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IN THE SUPREME COURT OF THE STATE OF DELAWARE

LA GRANGE COMMUNITIES, LLC and LA GRANGE PROPERTIES, LLC,	)	No. 56, 2013
Defendants Below, Appellants	)	APPEAL FROM JUDGMENT DATED JANUARY 9, 2013 AND RULING OF SEPTEMBER 19, 2012 OF THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY C.A. NO. N11C-05-016 CCLD
v.	)	
CORNELL GLASGOW, LLC	)	
Plaintiff Below, Appellee.	)	

OPENING BRIEF OF DEFENDANTS BELOW, APPELLANTS

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NATURE OF THE PROCEEDING

This is an appeal from a denial of a motion for partial summary judgment on a question of contractual interpretation, and a subsequent judgment after a bench trial before the Honorable Joseph R. Slights, III (retired).

The breach of contract action in the court below was brought by the appellee, Cornell Glasgow, LLC ("plaintiff" or "Cornell") against the appellants, La Grange Communities, LLC and an inactive affiliate, La Grange Properties, LLC (collectively, "La Grange"), C. A. No. N11C-05-016 JRS (CCLD). The parties asserted contractual claims against each other under a September 23, 2009 Development Agreement (Trial Exhibit 4, hereinafter "Development Agreement") and related documents. Together with an affiliated company, Cornell Homes, LLC, Cornell also asserted tort claims against La Grange, its principals and an employee. Dismissal of those claims left only the contract claims between Cornell and La Grange for trial.

After the main contract case was filed Cornell brought an action asserting fraudulent conveyance and other claims relating to La Grange's sale of a Model home to Bruce Johnson, C. A. No. N11C-07-160 JRS (CCLD). The cases were coordinated in pretrial proceedings and trial although never formally consolidated.

La Grange moved for partial summary judgment on the largest of Cornell's contractual claims, for "management fees" on lots that Cornell did not build houses on because Cornell had breached its own contractual duty to sell single family homes in timely fashion by not adhering to the schedule for selling homes and was therefore not

entitled to damages predicated on the assumption that Cornell had performed in full. The court below denied La Grange's motion on the premise that "the court has found some ambiguity in the agreement and has determined that there is need for additional evidence regarding enforcement of the 'time is of the essence' provision ..." Transcript of September 19, 2012 at 4 (attached hereto as Exhibit A).

A bench trial on the parties' damage claims was held the week of September 24-28, 2012. On December 7, 2012, the Court issued a Memorandum Opinion (attached hereto as Exhibit B and cited hereinafter in the form "Opinion at__"), ruling in Cornell's favor (1) on its claim for management fees in the amount of $1,716,114 in the main case, (2) on smaller claims for reimbursement of overhead and other costs in both cases, and (3) on La Grange's counterclaims.

La Grange appeals only the rulings (on the summary judgment motion and after trial) that permitted Cornell to recover expectation damages for management fees on homes that were unsold when the parties' relationship ended in early 2011. The court below had denied La Grange's motion for summary judgment on the grounds that the time requirements of the agreement were ambiguous. The court below based its ruling after trial on the different premise that the "ordinary meaning" and "more reasonable" interpretation of one contractual term, "projection", meant that the contractual sales schedule did not obligate Cornell to sell homes in timely fashion. Dec. 7, 2012 Opinion at 35-36.

This is La Grange's Opening Brief in support of its appeal. An Appendix of evidentiary and related material is filed herewith.

SUMMARY OF ARGUMENT

1. Cornell is not entitled to damages based on what it would have received had it performed its contractual obligations in timely fashion, when Cornell in fact failed to meet the contractual schedule for sale of single family homes, the Development Agreement provided that time is of the essence, and Cornell itself had argued for a strict construction of the same contractual schedule.

2. Cornell is judicially estopped from asserting that the contractual schedule for sale of single family homes was not firm, inasmuch as Cornell successfully avoided dismissal of its claim in C. A. No. N11C-07-160 by asserting that the contractual schedule was clear and that compliance was necessary.

STATEMENT OF FACTS

1. Background

Cornell is a Delaware limited liability company formed by Cornell Homes, LLC for the purpose of entering into the Development Agreement and performing the obligations thereunder.

La Grange Communities, LLC was formed by Stephen J. Nichols and Lowell McCoy for the purpose of developing a community of 227 personal residences near Newark, Delaware called La Grange Community. Before beginning work on the project, Mr. Nichols and Mr. McCoy interviewed a number of builders with regard to constructing homes at the Development. They decided to hire Cornell because it was willing to market, sell, and construct the homes as a contractor to La Grange. Nichols, A-107 – A-108.

La Grange and Cornell entered into the Development Agreement (A-142 - A-210) on September 23, 2009. Two amendments were executed later. The Development Agreement authorized Cornell to market, sell, and construct homes on La Grange's property subject to the terms of the Development Agreement. As noted in the post-trial opinion of the court below, Cornell was to receive a management fee at the closing of each home. A-126; Opinion at 6. La Grange also agreed to reimburse Cornell for overhead and construction costs. A-148; Opinion at 7.

2. Cornell's Breach of Its Duty to Sell Single Family Homes

Section 1.A of the Development Agreement (A-142) provided that Cornell would sell homes on a schedule:

1. **BUILDING RIGHTS.**

A. LaGrange hereby grants to Cornell the right to undertake the Construction Project per the timeframes set forth in the Sales Projection Schedule attached hereto and made a part hereof as Exhibit "A", commencing on the date of this Agreement (the "Term"), in accordance with the provisions of this Agreement.

In Trial Exhibit 51, Cornell's damages expert, David A. Anderson, interpreted Exhibit A (A-156) to provide for a sales pace for selling each of three kinds of homes to begin 90 days from the date of obtaining the first building permit for each product. A-218, n. 16. Mr. Anderson further stated that the first building permit for a single family detached home was January 27, 2010, that the first quarter of Exhibit A began on April 27, 2010, and that Cornell's obligation under Exhibit A was to sell 16 homes by January 26, 2011. A-264.

In reality, Mr. Anderson shows that by January 26, 2011, Cornell had only closed on three single family homes. A-259; *see also* Nichols, A-110.

Thus, from the beginning, Cornell's performance fell short of its contractual obligations under the Development Agreement. Cornell admitted in its Complaint that "sale of single homes at LaGrange lagged" (A-49) and the court below so found. Dec. 7, 2012 Opinion at 11. Cornell failed to sell single family homes on the schedule that it was obligated to meet under the Development Agreement, Section 1.A. (A-142)and Exhibit A (A-156).

Cornell argued below that the parties to the Development Agreement did not intend to commit Cornell to a firm sales pace because Mr. Lingo, the principal of Cornell, did "not necessarily"

foresee such a commitment in March 2009. The email cited by Cornell (A-114 - A-141) attached two different drafts of agreements between the parties, neither of which contained a clause stating that time is of the essence. Lingo, A-104. In contrast, the agreement which the parties did negotiate, agree to and sign contains such a clause: "Time is of the essence as to all matters to be performed by the parties under this [Development] Agreement" Section 19 (A-153). The first of those "matters to be performed" on time was Cornell's "undertak[ing] the Construction Project per the timeframes set forth in the Sales Projection Schedule attached hereto and made a part hereof as Exhibit 'A'." Development Agreement, Section 1.A. (A-142) As noted above, the schedule prescribed a sales pace by which a specific number of units were to be sold in successive periods beginning 90 days after the first building permit was issued.

La Grange had serious reasons to bargain for a sales schedule binding on Cornell. Mr. Nichols testified that "the bank would have never let us sign an agreement that didn't have a time frame hooked to it" because the bank needed to know how and when its construction loan would be repaid and La Grange was depending on the sales for its payments. Nichols, A-109:

> We came up with this agreement, with the expectations of adhering to schedules. I gave them the authority to move forward with the minimums that were in the schedules, but if anything needed to be decided beyond that schedule or beyond the terms in the contract, they would need the permission of La Grange to do that. La Grange, as well as the two banks involved in this agreement, had an expectation of timing and schedule. And they approved the financing based on that.

Nichols, A-108. Mr. Nichols understood that the "time is of the essence" language of the Development Agreement applied to Cornell's sales duty under Section 1.A. A-109 - A-110.

Cornell's nonperformance injured La Grange. With respect to La Grange's responsibility for the development of the property, Cornell alleges and La Grange agrees that "[u]nder the Development Agreement, LaGrange was responsible, at its sole cost and expense, for the construction and installation of all site improvements and infrastructure within the Development so that it could diligently provide to Cornell finished building lots upon which Cornell would construct the Residences." Complaint, ¶ 37, A-40 - A-41. This responsibility imposed upon La Grange a large financial burden at the beginning of the project. La Grange hired a contractor to install the site improvements in the Development (Complaint, ¶ 71, A-47) and proceeded with its excavating and grading responsibilities on the site, (*id.*, ¶ 78, A-49) as well as installing utilities, curb, and pavement. One effect of Cornell's failure to meet the sales schedule for single family homes was that La Grange was unable to recover the substantial sums that it had spent putting in the infrastructure for the single family home building sites. La Grange's cash flow was impaired accordingly. Nichols, A-110 - A-111. In unrebutted testimony, Mr. Nichols estimated the magnitude of the sunk costs to be "approximately $900,000." Nichols, A-113.

La Grange will not debate whether the court below was correct to characterize the breakdown of the parties' relationship (Opinion at 12-18) as an ouster of Cornell by La Grange (*id.* at 41, 45). The

court below further asserted that "[t]his breach of the Agreement [the "ouster"], in turn, rendered Cornell unable to perform services that would have yielded management fees from the future sales of homes." *Id.* at 45. This conclusion is inconsistent with Cornell's allegation, accepted by the court below, that it decided to abandon an action for specific performance a month after the "ouster" because "La Grange did not have enough funds in its construction line of credit to satisfy the cost associated with discharging its obligations of diligently delivering fully improved lots to Cornell . . ." Complaint ¶ 7 (A-36); Opinion at 21-22. If so, Cornell's own nonperformance contributed directly and substantially to the problem by putting $900,000 out of reach of La Grange, demonstrating why time was of the essence to La Grange when it negotiated the agreement.

ARGUMENT

I. CORNELL BREACHED THE AGREEMENT AND IS NOT ENTITLED TO DAMAGES BASED ON WHAT IT WOULD HAVE RECEIVED HAD THE AGREEMENT BEEN FULLY PERFORMED.

A. Question Presented

Whether the Court below erred by excusing Cornell's nonperformance of the contractual schedule for sale of homes when the agreement provided that time is of the essence, the schedule is clear and unambiguous and Cornell itself argued that the schedule "clearly establishes a time frame in which the Development was to be complete." (Argument II below). La Grange presented this question to the trial court in its July 13, 2012 Opening Brief in Support of its Motion for partial summary judgment (Transaction ID 45328742) and its August 3, 2012 Reply Brief in support of the same motion (Transaction ID 45712583). Defendants further presented the question at pages 11-15 of their October 26, 2012 Answering Post-Trial Brief (Transaction ID 47416625).

B. Standard and Scope of Review

"On appeal of a grant or denial of a motion for summary judgment the scope of review is *de novo*." *Lank v. Moyed*, 909 A.2d 106, 108 (Del. 2006). Similarly, in an appeal from the entry of a civil judgment following a Superior Court bench trial, "[t]his Court reviews *de novo* the Superior Court's formulation and application of legal principles." *Lorenzetti v. Hodges*, 2013 WL 592923 (Del., Feb. 13, 2013) at *3.

Contractual interpretation "involves legal questions and thus the standard of review is *de novo*." *Lank v. Moyed*, 909 A.2d at 108.

"Summary judgment is the proper framework for enforcing unambiguous contracts because there is no need to resolve material disputes of fact." *Hifn, Inc. v. Intel Corp.*, 2007 WL 2801393, at *9 (Del. Ch.). "Contract terms themselves will be controlling, when they establish the parties' common meaning so that a reasonable person in the position of either party would have no expectations inconsistent with the contract language." *Id.*, citing *Eagle Indus., Inc. v. DeVibiss Health Care, Inc.*, 702 A.2d 1228, 1236 (Del. 1997).

C. Merits

1. Under the Clear Language of the Agreement the "Timeframes" for Cornell to Build and Sell Homes Were of the Essence

"Whether time is of the essence depends in the first instance on whether the contract explicitly states so." *Hifn*, 2007 WL 2801393 at *9.

The Development Agreement does explicitly say so, providing as follows:

> 19. **TIME.** Time is of the essence as to all matters to be performed by the parties under this Agreement. The term "Business Day" means any day which is not a Saturday, Sunday, federal holiday or legal holiday in the State of Delaware. If the last day of any time period stated herein shall fall on a day which is not a Business Day, then the duration of such time period shall be extended so that the last day, when counting forwards, shall fall on the next succeeding day which is a Business Day or so that the last day, when counting backwards, shall fall on the next preceding day which is a Business Day.

A-153.

Section 19 provides that "[t]ime is of the essence as to *all matters* to be performed by the parties under this Agreement."

Emphasis added. In the case of the time for Cornell to build and sell homes, Cornell's obligation is prescribed by Section 1.A. of the Development Agreement which provides in pertinent part as follows:

> 1. **BUILDING RIGHTS.**
>
> A. LaGrange hereby grants to Cornell the right to undertake the Construction Project per the timeframes set forth in the Sales Projection Schedule attached hereto and made a part hereof as Exhibit "A", commencing on the date of this Agreement (the "Term"), in accordance with the provisions of this Agreement.

A-142.

Exhibit A of the Development Agreement provides a schedule to begin "90 days from the date of obtaining the first building permit for each product." A-156. Cornell's damages expert noted that the first building permit for a single family detached home was January 27, 2010 so that the first quarter of Exhibit A began on April 27, 2010. A-264.

Cornell's obligation was clearly prescribed. As recounted on page 5 above, it was not met. The court below erred when it denied summary judgment on the basis that "ambiguity lies, in particular, in the use of the term 'projection'." Sept. 19, 2012 Transcript at 3. Pursuant to Section 1.A. of the Development Agreement, Cornell was granted the right to build and sell homes *"per the timeframes set forth in the Sales Projection Schedule . . ."* Emphasis added. A-142. Pursuant to Section 19, *"[t]ime is of the essence as to all matters to be performed by the parties under this agreement,"* (A-153, emphasis added) including the "timeframes" in the "Schedule" for Cornell to build and sell homes.

In a successful effort to avoid application of the Rule Against Perpetuities in its second action, Cornell itself argued that the contractual language "clearly establishes a time frame" for performance thereunder. Sept. 26, 2011 Brief at 13-14 (A-81 - A-82). Transaction ID 40035236. Cornell should not have been heard to take the opposite position on La Grange's motion for summary judgment and at trial. *See also* Argument II, below.

2. The Court Below Erred In Relying on Inapposite Definitions of "Projection" in Isolation From the Agreement As a Whole

Cornell argued in its post-trial brief below that to hold it to the schedule it agreed to in Exhibit A of the Development Agreement would somehow violate the "ordinary and customary definition" of the word "projection". Oct. 15, 2012 Brief at 8. (Transaction ID 46990138). Cornell did not quote or cite such a definition. La Grange did, however, present definitions in its answering brief (Oct. 26, 2012 Br., at 3, Transaction ID 47416625), arguing that the following dictionary definitions of "projection" are consistent with the conclusion that the parties agreed that the schedule prescribed in Exhibit A was of the essence:

"something that is planned: DESIGN"

Webster's Third New International Dictionary of the English Language Unabridged. Springfield, Mass: G. & C. Merriam Co., 1967, definition 4b

"A plan for an anticipated course of action."

The American Heritage Dictionary, Second College Edition. Boston: Houghton Mifflin Company 1982, definition 3. *See* A-267, A-269.

In its opinion after trial (p. 35), the court below did not distinguish or otherwise comment on the definitions of "projection"

cited by La Grange and set forth above. La Grange submits that, even standing alone, such definitions are more to the point than the ones relied upon by the court below, which had not been cited by Cornell and to which La Grange did not have an opportunity to comment. The first definition cited by the court below was taken from Merriam-Webster's online dictionary, http:/www.merriam-webster.com/dictionary/projection. The court below selected the last of nine definitions presented there, "an estimate of future possibilities based on a current trend." Opinion at 35, *see* A-271. But at the time the Development Agreement was negotiated and agreed to, there was no sales experience at all at the La Grange Development. The contractual use of "projection" cannot have meant "an estimate. . . based on a current trend" since there was then no trend on which to base an estimate.

The court below ignored the fourth definition from the same online dictionary: "the forming of a plan: SCHEMING" (A-270). By focusing on the concept of planning, this definition is consistent with the definitions of "projection" cited to the court below by La Grange. Like them, it is consistent with treating the contractual "timeframe" or "schedule" as a firm one, particularly since the agreement expressly provides that time is of the essence.

The other definition cited by the court below appeared in a derivative case alleging that insiders had sold stock when they had inside information indicating the company likely would not meet public projections ("Market Estimates") of future performance. The Court of Chancery held that from the standpoint of a reasonable investor, "a

projection is, at best, a good faith estimate of how a company might perform in the future; it is by no means a warranty that can be blindly relied upon." *In re Oracle Corp.*, 867 A.2d 904, 905-906, 940-941 (Del. Ch. 2004). That comment does not construe "projection" as a term used in an agreement. Still less does the comment have any bearing on the meaning of the term in an agreement, such as the agreement here, that also provides that time is of the essence.

"Contracts must be construed as a whole, to give effect to the intentions of the parties." *Northwestern National Insurance Company v. Esmark, Inc.*, 672 A.2d 41, 43 (Del. 1996); *E. I. du Pont de Nemours and Co. v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del. 1985). "[T]he meaning inferred from a particular provision cannot control the meaning of the entire agreement where such inference conflicts with the agreement's overall scheme or plan." *Riverbend Community, LLC v. Green Stone Engineering, LLC*, 55 A.2d 330, 334-35 (Del. 2012); *du Pont*, 498 A.2d 1113.

The court below gave lip service to this principle. Opinion at 34, n. 133, *citing Estate of Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010). In practice, however, the court below construed the term "projection" in isolation from the contractual terms "timeframes" and "schedule" used with it in Section 1.A, as well as the "time is of the essence" provision in Section 19. Taken together, the contractual provisions clearly establish the parties' contractual intent that the schedule be firm.[1]

[1] The court below in the alternative cited "extrinsic evidence" in the form of "Lot Purchase Agreements" used by Cornell in contracts with

"When time is not of the essence in a contract, a party still commits a breach when it fails to perform within a reasonable time." *Hifn*, 2007 WL 2801393 at *11. The court below departed from this principle by stating that the sales schedule was merely "aspirational" (Opinion at 37)and by accepting Mr. Anderson's expert damages testimony (*id.* at 71-72) which was premised on Cornell's having a whole extra year to perform beyond the schedule in Exhibit A. Anderson, A-106; A-264. On this interpretation Cornell would not have been in default even if it never sold a house in the period actually contemplated by the agreement. This is not a "reasonable time," because in the meantime, La Grange would still have $900,000 tied up in infrastructure and would still be incurring interest in a setting in which Cornell asserts that La Grange already had exhausted its revolving line of credit.

3. Cornell's Failure to Sell Homes in Timely Fashion Was a Material Breach, Discharging La Grange's Obligation to Pay Unearned Management Fees

In the *Hifn* case, the Court of Chancery stated that "[w]hen time is of the essence in a contract, a failure to perform by the time stated is a material breach of the contract that will discharge the non-breaching party's obligation to perform its side of the bargain." Delaware courts have denied plaintiffs contractual relief on contracts for the sale of real estate that provided that time is of the essence, where the plaintiff had not performed by the time specified in the

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other parties. Opinion at 36. There is no evidence that these were shared with La Grange before the Development Agreement was negotiated. They are not evidence of what these parties intended in the Development Agreement, even if that agreement were ambiguous.

contract. *Peden v. Gray*, 886 A.2d 1278 (Table), 2005 WL 2622746, at **3-4 (Del. Oct. 14, 2005); *Thompson v. Burke*, 1985 WL 165736, at **3-4 (Del. Ch. June 7, 1985); *see also Allen v. Rock*, 2004 WL 1398838, at *5 (Del. Com. Pl. June 22, 2004) (where the contract stated that time is of the essence, the contract became null and void when the buyers could not obtain financing by the date specified and the buyers were entitled to return of their deposit).

In this case, Cornell breached its obligation to sell single family homes on the schedule prescribed by the Development Agreement. That failing injured La Grange and there is no basis in that agreement or otherwise for the conclusion below that Cornell's failure to comply is excused by "[t]he profitability of the project," Opinion at 48. Cornell is not entitled to expectation damages in the form of management fees for homes it did not sell.

II. CORNELL IS JUDICIALLY ESTOPPED FROM CONTESTING A STRICT CONSTRUCTION OF THE CONTRACTUAL SCHEDULE

A. Question Presented

Whether Cornell, having prevailed on one claim on the premise that the Development Agreement established a clear and firm schedule for selling homes, is judicially estopped from asserting the opposite proposition in support of its claim for management fees. La Grange presented this question at pages 5-6 of its August 3, 2012 Reply Brief in Support of its Motion for Partial Summary Judgment (Transaction ID 45712583) and page 11 of its Answering Post-Trial Brief filed October 26, 2012 (Transaction ID 47416625).

B. Standard and Scope of Review

"The determination of judicial estoppel is a question of law and is reviewed *de novo*." *Motorola, Inc. v. Amkor Technology, Inc.*, 958 A.2d 852, 859 (Del. 2008).

C. Merits

The second case filed by Cornell Glasgow (C. A. NO. N11C-07-160 JRS CCLD) asserted damages after trial arising from La Grange's sale of a Model Home, a deed to which had earlier been put in escrow. The court below awarded damages after trial on a breach of contract theory (see below). La Grange does not appeal from that ruling.

Cornell claimed in its complaint that the escrowed deed, combined with La Grange's subsequent alleged default, operated as a conveyance of the property to Cornell (Transaction ID 38844352). La Grange moved to dismiss on the grounds that, under the terms of the relevant instruments, the interest might not vest within 21 years, so that the so-called conveyance was void under the Rule Against Perpetuities.

Cornell argued below that the Rule did not apply because the "Sales Projection Schedule" in Exhibit A clearly prescribed a shorter time:

> [T]he language of the Agreement itself — as negotiated and agreed to by the parties — clearly establishes a time frame in which the Development was to be complete, and accordingly, any claims to the Escrow Deeds would ripen.
>
> The Agreement between Cornell and La Grange provided that all Lots within the Development would be sold to third-party purchasers in accordance with the "Sales Projection Schedule" attached to the Agreement as Exhibit "A". See Development Agreement ¶1.A, attached to the Complaint as Exhibit "A". The Sales Projection Schedule, in turn, provided that all Lots would be sold within 11 quarters (i.e. in under three (3) years) of the date of the Agreement.
>
> * * *
>
> Per the very terms of the Agreement, all Lots were to be under agreement with third party purchasers within three (3) years of the Agreement date, and Cornell was to complete construction of each Residence within two (2) years of the Purchase Agreement of the Residence in question. Accordingly, any claim of default by either party under the Agreement which would trigger the self-effectuating provisions of the Escrow Agreement — and thereby transfer the Escrow Deed to the non-defaulting party — would necessarily have occurred within five (5) years of the date of the Agreement; well within the twenty-one year limitation of the Rule [Against Perpetuities].
>
> As the language of the Agreement itself clearly establishes the time period within which such a right to an Escrow Deed could be exercised - and that period is well within the limits of the Rule - the Escrow Deeds do not violate the Rule and Defendants' Motion to Dismiss Plaintiff's Complaint should be denied.

Plaintiff's Responsive Brief in Opposition to Defendants' Motion to Dismiss (in C.A. No. N-11C-07-160 (JRS) [CCLD], Sept. 26, 2011 at 13-15) (Transaction ID 40035236), A-80 - A-82.

Based on the Court's acceptance of that contention, Cornell successfully avoided dismissal of its Complaint in the "07" case based on the Rule Against Perpetuities. *Cornell Glasgow, LLC v. La Grange Properties, LLC*, C.A. No. N11C-07-160 JRS CCLD, Aug. 1, 2012 Memorandum at 11-13 (Transaction ID 45662798), A-86 - A-102. The court below specifically held "Under the Development Agreement the lots must be sold within eleven (11) quarters (or 2.75 years) from the date of the Agreements," A-96, *citing* Section 1.A. and Exhibit A of the Agreement.[2] The court below continued that "if the homes are not 'sold' within the designated period, Cornell is subject to default under the Development Agreement and corresponding penalties." A-97.

This decision preserving Cornell's claim led in turn to an award of $192,281 in damages in the Superior Court's decision after trial. Dec. 7, 2012 Opinion at p. 5.

Having succeeded in arguing for a strict interpretation of the schedule prescribed by Exhibit A of the Development Agreement and obtaining a Court ruling explicitly based on that interpretation, Cornell is judicially estopped from taking the contrary position now. *Motorola, supra*, 958 A.2d at 859-860. Time was of the essence and Cornell's "failure to perform by the time stated is a material breach

[2] This express basis for the prior ruling of the court below is not fairly characterized by its later comment that it "did not conclude there ... that the exhibit clearly and unambiguously sets those projections as firm deadlines." Sept. 19, 2012 Tr., at 5.

of the contract that will discharge the non-breaching party's obligation to perform its side of the bargain." *Hifn*, 2007 WL 2801393, at *9. La Grange is not liable to pay Cornell contractual management fees on any homes of any description as to which sales had not closed by February 2011.

CONCLUSION

For the reasons stated, the judgment below should be reversed and the case remanded with instructions to enter judgment in La Grange's favor on the issue of management fees under the contract.

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