

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

REPLY BRIEF OF DEFENDANTS BELOW, APPELLANTS

POTTER ANDERSON & CORROON LLP
Daniel F. Wolcott, Jr. (# 284)
Gregory A. Inskip (# 270)
1313 N. Market Street, 6th Floor
P.O. Box 951
Wilmington, Delaware 19899-0951
Phone:(302) 984-6000
Fax: (302) 658-1192

Attorneys for Defendants Below, Appellants

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INTRODUCTION

This is the reply brief of La Grange Communities LLC and La Grange Properties LLC (“La Grange”) in support of La Grange’s appeal from (1) a September 19, 2012 ruling of the Superior Court denying La Grange’s motion for summary judgment; and (2) a judgment dated January 9, 2013 implementing (for purposes of C. A. No. N11C-05-016 CCLD) the Superior Court’s December 7, 2012 Memorandum Opinion (“Opinion”). The rulings appealed from resulted in the award of \$1,716,000 in “lost management fees” to plaintiff-appellant Cornell Glasgow LLC (“Cornell”), Opinion at 71 – 72. This amount is the major portion of \$1,966,745 awarded in damages by the court below. *Id.* at 74 – 75.

The procedural and factual background of this contractual dispute are recounted in La Grange’s March 25, 2013 Opening Brief at 1-2, 4-8. Cornell’s April 26, 2013 Answering Brief demonstrates that while the parties substantially agree about the factual context of their contractual relationship, they sharply disagree over interpretation of the contract itself.¹

Cornell and La Grange entered into the Development Agreement on September 23, 2009. AB at 6. Pursuant to that agreement, Cornell would construct, market and sell 185 of the total 227 lots at the La Grange development,

¹ Citations to La Grange’s Opening Brief are in the form “OB at (page).” Citations to the Appendix filed therewith are in the form “A-(page).” Cornell’s (corrected) Answering Brief is cited in the form “AB at (page).”

including townhomes, duplexes, and single-family homes. *Id.* “La Grange, at its sole cost and expense, was to complete all necessary site improvements and deliver to Cornell fully improved lots upon which Cornell could construct the homes.” *Id.*

In Paragraph 1.A of the Development Agreement, La Grange granted to Cornell the right to build and sell homes “per the timeframes set forth in the Sales Projection Schedule attached hereto and made a part hereof as Exhibit ‘A’...” AB at 7; A-142, A-156. That Schedule provided separate, parallel time lines for sale of townhomes, duplexes and single family homes. AB at 8, 10. The Schedule was never amended. *Id.* at 15, 20.

Cornell repeatedly asserts in its Answering Brief that the Sales Projection Schedule “lacked any specific date for performance” (AB at 18), “did not establish a firm deadline for performance” (*id.* at 19), “is not sufficient to establish with specificity and certainty a hard deadline for Cornell’s performance” (*id.* at 21), did not state a “specific date” for performance (*id.* at 22) and “did not establish a clearly specific deadline by which Cornell was expected to perform ...” *Id.* at 25.

Cornell admits, however, that the Schedule establishes a “sales pace [that] begins ninety days from the date of obtaining the first building permit for each product.” AB at 8; A-156. This language was specific enough to enable Cornell’s own expert witness to note that the first building permit for a single family detached home was obtained January 27, 2010, and then to calculate that the first

quarter of Cornell's obligation to sell single family homes began on April 27, 2010 and that Cornell was to have sold 16 single family homes by January 26, 2011.

OB at 5, A-264.

Cornell admits that "sales of single family detached homes lagged." AB at 16. Cornell had only closed on three homes, not 16, by January 26, 2011. OB at 5; A-110; A-259. Cornell attempts to excuse its nonperformance as to single family home sales with the observation that "Cornell sold townhomes and duplexes at a faster pace than the parties had originally projected." AB at 15. However, the sale of these other categories of homes did not free up the approximately \$900,000 in sunk costs incurred by La Grange in building infrastructure for the single family homes that Cornell had failed to sell. OB at 7; A-110 – A-111, A-113.

Cornell asserts that by early 2011 "La Grange did not have enough funds in its construction line of credit to satisfy the costs associated with discharging its obligations of delivering fully improved lots to Cornell. " AB at 1. If so, Cornell bears much of the blame by failing to sell single family homes in timely fashion so as to free up the substantial costs that La Grange had incurred installing infrastructure. Cornell breached its contractual obligation and is not entitled to an award of contractual management fees for homes that were never sold under the Development Agreement.

ARGUMENT

I. THE AGREEMENT CLEARLY PRESCRIBED A FIRM SCHEDULE BY WHICH CORNELL WAS OBLIGATED TO SELL SINGLE FAMILY HOMES

A. The Controlling Principles of Contractual Interpretation.

The Court recently declared the principles guiding contractual interpretation as follows:

When we interpret contracts, we “give priority to the parties’ intentions as reflected in the four corners of the agreement” We “must construe the agreement as a whole, giving effect to all provisions therein.” “The meaning inferred from a particular provision cannot control the meaning of the entire agreement if such an inference conflicts with the agreement’s overall scheme or plan.” We “interpret clear and unambiguous terms according to their ordinary meaning.”

Riverbend Community, LLC v. Green Stone Engineering, LLC, 55 A.3d 330, 334-335 (Del. 2012) (footnotes omitted.) As noted in the Opening Brief (OB at 9 – 10), the standard of review on questions of contractual interpretation is *de novo*. *Lank v. Moyed*, 909 A.2d 106, 108 (Del. 2006).

B. The Plain Meaning of the Agreement.

In this case, the pertinent contractual provisions are two:

1. Development Agreement Section 1.A. and Exhibit A

The time for Cornell to build and sell homes 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.

2. Time

"Whether time is of the essence in a contract turns in the first instance on whether the contract explicitly states so." *Hifn, Inc. v. Intel Corp.*, 2007 WL 2801393 at *9 (Del.Ch. May 2, 2007). Section 19 of the Development Agreement explicitly provides that "[t]ime is of the essence as to all matters to be performed by the parties under this agreement." A-153. This language clearly applies to "the timeframes set forth in the Sales Projection Schedule," A-142. Together, Sections 1.A and 19 of the Development Agreement establish a firm schedule for Cornell to sell the three kinds of homes, including detached single family homes. There is nothing ambiguous or unclear concerning the date when the schedule starts nor how many houses were to be sold during ensuing periods under the Schedule.

When a contract is clear and unambiguous, it is construed as a matter of law by the courts. The court below manufactured an ambiguity by its construction of the term “projection.”

C. The Use of the Word “Projection” in the Agreement Does Not Negate Cornell’s Obligation or Render it Ambiguous.

Based on the parties’ use of the word “projection”, the court below ruled that the Development Agreement did not establish a “deadline” for Cornell to sell homes. Opinion at 34 – 35. Cornell defends this construction by asserting repeatedly that “the Trial Court properly ruled that a projection, as used in the Development Agreement, did not mean a firm deadline.” AB at 5; *see also id.* at 8, 9, 11, 21, 22. This myopic focus by the court below and Cornell on one word (“projection”), out of the context of the word as used in the agreement, ignores the requirement to “construe the agreement as a whole, giving effect to all provisions therein.” *Riverbend Community*, 55 A.3d at 334.

The Development Agreement does not use the word “projection” in isolation. The word occurs in the phrase “Sales Projection Schedule” (used in Section 1.A and Exhibit A) which is stated by Section 1.A. to prescribe the “timeframes” within which Cornell was to build and sell homes. Read together these contractual terms unambiguously create a firm obligation to sell homes on the schedule prescribed. Any lingering doubt is resolved by Paragraph 19 of the

Agreement, providing that “[t]ime is of the essence as to all matters to be performed by the parties under this agreement.” A-153.

Cornell asserts that this conclusion is somehow inconsistent with the “ordinary and customary definition” of the word “projection.” AB at 12. Cornell does not explain (a) what that definition is, (b) why it is proper to focus on one word in isolation from its place in the agreement, and (c) why the following definitions of “projection,” cited by La Grange but ignored by Cornell as well as by the court below (OB at 12-13) do not support the conclusion that the contractual schedule is a firm one:

“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.

D. The Resort to Extrinsic Evidence By the Court Below Was Error, and Cornell’s Citation of Such Evidence is Unavailing.

“If a contract is unambiguous, extrinsic evidence may not be used to interpret the intent of the parties, to vary the terms of the contract or to create an ambiguity.” *Eagle Industries, Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997); *Pellaton v. Bank of New York*, 592 A.2d 473, 478 (Del. 1991).

“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.” *Eagle Industries*, 702 A.2d at 1232.

Since the contract is unambiguous, the court below should have ignored extrinsic evidence of (1) how Cornell subjectively interpreted the term “projection” (AB at 8 – 10), or (2) Cornell’s subjective belief that “the Sales Projection did not establish a clearly specific deadline by which Cornell was expected to perform in accordance with the time is of the essence provisions.” *Id.* at 25.

Equally irrelevant is “Cornell’s customary use of Lot Purchase Agreements” (*id.* at 20; Opinion at 36), which have no bearing on these parties’ relationship and apparently were not even shared with La Grange. Even if it were appropriate to refer to extrinsic evidence in this case, these agreements of Cornell with third parties have no bearing on the agreement that La Grange and Cornell reached in this case.

Finally, the claim of Cornell that “Profitability Trumps Pace” (AB at 15 – 17), like the similar conclusion of the court below (Opinion at 47 – 48), has no support in the language of the Development Agreement, and is contradicted by the express provision in Section 19 that “[t]ime is of the essence as to all matters to be performed by the parties under this Agreement.” A – 153. As Cornell itself

asserted:

[T]he language of the Agreement itself – as negotiated and agreed by the parties – clearly establishes a time frame in which the Development was to be complete . . .

Plaintiff's Responsive Brief in Opposition to Defendants' Motion to Dismiss (in C. A. No. N11C-07-160 (JRS) [CCLD]), Sept. 26, 2011 at 13 – 15 (Transaction ID 40035236), A-80 – A-81.

II. CORNELL IS JUDICIALLY ESTOPPED FROM CONTESTING THAT THE CONTRACTUAL SCHEDULE WAS FIRM

Defendants showed in their opening brief that plaintiff successfully avoided dismissal of the Complaint in a related case (C. A. No. N11C-07-160 JRS [CCLD]) on the premise, accepted by the court below, that the Development Agreement established a clear and firm schedule for selling homes. OB at 17 – 19. Defendants supported their argument with lengthy quotations from Cornell’s brief and the August 1, 2012 decision of the court below on the issue.

Cornell does not seriously address what it said or what the court below did on La Grange’s motion to dismiss the related case. Cornell argues now that “[t]he crux of Cornell’s argument . . . was not that there was a firm deadline for completion but rather that completion of the project was certainly intended to be finished within twenty-one years.” AB at 29. In actuality, Cornell needed to establish a firm and objective timeframe in order for its alleged interest to vest within the 21-year period prescribed by the Rule Against Perpetuities. Thus, Cornell argued unequivocally that the contractual schedule was clear: “the language of the Agreement itself – as negotiated and agreed by the parties – clearly establishes a time frame in which the Development was to be complete.” A-80 – A-81.

Cornell further asserts that “the Trial Court did not previously rely on the alleged inconsistent position as a basis for its ruling on the Motion to Dismiss in the Lot 206 Action,” AB at 26. On the contrary, in its August 1, 2012 decision the court below denied defendants’ motion to dismiss on the basis that “[u]nder the Development Agreement the lots must be sold within eleven (11) quarters (or 2.75 years) from the date of the Agreement.” A – 96, *citing* Section 1.A. and Exhibit A of the Development Agreement.

As noted in La Grange’s Opening Brief (OB at 19, n. 2), this express basis for the prior ruling of the court below is not fairly characterized by its later comment, quoted by Cornell (AB at 28 – 29) that it “did not conclude there . . . that the exhibit clearly and unambiguously sets those projections as firm deadlines.” Sept. 19, 2012 Tr., at 5. In its prior ruling (Aug. 1, 2012), the court below went so far as to state, “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 basis for the ruling denying La Grange’s motion to dismiss, sought by Cornell, is directly contrary to the ruling appealed from that the Sales Projection Schedule “set forth aspirational projections, not deadlines,” Dec. 7, 2012 Opinion at 37, quoted AB at 21.

By successfully arguing for a strict interpretation of the Sales Projection Schedule, Cornell avoided dismissal of its claim in Civil Action No. N11C-07-160

JRS [CCLD]. That ruling ultimately led to an award of \$192,281 in damages in the Superior Court's decision after trial. Dec. 7, 2012 Opinion at 68 – 69, 75. Having obtained a court ruling in its favor by successfully arguing for a strict interpretation of the sales schedule, Cornell is judicially estopped from taking the contrary position now, *Motorola, Inc. v. Amkor Technology, Inc.*, 958 A.2d 852, 859 (Del. 2008), regardless of how the court below may later have characterized its August 12, 2012 holding reproduced at A-96 – A-97.

III. CORNELL'S FAILURE TO SELL SINGLE FAMILY HOMES IN TIMELY FASHION WAS A MATERIAL BREACH OF THE AGREEMENT, DISCHARGING LA GRANGE'S OBLIGATION TO PAY MANAGEMENT FEES FOR UNSOLD HOMES

Cornell's comment that "failure to abide by a time of the essence provision can result in a material breach" (AB at 24) imprecisely states the law. Where, as here, the agreement contains a time of the essence clause and where, as here, a party fails to meet a contractual time commitment, such failure is a material breach of the agreement. "When it is said that time is of the essence, the proper meaning of the phrase is that the performance by one party at or within the time specified in the contract is essential in order to enable that party to require performance from the other party. . . .[E]xact compliance with the terms of the contract in this respect is essential to the right to require counter – performance." 15 WILLISTON ON CONTRACTS § 46:2 (4th ed. 2000) , quoted in the Opinion below at p. 33. "When 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. *Hifn, Inc. v. Intel Corp.*, 2007 WL 2801393, at *9, *citing* 15 WILLISTON, *op. cit.*, § 46:3 .

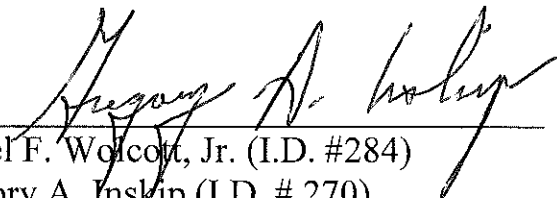
Time was of the essence and Cornell's failure to sell single family homes by the time stated is a material breach of the Development Agreement that extinguishes Cornell's right to recover expectation damages under the contract.

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 herein and in LaGrange's opening brief, 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.

POTTER ANDERSON & CORROON LLP

By 
Daniel F. Wolcott, Jr. (I.D. #284)
Gregory A. Inskip (I.D. # 270)
1313 North Market Street - 6th Floor
Wilmington, DE 19801
Phone: (302) 984-6000

Attorneys for Defendants Below, Appellants

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