make Time Of The Essence

The Court of Chancery applied the correct legal standard in holding that Lewes Investment did not make time of the essence with its July 25 Letter. As the Court of Chancery recognized, "[t]ime is generally not of the essence in contracts for the sale of land" and "settlement dates in contracts without this language [are], at best good faith estimates of when the transaction will be consummated." Mem. Op. at 37 (citations omitted); *see also Bryan v. Moore*, 863 A.2d 258, 261 (Del. Ch. 2004). It then properly looked to the course of dealing between the Graves and Lewes Investment, using the treatise Williston on Contracts for guidance. Mem. Op. at 37-43; *Brasby v. Morris*, 2007 Del. Super. LEXIS 73, at *11 (Del. Super. Ct. Mar. 29, 2007) (where a contract and its subsequent modification do not explicitly state that time was of the essence, the deadline for completion "will hinge on a reasonable interpretation of what could be implied by the dealings between the parties"). In doing so, the Court of Chancery acknowledged that time can be made of the essence "by a performance or tender of performance by one party and a demand of the other, or by a demand by a party not in default who is ready to perform." Mem. Op. at 37-38 (citing 15 Williston on Contracts § 46:16, and *Coyle v. Kierski*, 89 A. 598, 600 (Del. Ch. 1913)).

Because Lewes Investment did not perform or tender performance, the Court of Chancery applied the second principle and concluded that time was not made of the essence because Lewes Investment was not willing or able to close within the 30-day period stated in the letter. Mem. Op. at 38-39. Unable to perform, Lewes Investment could not require counter-performance by the Graves within the stated time. *Id.* at 38-43. Thus, the Graves did not breach the Agreement. *Id.*

Lewes Investment erroneously asserts that the Court of Chancery should have assessed the July 25 Letter by a third test articulated in 15 Williston on Contracts § 46:16 – specifically, that time can be made of the essence "by one of the parties fixing a reasonable time for the completion of the contract and giving notice to the other party of an intention to abandon the contract unless it is completed within the specified time." Op. Br. at 15. This argument fails because (1) the July 25 Letter, on its face, fails to meet the proffered standard, and (2) even if the standard applied, the Graves' obligation to provide good and marketable title was not triggered within the 30-day period because Lewes Investment was unable and unwilling to go to closing within that time.

15 Williston on Contracts § 46:16 provides, in pertinent part:

> [O]ne party may in effect make time of the essence at any time by informing the other party that he or she will insist upon timely performance under the contract. Consequently, while not otherwise of the essence time can be made of the essence of a contract by a performance or tender of performance by one party and a

> demand of the other, or by a demand by a party not in default who is ready to perform. *It may also be made of the essence by one of the parties fixing a reasonable time for the completion of the contract and giving notice to the other party of an intention to abandon the contract unless it is completed within the specified time.* . . . This principle applies to both vendor and purchaser. The notice binds not only the party upon whom it is served, but also the party serving it; the party serving it must perform within the time stated or thereafter be unable to require counterperformance.

Id. (emphasis added). Under the standard Lewes Investment offers for consideration, two requirements must be met for time to be made of the essence: (i) a reasonable time for completion of the contract must be fixed, and (ii) notice must be given to the other party of an intention to the abandon the contract if it is not completed within the stated time. *Id.* Importantly, the "notice must be explicit to the effect that the contract will be terminated if not completed within the time set." *Coyle v. Kierski*, 89 A. 598, 601 (Del. Ch. 1913) (citing *Reynolds v. Nelson*, 6 Madd. 60 (56 Eng. Rep. 817)). Lewes Investment's July 25 Letter fails to meet either requirement.

First, 30 days was not a reasonable time for completion of the contract. Indeed, the Court of Chancery held, and Lewes Investment does not dispute, that Lewes Investment was not financially or logistically prepared to go to closing within that time period, or any time in the near future. Mem. Op. at 39-40 ("[T]here is no evidence that Lewes Investment tendered payment, or was willing

and able to make payment on August 25, 2006, or ever. Lewes Investment's letter did not set a time and location for closing to occur, nor did it represent that the buyer was in fact willing and able to close"); Op. Br. at 4 ("Lewes Investment does not challenge any fact findings made by the Court below").

Second, nowhere in the July 25 Letter did Lewes Investment explicitly provide that the Agreement would be terminated if the Graves did not provide good and marketable title in the 30-day period. Rather, the letter stated that, if title was not cleared within the 30 days, Lewes Investment would like to further negotiate an extension under the Agreement, not terminate it:

> *In lieu of exercising its remedies under the Agreement, Purchaser would prefer to negotiate a mutually acceptable extension of the Agreement.* We trust that Seller can appreciate that Purchaser cannot prudently incur additional expenses in its development efforts in the absence of complete assurance that the defect in title has been cured. *In the absence of a mutually acceptable extension, Purchaser is left with no alternative but to exercise the remedies under Section 14 of the Agreement.* It is certainly Purchaser's desire to reach an amicable resolution to this impasse, recognizing the considerable time and expense Purchaser has invested in the development of the Property over the past two years.

A185-86. Consistent with this language, Lewes Investment's actions beyond the 30-day period also indicate that it viewed the contract as still in force. In particular, Lewes Investment:

- Sent the Graves a letter on August 28, 2006, that referenced Lewes Investment's reservation of rights under the Agreement;

- Met with the Graves in September 2006 to try to work out an extension for closing under the Agreement;

- Stated at the September 2006 meeting that an alternative to extending the Agreement was to cancel it and pursue litigation;

- Failed to correct counsel for the Graves when he stated that he parties still had a contract and called Stout a "contract purchaser" at the September 2006 meeting;

- Continued to have its engineering and design consultants work on and bill for the development project through March 2007;

- Continued to meet with State officials in September 2006 and possibly later.

See supra pp. 12-14. Lewes Investment did not notify the Graves that it would terminate the Agreement, nor did it terminate the Agreement, for failure to clear the title within the 30-day deadline. Third, in contradiction to Lewes Investment's argument that the July 25 Letter made time of the essence, Tatusko stated in the July 25 Letter that time was *not* of the essence.

Lewes Investment further contends that the Court of Chancery improperly "focus[ed] its inquiry on whether and when Lewes Investment was ready and able to perform." Op. Br. at 15. In essence, Lewes Investment would have the Court

believe that the July 25 Letter obligated both parties to perform within 30 days. This argument ignores the fact that both the Agreement and the tests set forth in 15 Williston on Contracts § 46:16 require concurrent performance. Mem. Op. at 32 ("Each party's duty to perform is conditioned on the other party's performance, or manifested, present ability to perform, under the contract"); 15 Williston on Contracts § 46:16 ("The notice binds not only the party upon whom it is served, but also the party serving it; the party serving it must perform within the time stated or thereafter be unable to require counterperformance"). Under the principle of concurrent performance, a party's performance or tender of performance, not its demand, triggers another's duty to perform. *Id.* The demand merely provides a time period in which a party must perform *if its duty to perform is triggered.* Because neither Lewes Investment nor the Graves were ready to go to closing in July or August 2006, neither was required to perform its obligations under the Agreement. Thus, no breaches occurred at those times.

Because the legal standard Lewes Investment proposes is inapplicable and neither party's duty to perform under the Agreement was triggered prior to the Graves curing the title defect, the Court of Chancery correctly held that time was not of the essence.

2. Assuming, *Arguendo*, That Lewes Investment Did Make Time Of The Essence, Its Continued Efforts After August 2006 To Negotiate An Extension Under The Agreement And Develop The Property Waived Its Right To Insist On A Forfeiture For Non-Performance

Even if time was made of the essence, Lewes Investment waived any right to claim that the Graves forfeited the Agreement when it continued to act as if the Agreement was still valid. 15 Williston on Contracts § 46:16 speaks on waiver by continued performance of a contract:

> When a specific time is fixed for performance of a contract and is of the essence of the contract and it is not performed by that time, but the parties proceed with the performance of it after that time, the right to suddenly insist on a forfeiture for failure to perform within the specified time will be considered to have been waived and the time for performance will be considered to have been extended for a reasonable time.

Similarly, 77 Am. Jur. § 77, states that waiver of a party's non-performance can occur in a variety of ways, including failure to object at the appropriate time:

> The right of a vendee to assert, as a ground of defense or a ground for rescission, the failure of the vendor to perform within the time stipulated in the contract may be waived by the vendee in a variety of ways such as by failing to assert an objection at the proper time or by entering into the contract with knowledge of the vendor's lack of title.

Lewes Investment not only proceeded with the performance of the Agreement by continuing extension negotiations and engineering and design work, but it failed to assert an objection when counsel for the Graves stated that the contract was still in

effect and referred to Stout as a "contract purchaser." *See supra* pp. 12-14. Consequently, the Agreement was extended for a reasonable period of time and the Graves' resolution of the title defect in February 2007 was acceptable in light of the development issues Lewes Investment experienced. Mem. Op. at 45.

Lewes Investment cannot now claim forfeiture because terminating the contract is financially more favorable than settlement and continued property development. The Court of Chancery remarked on Lewes Investment's self-serving behavior in its Opinion:

> In July 2006, although the buyer itself was not ready to go to closing, it demanded the Graves family cure a title defect on the property, a defect that the Graves were not contractually bound to clear until closing. One month later, the buyer declared the Graves in breach of the contract, although closing had not been scheduled, the buyer was not able or willing to close, and the buyer continued to act as though the contract were in force. It is obvious that the buyer wanted to go forward under the terms of the contract to the extent it remained profitable to do so, with the availability to force the Graves to forfeit the down payment and to reimburse the buyer for its expenses, if the potential for profit proved illusory. In fact, a few months after the clear-title demand, the Graves family cleared the title and demanded that the buyer go to settlement; the buyer instead brought this action, demanding return of the down payment and that the Graves pay its out of pocket costs – in total around $1 million. In other words, the buyer wanted a cost-free option period, in which its efforts were financed by the Graves: it wanted to have its cake, and eat it, too.

Mem. Op. at 3.

For the above reasons, Lewes Investment has waived any right to claim forfeiture under the Agreement.

II. THE COURT OF CHANCERY PROPERLY HELD THAT THE GRAVES SHOULD RETAIN THE DEPOSIT FOR THE PROPERTY

A. Question Presented

Section 13(a) of the Agreement permitted the Graves to retain the deposit as liquidated damages if Lewes Investment defaulted on its obligations. Neither Lewes Investment nor the Graves were in a position to perform their obligations under the Agreement until the Graves resolved the title defect as to Parcel 176 in February 2007, and demanded Lewes Investment go to closing. Instead of going to closing, Lewes Investment filed suit against the Graves. Did the Court of Chancery correctly hold that the Graves were entitled to retain the deposit?

B. Scope Of Review

This Court reviews questions of law and interprets contracts *de novo*. *Estate of Osborn v. Kemp*, 991 A.2d 1153, at 1158 (Del. 2010).

C. Merits Of Argument

1. Lewes Investment Abandoned Its Claim For Rescission On The Eve Of Trial

In its Opening Brief, Lewes Investment argues that rescission is the appropriate remedy, wholly ignoring the fact that it abandoned its request for this rescission on the eve of trial in the Court below. In the Pretrial Order, Lewes Investment stated that it only sought money damages:

A Statement of the Relief Sought By Each Party

By Plaintiff:

> Plaintiff seeks the return of its $650,000 deposit, extension payments totaling $150,000, its out of pocket expenses totaling $148,775.79, plus pre-and post-judgment interest and costs.

Pretrial Order at 10; *see also* Mem. Op. at 4 ("As damages, the Plaintiff requests the return of its down payment along with its costs expended in attempting to obtain regulatory approvals to develop the land into a subdivision, as provided for in the contract"). Thus, rescission is no longer available to Lewes Investment and its request for such relief should be denied.

2. The Graves Are Entitled To Retain The Deposit Because Lewes Investment Breached The Land Sale Agreement

The Agreement mandates concurrent performance by the parties at the time of closing. Neither Lewes Investment nor the Graves were prepared to close prior to February 2007. In February 2007, the Graves resolved the title defect for Parcel 176 and notified Lewes Investment of the same. In April 2007, the Graves, then in a position to perform under the Agreement, demanded that Lewes Investment go to closing on the Property. Rather than perform its concurrent obligation, Lewes Investment decided to file suit. Therefore, Court of Chancery correctly found that Lewes Investment defaulted and the Graves were entitled to retain the $650,000 deposit under Section 13 of the Agreement. Mem. Op. at 47-48.

To defeat this decision, Lewes Investment contends that, because it made time of the essence, the Agreement ended when neither party performed in August 2006. Op. Br. at 19-20. As discussed in detail above, Lewes Investment's July 25 Letter did not make time of the essence and neither party was required to perform in July or August 2006. Thus, neither party breached the Agreement in July or August 2006. Moreover, Lewes Investment's behavior after August 2006 waived any argument that the Agreement ended in August 2006. 77 Am. Jur. § 77. It continued to negotiate an extension under the Agreement, pay for engineering and design work for the development project, and otherwise act as if it was still under contract. For these reasons, rescission is inappropriate.

CONCLUSION

For the reasons stated above, the Court of Chancery's Memorandum Opinion dated February 12, 2013, and Final Order dated February 25, 2013, should be affirmed.

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Dated: June 5, 2013