IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

LEWES INVESTMENT COMPANY, L.L.C.,	)	
Plaintiff,	)	
v.	)	*Civil Action No. 2893-VCG*
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.	)	

MEMORANDUM OPINION

Date Submitted: December 17, 2012
Date Decided: February 12, 2013

William E. Manning, James D. Taylor, Jr., and Jennifer M. Becnel-Guzzo, SAUL EWING LLP, of Wilmington, Delaware, Attorneys for Plaintiff.

Craig A. Karsnitz, YOUNG CONAWAY STARGATT & TAYLOR of Georgetown, Delaware, Attorney for Defendants.

GLASSCOCK, Vice Chancellor

This matter involves a failed attempt to develop a farm between Belltown and Cool Spring, in eastern Sussex County. The farm (the "Graves farm") is owned by the Defendants, members of the Graves family. It lies between Beaver Dam Road and the heavily traveled Lewes-Georgetown Highway, U.S. Route 9. Since the farm lies just to the west of the busy Route 1 beach corridor, it was a prime candidate for development during the real-estate boom of the last decade. In July 2004, the Plaintiff entered into a contract to purchase the Graves farm for $13 million. This particular contract was akin to an option contract; it permitted the buyer to walk away from the transaction, in which case the Graves family was entitled to retain a down payment in the amount of $650,000—5% if the total purchase price—made to the Graves by the buyer after a due-diligence period. In other words, the buyer, when it elected to go forward after the due diligence period, purchased an option at a cost of $650,000 to buy the Graves farm for $13 million. If, at any time prior to closing, the market, the regulatory outlook, or other factors made purchase of the property unattractive, the buyer could simply walk away, leaving the Graves with the down payment. If, however, the Graves breached their contractual obligations (including, pertinently, their obligation to provide good and marketable title at closing), the Graves would forfeit the down payment, and also be liable for the costs the buyer had incurred in an effort to

develop the property. The contract also provided the buyer—but not the seller—with a right to specific performance.

As time went on and the buyer sought financing and regulatory approval, the real estate market began to soften. In July 2006, although the buyer itself was not ready to go to closing, it demanded that 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 ability 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 cost—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. This, of course, is no unusual desire. Contrary to the proverb, at least in a metaphorical sense, a party *can* both have and eat a cake, but only where it contracts for the ability to do so. Because I

find that the Graves did not breach their contract with the Buyer, that entity is not entitled to the relief sought here.

I. SUMMARY

This matter is before me on exceptions to the final report of the Master, dated September 24, 2012.[1] As described above, the Plaintiff seeks damages under a contract of purchase and sale, alleging that the sellers committed a material breach by failing to deliver good and marketable title to the land on the date agreed to for closing. 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. These amounts total about $1 million. The Defendants have counterclaimed for breach of contract, alleging that they cured any potential breach within a reasonable time. As liquidated damages, the Defendants seek to retain the $650,000 down payment, consistent with section 13 of the contract. The Plaintiff filed this lawsuit after the Defendants demanded that the Plaintiff go to closing, some eight months after the date originally contemplated. After a thorough review of the evidence, I have determined that neither the Plaintiff nor the Defendants were ready, willing, and able to perform on the date for closing. As a result, I find that Defendants were not required to provide marketable title on that date. With respect to the Defendants'

[1] *Lewes Inv. Co. LLC v. Frances B. Graves Estate*, C.A. No. 2893-MA (Del. Ch. Sept. 24, 2012) (Master's Report).

counterclaim, I find that the Defendants were ready to perform within a reasonable time, based on the parties' course of dealing, and that the Plaintiff is in breach of the contract. My reasons for so finding follow.

II. PROCEDURAL HISTORY

This case has a long and complicated procedural history. Plaintiff Lewes Investment Company, LLC ("Lewes Investment"), a Delaware entity, filed the Complaint on April 12, 2007, alleging breach of contract and breach of the duty of good faith and fair dealing.[2] The Defendants, the Graves family, answered the Complaint and counterclaimed for breach of contract on May 25, 2007.[3] The Graves moved to dismiss the Complaint for failure to prosecute on December 1, 2008.[4] The Master heard argument on the motion to dismiss on January 14, 2009 and issued an oral draft report denying the motion following argument. The draft report became final on February 23, 2009.[5] The Plaintiff moved for summary judgment on November 11, 2009. The Master issued an oral draft report granting the Plaintiff's motion on March 3, 2010, to which the Defendants took exceptions on March 8, 2010. The Master withdrew her draft report granting the Plaintiff summary judgment on January 31, 2011.[6] Trial was held on August 22, 2011, after

[2] Compl. ¶¶ 41-53, Apr. 12, 2007.
[3] Defs.' Ans. 8, May 25, 2007.
[4] Defs.' Mot. Dismiss 2, Dec. 1, 2008.
[5] *Lewes Inv. Co. LLC v. Frances B. Graves Estate*, C.A. No. 2893-MA (Del. Ch. Feb. 23, 2009) (ORDER).
[6] Letter to Counsel 1, Jan. 31, 2011.

which the Master reserved decision. The parties submitted post-trial briefs, and the Master issued a written Draft Report finding for the Plaintiff on March 22, 2012.[7] The Defendants took exceptions to the Draft Report on March 27, 2012, and, following briefing, the Master adopted her Draft Report without modifications as her Final Report on September 24, 2012.[8] Once again, the Defendants took exceptions to the Master's Report, at which point the case was transferred to my chambers. The parties submitted briefs on the exceptions request, and oral argument was held on December 14, 2012. The Defendants moved to dismiss based on lack of subject matter jurisdiction, which motion I denied from the bench following oral argument.

III. BACKGROUND FACTS

On July 22, 2004, the Graves entered into an Agreement of Sale (the "Agreement") with Lewes Investment.[9] The Agreement provided that Lewes Investment would purchase from the Graves two parcels of land containing approximately 88.4 acres in total, located in Sussex County, Delaware, and known locally as the "Graves Farm" (the "Property"). The smaller of these parcels

[7] *Lewes Inv. Co. LLC v. Frances B. Graves Estate*, C.A. No. 2893-MA (Del. Ch. Mar. 22, 2012) (Draft Report).
[8] *Lewes Inv. Co. LLC v. Frances B. Graves Estate*, C.A. No. 2893-MA (Del. Ch. Sept. 24, 2012) (Master's Report).
[9] Compl. Ex. A. Lewes Investment is actually the successor-in-interest to Ivy Partners III, LLC, another Delaware entity. Ivy Partners assigned its interest under the Agreement to Lewes Investment on October 22, 2004. *See* Compl. Ex. B. For clarity, I have described the facts as only involving Lewes Investment.

contained approximately three acres (the "Three-Acre Parcel"). The Graves sold the Property through a bidding process conducted by their attorney, George B. Smith ("Smith"), and Lewes Investment was the successful bidder, offering to buy the Property for $13 million. The Agreement required the Graves to provide good and marketable title to the Property, and Lewes Investment was required to pay $13 million in return. The buyer put down an initial deposit of $10,000, and a second deposit of 5% of the purchase price was due within 90 days. The balance of the $13 million was due "at closing by wired funds."[10] The sellers were obliged to deliver "good and marketable" title at closing,[11] "free and clear of all liens, restrictions, easements, encumbrances, leases, tenancies and other title objections . . . ."[12] Closing was to take place at Lewes Investment's counsel's office in Sussex County, Delaware.[13] This exchange was to occur simultaneously at closing, originally scheduled for eighteen months following the execution of the Agreement (approximately January 22, 2006).[14] The Agreement provided Lewes Investment with an option to extend closing by six months, in exchange for a $25,000-per-month fee.[15] The Agreement specified that time was of the essence in regard to the

[10] Compl. Ex. A, Ag. § 2(b).
[11] *Id.* at § 9(a)(i).
[12] *Id.* at § 4(a).
[13] *Id.* at § 3(a).
[14] *Id.*
[15] *Id.*

$25,000 per month extension payments,[16] but the Agreement was silent as to all other aspects of time being of the essence.

Notably, the parties waived the requirement for formal tender of an executed deed and purchase money.[17] Section 15 of the Agreement, titled "Miscellaneous," provided the following: "Possession is to be delivered by Seller to Purchaser at Closing. Formal tender of an executed deed and purchase money is hereby waived."[18]

Lewes Investment put down a $10,000 deposit when signing the Agreement.[19] The Agreement contained a 90-day due diligence period in which title problems were supposed to be investigated and resolved.[20] At the end of this 90-day period, Lewes Investment was supposed to tender an additional $640,000 to the Graves if it wished to move forward with the sale.[21] The Agreement required Lewes Investment to do a title search promptly after contracting.[22] This title search was conducted, and on August 23, 2004, the buyer's attorney, Jim Fuqua, sent a letter to Smith informing him of a title defect on the Three-Acre Parcel.[23] This letter explained that the chain of title only accounted for a 7/8 interest in the Three-

[16] *Id.* ("Time is of the essence in this regard. This Agreement does not contain any financing contingency.").
[17] *Id.* at § 15(c).
[18] *Id.*
[19] *Id.* at § 2(a).
[20] *Id.* at §§ 2(a), 7.
[21] *Id.* at § 2(a). This amount, with the $10,000 deposit, equaled 5% of the total purchase price.
[22] *Id.* at § 4(b).
[23] Joint Trial Ex. 5, Letter from James A. Fuqua, Jr. to George B. Smith, at 1 (Aug. 23, 2004).

Acre Parcel, and that the remaining 1/8 interest had been retained by others.[24] It seems that, when the Defendants' father purchased the farm in the 1950s, one of the owners was not present to sign over his or her interest in the land.[25] As a result, the heirs of the missing owner still held title to the missing owner's 1/8 share of the Three-Acre Parcel. In the letter to Smith, Fuqua wrote that "this issue must be resolved in order for the Seller to be able to deliver good and marketable title."[26]

At the end of the 90-day due diligence period, Lewes Investment requested a 15-day extension to pay the $640,000 to the Graves "in order to give [the parties] time to discuss and resolve the [title issue]."[27] Smith was out of town when this request was made, and was unable to grant such an extension. Nonetheless, despite the lurking title issue, Lewes Investment paid the $640,000 to the Graves on schedule in October 2004. The Agreement provided the Graves with limited remedies if Lewes Investment chose to walk away from the deal: the Graves' recovery was limited to the down-payment.[28] Therefore, Lewes Investment had a way out of the Agreement with only $640,000 in lost cash. In contrast, if the Graves breached the Agreement, the Graves were obligated to reimburse Lewes

[24] *Id.*
[25] Tr. of Meeting 134:10-23 (June 29, 2006)(" June Mtg. Tr.").
[26] Joint Trial Ex. 5, Letter from James A. Fuqua, Jr. to George B. Smith, at 2 (Aug. 23, 2004).
[27] Compl. Ex. F.
[28] Compl. Ex. A, Ag. § 13(b) ("In the event that Purchaser violates or fails to fulfill and perform the terms of conditions of this Agreement, Seller shall retain the Deposit as liquidated damages for such breach. Purchaser and Seller shall be released from any further liability or obligation and this Agreement shall be null and void.").

Investment for all of its out of pocket expenses.[29] Lewes Investment—but not the Graves—also had the right to seek specific performance of the Agreement.[30]

Over the next two years, Lewes Investment moved towards developing the property by meeting and negotiating with state and local government officials and consultants. It retained consulting services in drawing up designs and plans for a residential neighborhood that would be composed of over 500 dwelling units. These plans incorporated the Three-Acre Parcel, and the Three-Acre Parcel was quite important to the project's moving forward.[31] Preparations for developing the property cost Lewes Investment approximately $130,000 in out-of-pocket costs.

On October 21, 2005, Lewes Investment exercised its option to extend the closing date for the Agreement until July 26, 2006.[32] As required by the Agreement, Lewes Investment paid the Graves $25,000 for each of the six months, for a total of $150,000. In Lewes Investment's letter to Smith formally exercising this option, Lewes Investment also noted: "Separately, we are still working on a proposal for purchasing a portion of the Graves farm before next July and for extending the closing date for the remainder of the farm. We will be in touch

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[29] *Id.* at § 14 (enumerating expenses including "engineering surveys, wetland studies, environmental studies, title insurance commitment, and consultant fees.").
[30] *Id.*
[31] Lewes Investment was discussing plans with local government officials to join the Graves' Property with property across the street, owned by the County, in one integrated development. The Three-Acre Parcel was where the government officials wanted to build a new on-ramp to a public road. *See* June Mtg. Tr. 131-39.
[32] *See* Compl. Ex. G.

shortly with a written proposal for your and your client's review."[33] It is unclear whether such a formal proposal to extend closing was ever submitted to the Graves, but Lewes Investment was at least considering doing so in October 2005.[34] The title issue was not mentioned in this letter extending closing.[35]

In the interim between October 2004 and May 2006, the parties appear to have forgotten about the title issue.[36] No work was done to clear the title or to investigate the whereabouts of the holders of the remaining 1/8 interest in the Three-Acre Parcel. Sometime in May or June 2006, Lewes Investment's counsel, Fuqua, ran another title search on the Three-Acre Parcel and discovered that the title defect persisted. This was communicated to Smith at some point prior to June 29, 2006.

A. The Parties' June 29, 2006 Meeting

On June 29, 2006, the parties met to discuss the progress with the project (the "June Meeting"). An audio record of the June Meeting was made by Mahlon Graves, and a transcript was produced for the Court during litigation. Most pertinent for our purposes, the subject of the "title issue" was not broached until the last five minutes of the June Meeting, after ninety minutes was spent discussing whether the Graves family would grant Lewes Investment a further extension on

[33] *Id.*
[34] *See id.*
[35] *See id.*
[36] June Mtg. Tr. 131-32.

closing.[37] During that brief discussion, Smith acknowledged that the title defect needed to be resolved and that he planned to work on it. He told Lewes Investment's representative, Richard D. Stout, that "obviously, we're assuming that [Lewes Investment is] going to have good title to the whole thing."[38] Stout's responses to these assurances showed a lack of concern; he told the Graves that he thought they "might be able to find a way to work around [the title defect] if it gets to be a -- a real problem," and that the title defect may not be a problem in any case because the state could take the land (presumably by eminent domain) to build a new road.[39]

Instead of discussing the title-defect issue, the parties spent most of the June Meeting negotiating whether *Lewes Investment* would be willing and able to close by July 26, and if pushed by the Graves to close on schedule, whether Lewes Investment would walk away from the deal. To avoid this consequence, which neither party seemed to find attractive, the parties discussed whether the Graves would delay enforcing their rights under the Agreement for six, twelve, or twenty-four months.[40]

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[37] *See id*. at 131.
[38] *Id.* at 133.
[39] *Id.* at 131-39.
[40] *See generally* June Mtg. Tr.

At the time of the meeting, Lewes Investment had an interest in delaying the closing until regulatory approvals and financing had been obtained.[41] This would allow Lewes Investment to minimize its risk exposure in the event that regulatory approvals could not be obtained or there was a change in the market. In contrast, the Graves had an interest in getting the deal done as soon as possible, particularly because the property had a $5 million "tax problem" accruing interest with the IRS.[42] Lewes Investment's representative, Stout, explained numerous obstacles to the county and state approvals processes for land development and issues with obtaining financing for the deal. Stout described these impediments to the Graves as the following:

> The long and the short of all this is that we are at a stage where, in order to complete the transaction in a prudent fashion, we need additional time . . . . We are also at a stage where there – if . . . put it this way, if, say, we're just going to stick to the contract and that's all there is to it, we're going to have to make a very difficult decision about whether we're going to sign the kinds of personal guarantees that would be required to get this thing to settlement. And, I can tell you, we haven't – it's going to depend on give-and-take from the lenders. I'm at a stage now, though, where I need to hear from you guys because if I don't, I'm – I'm going to be in a position where I don't have enough time even to get the documentation pulled together. And that's – that's kind of where we're – we're sitting on it at this point.[43]

[41] *See* Trial Tr. Vol. I 49:10-13 ("My objective 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.").
[42] June Mtg. Tr. 30-31.
[43] *Id.* at 26-27.

When pushed to be clearer about what he needed from the Graves, Stout elaborated as follows:

> [T]o get to the settlement on the 26th of July, assuming that's the date – and I think that's what the contract . . . clearly calls for at this point, we have to – I know I have to finish my dealings with the state, which, frankly, are still in limbo. I'd like – I'd be much happier to have more time to get, you know, some of that negotiations squared away. But we've simply got to get it lined up. I also won't do this deal – [my business partner] and I won't do this deal without involving – at these numbers we know we will have to involve a third party equity participant and – we're not sure whether the terms of that deal, which we're currently at least having discussions about and, of course, we don't want to go too far until we know where you're going to be.[44]

Throughout the June Meeting, Stout asked the Graves for more time[45] and attempted to move the Graves away from trying to enforce the Agreement as written.[46] The parties candidly discussed the uncertainty with the housing market and various ideas for how they could manage that risk appropriately.[47] As real

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[44] *Id.* at 28-29.

[45] *See id.* at 37-38 ("What I want is more time."); *id.* at 39-40 (discussing an extension between four and six months in length); *id.* at 42 ("I would think we would need a year to get a final approval. Frankly, my engineer is telling me he thinks it may take closer to two by the time they're really done . . . ."). Stout testified at trial he would have preferred a later date than the closing date. Trial Tr. Vol. I 76:23-77:2.

[46] For example, Stout told the Graves that "I know . . . you'd like us to settle in compliance with the contract straightforwardly," but then mentioned that he thought he could probably take care of the family's $5 million "tax problem" immediately. June Mtg. Tr. at 30-31. *See also id.* at 89 ("If you're committed to selling the property, we could get you the funds to get the IRS off your back, continue to move the process forward . . . and then if, for whatever reason, we failed, at least you'd have an approved project."). Stout told the Graves "[Y]ou guys are going to make your own decision on – on the key issue of whether you're saying, look, a contract is a contract, and we can live with that. . . . I'm trying to see if there are ways to meet your needs . . . ." *Id.* at 35.

[47] *See id.* at 41-50.

evidence of this risk, Stout described a proposed deal Lewes Investment had with Toll Brothers, worth $30 million, that could possibly fall through.[48]

Stout repeatedly attempted to shift the risk of a tanking housing market onto the Graves family, by delaying the closing.[49] When asked by the Graves why Lewes Investment had not moved faster in getting together the necessary financing and approvals, Stout responded, "I'll be candid and then you can choose to chastise me for the way we do business. But, essentially, we're somewhat in the option business. In other words, we hope to put in a million dollars and make 10. And we – every so often, they fall out." Indeed, Mr. Stout said it best when he noted the parties were "playing opposite sides of the same bet . . . ."[50]

When the Graves asked Stout what he would do if they tried to enforce the Agreement on the July timetable, Stout wavered. First, he replied that the buyers would likely cancel the Agreement, "lick [their] wounds and go."[51] Under the terms of the Agreement, this would result in a forfeiture of both the down payment and also the sunk development costs—approximately $1 million. Then, he seemed to change his mind: "I'll tell you what I would do is I'll spend the next three weeks

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[48] *Id.* at 32-34.

[49] For instance, the parties negotiated for several minutes about whether a $25,000 per month extension fee would be sufficient. *Id.* at 53-61. Stout also casually suggested that they restructure the contract to give the Graves a 50% stake in the eventual sale of the property, with all government approvals in place, two years down the line. *See id.* at 35-36, 41 ("And what I would like to do even more, frankly, is to take you all the way through a final approval process and have you participate with it.").

[50] *Id.*

[51] *Id.* at 62 (answering "Yes" when asked if he would cancel the contract).

working as hard as we can to cobble together a way to do it."[52] Almost an hour into the meeting, the parties had the following exchange:

> MR. STOUT: [T]o me, a million dollars is a lot of money. To walk on that is not something we take lightly but, at the same time, we are in a business that says you've got to sometimes just accept that's where you go. I'm telling you right now, I don't fully know what we would do.
>
> MR. SMITH: If they only were willing to give you six months, what would you do?
>
> MR. STOUT: I'd work darn hard.[53]

When pressed again about what would happen if the Graves tried to enforce the Agreement as written, Stout alluded to the fact that the deal could not be done during the original time period.[54] Indeed, Stout openly told the Graves that Lewes Investment did not have the resources to settle the deal without financing, which was not yet in place.[55] Furthermore, when asked if Stout could supply the sellers with copies of the various approvals he had obtained so far, Stout responded "I need to make clear to you, we don't have many things that are actually formal approvals . . ."[56]

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[52] *Id.* at 63.
[53] *Id.* at 67.
[54] *See id.* at 68-74 (alluding to holdups with the Department of Transportation, sewer installation, and regulatory approval process).
[55] *Id.* at 75-76 ("I don't have the cash resources today. I'd have to go sell a bunch of office buildings and shopping centers and other things to even get to the position to have the kind of cash to say I could absolutely do it. I do have a lender who's saying they're ready. I'll share the commitment letter with you when I get it.").
[56] *Id.* at 79.

At trial, Stout's recollection of what he told the Graves was somewhat more definite on his ability to close on July 26.[57] When asked what he told the Graves when asked if was prepared to close, Stout responded at trial that: "I said that we would work very hard in that direction and that I expected that with personal guarantees and the like that we would go to closing."[58] This self-serving recollection is belied by the transcript of the June Meeting, however. In contrast, Smith and William Graves recalled that at the end of the meeting, the parties understood that they were not going to closing on July 26.[59]

Stout was clear at the meeting that he wanted to continue the project: that is, he did not want to walk away.[60] Still, there was no formal tolling or extension arrangement agreed to by the parties. Smith informed the Graves that the tolling agreement was not final until it was "typed up."[61] At trial, Stout confirmed that there was no tolling agreement.[62] There do not appear to have been any other communications between the parties until July 20, 2006, six days before closing was scheduled to occur.

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[57] *See* Trial Tr. Vol. I 50:18-24
[58] *Id.*
[59] Trial Tr. Vol. II 18:10-15; Trial Tr. Vol. II 145:13-16.
[60] *See* June Mtg. Tr. at 90 ("[W]e don't want to quit. We want to keep it going.").
[61] *Id.* at 105. Smith told his clients that he would let Stout do that work, and he would submit comments, so that it would not cost them more money. *Id.*
[62] Trial Tr. Vol. I 50:10-17.

B. Communications near the Original Closing Date

On July 20, 2006, a real estate agent associated with the deal emailed Smith to tell him that the upcoming closing on July 26 was supposed to yield a 1.25% commission to the real estate agents.[63] Smith replied that the sale "may or may not go on schedule" and that some sort of extension would likely be forthcoming since the buyers were "out of contract."[64] To this, the real estate agent replied "I'm not sure what you mean by the Buyers will be out of contract? The Buyers are ready to settle. We are under the impression that there is an issue with the Deed. Is that the case?"[65]

On July 25, 2006, Smith received a letter from an out-of-state attorney, Wayne G. Tatusko ("Tatusko"), who (along with Fuqua) represented Lewes Investment. Tatusko informed the Graves that, unless they could cure the title defect within 30 days, they would be in breach of the Agreement.[66] Tatusko noted that section 14 of the Agreement requires the seller to reimburse the buyer for all of the buyer's out-of-pocket expenses if the seller fails to perform the terms and conditions of the Agreement.[67] Thus, at this point, Lewes Investment's position seems to have been that if the Graves were unable to clear title by August 25,

[63] Joint Trial Ex. 12, Email from Matt Brittingham to George B. Smith 1, July 20, 2006 (12:51 PM EST).
[64] *Id.*
[65] *Id.*
[66] Joint Trial Ex. 13, at 2.
[67] Compl. Ex. A, Ag. § 14.

2006, the Graves had to pay Lewes Investment $1 million. Yet if the Graves did clear title by that date, and Lewes Investment refused to or was unable to perform under the Agreement, the Graves would have no recovery beyond the $650,000 already paid to them.[68]

Tatusko's July 25 letter explicitly stated that "time is not of the essence for the closing of the purchase and sale of the Property . . . ."[69] However, Tatusko provided at the end of the letter: "In lieu of exercising its remedies under the Agreement, Purchaser would prefer to negotiate a mutually acceptable extension of the Agreement . . . . 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."[70]

Smith interpreted the letter as being an attempt made by the buyer's counsel "to have an out on the contract."[71] Smith did not respond directly to Tatusko. Instead, on July 31, 2006, Smith responded to Tatusko's letter by writing to Lewes Investment's local counsel, Jim Fuqua, with whom he had been dealing up to that point. In his letter, Smith confirmed that the sellers wished to proceed to

[68] *See id.* at §13(b).
[69] Joint Trial Ex. 13, at 2.
[70] *Id.* at 3.
[71] Trial Tr. Vol. II 24:11-12.

closing, just like the buyers.[72] Smith included further information in this letter that is helpful in determining what was going on around the original closing date:

> I must remark that you and I spoke prior to July 26 and you agreed to prepare an agreement that would "toll" the closing date and address open issues. I never received anything from you. I subsequently called Karen to discuss the title issue on the 1/8 of the 3.32 acres, left a message and never received a call back. When I called her today, she said she gave that message to you because you had the file. I had finished my review of our searches and was ready to attempt to resolve the open title issue.[73]

Following this paragraph, Smith wrote that he believed the title issue could be cleared quite quickly, and that his clients expected either a "speedy closing" or an extension.[74]

Lewes Investment's attorney, Fuqua, testified that his secretaries were preparing for the closing in the summer of 2006, but Fuqua was out of the office with a serious injury.[75] He did not recall the supposed conversation with Smith about a tolling agreement. Fuqua was not aware whether the buyers had obtained any financing, and he was not aware that Lewes Investment had repeatedly asked the Graves for an extension.[76]

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[72] *See* Joint Trial Ex. 14.
[73] *Id.* At trial, Stout testified that he believed Smith "made up" the conversation with Lewes Investment's attorney, but that, at the time, he remained interested in extending the agreement under the right terms. *See* Trial Tr. Vol. I 151:13-23.
[74] *Id.*
[75] Trial Tr. Vol. I 224:7-19.
[76] *Id.* at 232:17.

C. Tatusko Purports to Terminate the Agreement

On August 28, 2006, Tatusko sent Smith a letter "following up" on the parties' prior letters (the "August Letter").[77] The August Letter recited that the Graves had not yet cleared the title defect, and that the 30-day "reasonable adjournment of the closing date" had expired.[78] Tatusko concluded the August Letter with the following:

> 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 its rights under the Agreement*, Purchaser will likely contact Sellers directly to try to find a mutually acceptable business solution in the current environment.[79]

Lewes Investment contends that this letter terminated the Purchase Agreement,[80] and that any further discussions it had with the Graves were discussions pertaining to a possible new agreement.[81] As discussed below, however, Lewes Investment did not put its effort to develop the property "on hold." The Graves contend that

[77] Compl. Ex. I, at 1.
[78] *Id.*
[79] *Id.* (emphasis added).
[80] *See* Trial Tr. Vol. I 57-59.
[81] *Id.* at 60:4-7, 60:17-18.

the parties were still operating under the original Purchase Agreement. Smith testified at trial that the actions of Lewes Investment's counsel, in sending the termination letter, were inconsistent with the actions of Stout, who was still urging that the deal go forward.[82]

D. The Parties September 2006 Meeting

On September 19, 2006, Stout and his business partner, G. Neel Teague, met with the Graves to discuss Lewes Investment's purchase of the Graves' land (the "September Meeting"). Like the meeting held in June 2006, the September Meeting was taped, and a transcript was produced.[83] The September Meeting lasted over 90 minutes, and once again the parties were quite candid with one another. For example, William Graves asked if Lewes Investment had been "prepared" to close on the closing date and if it was "going to settle that date."[84] Stout responded "I didn't say we were fully prepared. We were moving to be prepared. . . ."[85] He elaborated:

> We had Discover agreeing, you know, that they would sit there, and I said, "Look, this thing, we don't know how its going to play itself out." And they said, "Well, want to be ready, but we don't go through an unnecessary drill." And I think that was what we were talking about in our meeting in July [sic], 'cause they were saying, "We're

[82] Trial Tr. Vol. II. 25:19-26:6 ("Mr. Stout still wanted to do this transaction. He would explain to us where he was having problems getting financing, where he was getting problems getting home builders . . . and how he wanted to figure out a way that we could all go forward on this.").
[83] At trial, the parties did not dispute the accuracy of the transcript. *See* Trial Tr. Vol. I 62:5-7.
[84] Tr. of Meeting 54, September 19, 2006 ("Sept. Mtg. Tr.").
[85] *Id.* at 54.

> ready." And I think I was candid enough to say, "We don't know whether we're going to be able or willing or close."
>
> The fact is we were able, in other words I know our financials are strong enough that if we simply said, "You've got your full, unconditional guarantee and here's the equity slug," we could have done the deal. *Whether we were willing under those circumstances is another question*.[86]

A fair summary of the September Meeting is that the parties were still working toward their mutual goal of performing under the Agreement.[87] Stout suggested several times that the Agreement was still valid. For example, neither Stout nor Teague contradicted a statement by Smith that the parties still had a Agreement.[88] Nor did either buyer correct Smith when Smith called Stout a "contract purchaser."[89] Following a discussion about how much monthly interest Lewes Investment would be willing to pay to keep the Agreement open, without closing, for an additional three years, Stout told the Graves that "we might at some point prefer to have a new contract with you."[90] Then, Stout reiterated to the Graves that "sooner or later [the title issue had to be] cleaned up."[91] Finally, when Dean

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[86] *Id.* at 23 (emphasis added).

[87] At trial, Stout contradicted this characterization of the meeting. When questioned about the September Meeting, Stout explained that: "Well, what we were trying to do was to work out *an extension* to avoid litigation." Trial Tr. Vol. I 65:6-7 (emphasis added). Still, he testified that his understanding was that the previous agreement had been breached, and that any agreement reached at that time would be a new agreement. *Id.* at 65-66. Furthermore, Stout testified that he did not think he had acted inconsistently in continuing to negotiate with the Graves, while purportedly asserting that the Graves had breached the contract. *Id.* at 66:16-21.

[88] Trial Tr. Vol. II. 34:12-35:2; Sept. Mtg. Tr. 21.

[89] Sept. Mtg. Tr. 16.

[90] *Id.* at 42.

[91] *Id.* at 13.

Graves asked Stout what incentive the Graves had to give Lewes Investment more time, Stout replied:

> [H]ere's your incentive – I hope this will go over all right. Your incent – your choice is otherwise – I mean if you were to simply say, "Look, we think the contract is 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.[92]

From these facts, I infer that Stout and Teague believed that the Agreement was still valid.

At the same time, Stout made a few comments suggesting that he thought he had the upper hand in the discussion. Stout told the Graves that Lewes Investment's "letters speak for themselves," presumably alluding to the Tatusko letters demanding that the Graves clear title.[93] Stout also repeatedly suggested that it was in both parties' best interest to avoid a lawsuit.[94] When explaining his change in position from the time of the June 2006 Meeting until the date set for closing in July, Stout said the following:

> [F]rankly I was assuming at the time – and I'll be matter-of-fact – I was assuming that your title was not going to be an issue. In other words, I had every reason to think your title was fine or was going to be fine within short order. And in that sense what I was willing to do to protect the million-plus dollars that we have in it is a little different than we I think there's at least some possibility of recovery.[95]

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[92] *Id.* at 38-39.
[93] *Id.* at 31.
[94] *E.g.*, *id.* at 40 ("I think we both benefit by finding a way not to get into a lawsuit.")
[95] *Id.* at 39-40.

Thus, Stout was relatively open with the Graves about his using their title issue to gain a strategic advantage. When the Graves assured Stout and Teague that the title was not a problem, Stout and Teague replied that they believed the Graves and agreed with them.[96]

Stout and Teague provided further mixed messages to the Graves during this meeting. First, Stout told the Graves that Lewes Investment could have closed in July if it had needed to, because Discover Bank had verbally told Stout that it would loan Lewes Investment $8 million.[97] But Discover Bank never gave Stout or Lewes Investment a commitment letter.[98] Second, Stout said that Discover was no longer willing to lend that money to Lewes Investment in September 2006, but the chances were good that a loan could be made after the first of the year (i.e. January 2007). [99] Third, Stout and Teague repeatedly entreated the Graves to become long-term investors in their business venture.[100] But at the same time, Lewes Investment encouraged the Graves to find another purchaser to buy the

[96] *Id.* at 22.
[97] *Id.* at 19.
[98] *Id.* at 23.
[99] *Id.* at 19 ("[T]hey said they would be ready to go again come the first of the year. With the partition that may not be terrible timing.").
[100] *E.g.*, *id.* at 33 (describing the Graves' potential stake in the venture as "second lender or partner" and continued that "it could be any one of those things would be a way so that our interests are bound").

property and then "release" Lewes Investment from the Agreement.[101] Specifically, Stout said the following:

> 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 decision about where, you know, what you do, and of course, the consequences of what you do make a big difference. Our consequences don't look necessarily quite as dire as they looked a few months ago, and that's just, you know, part of where things are. . . .
>
> I'm also saying the other alternative is if we have to deal with the market the way it exists at this moment, stating the obvious, we're in the business to make a dollar. If I have to close on it and we're to attempt to do that at $13,000,000.00 in the short-run, I think it's a money losing proposition and the idea of pumping additional dollars into that and tying up our time and our capital isn't in that sense terribly desirable.
>
> One of the things I was going to say is you might want – and we talked about this – if you were to, if you've got someone else out there, if you think there's more market than we think there is, we're not opposed to a notion where you can go out and remarket, and if you can find a deal that you like, *we'd probably be willing to let you take that deal and release us.*[102]

Stout renewed the suggestion that the Graves seek another purchaser later on in the meeting.[103] Stout's reasons for suggesting these two courses of action—either (1) bringing the Graves in as a long-term partner or (2) having the Graves find another purchaser—were that, in September 2006 "no one [would] buy a preliminary [site

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[101] *Id.* at 31.

[102] *Id.* (emphasis added). This passage provides a good example of the contradictory tone of Stout's conversations with the Graves. Stout seems to threaten the Graves with Lewes Investment's attorney letters, while proposing that the Graves "release" Lewes Investment at the same time. *Id.*

[103] *See id.* at 34.

plan]" and, therefore, Lewes Investment needed more time.[104] Based 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.[105] Later in the September Meeting, Teague clarified that the deal was not worth $13 million to Lewes Investment anymore.[106]

The parties discussed at length whether Lewes Investment would be willing to pay the Graves monthly interest payments to keep the Agreement open for three years. At any given point, payment amounts from $15,000 to $50,000 were proposed.[107] Neel Teague suggested that Lewes Investment would pay the Graves $25,000 per month, starting from the date when the title issue was resolved.[108] Though no formal arrangement was agreed to at the September Meeting, several ideas had been proposed that would keep the parties working together. Stout left

[104] *Id.* at 38 ("I need more time anyway. To get it through the final I know I need at least 18 months; because of the uncertainties, I'd like to have up to the three years."). *See also id.* at 20 ("My preference would be to have you give us enough time to try to get to that higher pricing, which obviously in the end I assume is what you would like to have."). Stout detailed Lewes Investment's many problems obtaining regulatory approvals. *E.g.*, *id.* at 25 (describing problems with the "MPHU" in obtaining preliminary site approval and a loan from Discover).
[105] *Compare* June Mtg. Tr. 32-34 *with* Sept. Mtg. Tr. 49.
[106] Sept. Mtg. Tr. 51 ("I think the simple approach just gets less money . . . . [W]e certainly thought at one point there might be a way to make it work for us at $13,000,000.00 without that, but as we've learned more, we don't think that anymore.").
[107] *E.g.*, *id.* at 48-49.
[108] *Id.* at 48.

the meeting by expressing his hopes that they could find a way forward that would make both parties happy with what comes out of the deal.[109]

E. Lewes Investment's Development Efforts Following the August Tatusko Letter

After Tatusko sent the August letter, purporting to terminate the agreement, Lewes Investment continued at some level to work toward developing the Property. For example, Lewes Investment's engineering and design consultants billed work towards the project in the amounts of $1,915.00 for August 2006, $309.95 for September 2006, $420.00 for October 2006, and $627.50 for March, 2007.[110] Additionally, Stout continued to meet with state officials regarding developing the Graves' Property in September and perhaps afterward.[111]

Those same figures show that the intensity of Lewes Investment's interest waned after August 2006.[112] A week after the September Meeting, on September 26, 2006, Smith sent Stout a memorandum outlining terms for a tolling agreement extending closing for three years.[113] Under this proposal, Lewes Investment would pay the Graves $25,000 per month, not applied to the purchase price, retroactive to July 2006.[114] These payments would not begin until the Graves cleared the title.[115]

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[109] *Id.* at 56.
[110] Joint Trial Exs. 25, 27.
[111] Sept. Mtg. Tr. 17 ("We just met with the State, who is anxious still to keep things going.").
[112] *See* Joint Trial Exs. 25, 27.
[113] Joint Trial Ex. 17.
[114] *Id.*
[115] *Id.*

After 18 months, the monthly payments would increase to $40,000 per month, of which $15,000 would be applied to the purchase price.[116] This was the last communication between the parties until February 12, 2007, when Smith informed Lewes Investment that the title defect had been cleared.[117]

F. The Title Clearing

On February 12, 2007, Smith wrote to Lewes Investment's lawyer to inform him that the title had been completely deeded to the Graves siblings.[118] The title, while not expensive to clear, had been aggravating for Smith due to one of the heirs being subject to a guardianship.[119] In attempting to explain his lack of effort in July 2006 to attempt to clear the title, Smith testified as follows at trial:

> Q. Let me ask you this. When you were approaching this problem in the summer of 2006, were you in an all out panic mode we have to get this done yesterday?
> A. No. I was aggravated, but I wasn't in a panic mode.
> Q. Well, why not? Were you worried that settlement was coming up on July 26th?
> A. There was no way that the buyers were going to be able to make settlement in July of 2006 regardless of this issue. So, no, I was not in panicked.
> Q. Not only was there no way they were not going to make settlement, but they didn't want settlement?
> A. That is correct.
> Q. So you weren't drop everything, send staff around to get documents signed, that kind of thing?

[116] *Id.*
[117] Joint Trial. Ex. 22.
[118] *Id.*
[119] Trial Tr. Vol. II 30:15-19. The heir's interest had to go through a court process before it could be sold. *Id.*

> A. No. I mean we worked on it very promptly, but no, I was not in panic mode.[120]

The Graves finally cleared the titled by paying approximately $80,000 to the previously unknown heirs.[121] It took William Graves about six weeks to track down the heirs' identities and locations.[122]

G. The Graves Letter to Lewes Investment Demanding Closing

Lewes Investment was still paying the bills of its consultants through the spring of 2007, which suggests that they were still working on the project at some level.[123] On April 2, 2007, more than six weeks after informing the Plaintiff that all title defects had been cured, the Graves sent a letter to Lewes Investment demanding closing within thirty days.[124] Ten days later, the Plaintiff filed the Complaint in this Court alleging breach of contract and breach of the duty of good faith and fair dealing.[125] William Graves did not realize that Lewes Investment had "changed their minds" until the company filed suit against the Graves.[126]

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[120] *Id.* at 30:20-31:15.
[121] *Id.* at 137:21.
[122] *Id.* at 138:13-20. I note that the Graves have a pending malpractice suit against Smith, arising out of his failure to clear the title defect by July 2006. *Id.* at 7:10-15.
[123] Trial Tr. Vol. I 193-94.
[124] Letter from Craig A. Karsnitz to Richard D. Stout 1-2, April 2, 2007.
[125] Compl. ¶¶ 41-53. The Plaintiff failed to brief breach of the covenant of good faith and fair dealing, and I consider that issue waived. *See Emerald P'rs v. Berlin*, 726 A.2d 1215, 1224 (Del.1999)("Issues not briefed are deemed waived.").
[126] Trial Tr. Vol. II 139:19-21.

IV. ANALYSIS

This Court reviews the legal and factual findings of a Master's report *de novo*.[127] Because I find—and the parties concur—that a retrial is not required, what follows is my post-trial opinion relying on the record developed at trial on August 22, 2011. The questions presented in this matter are the following. First, was the title defect, which was subsequently cured, material to the land sale Agreement? If so, did the Graves' failure to have clear title in hand as of the summer of 2006 breach the Agreement? Finally, did Lewes Investment breach the Agreement after the Graves obtained clear title and demanded performance in the spring of 2007? These issues will be discussed in turn below.[128]

A. Lewes Investment's Breach of Contract Claim

The burden is on the Plaintiff to demonstrate that the Graves committed a material breach of the Agreement.

1. Materiality

The Graves argue that a lack of a 1/8 interest in a Three-Acre Parcel representing a portion of the 88 acres under the Agreement is a de minims defect that is not material. I disagree. A title defect that renders the seller unable to transfer the entire fee interest is a material breach of a contract—as here—

[127] *DiGiaccobbe v. Sestak*, 743 A.2d 180, 183 (Del. 1999).
[128] The Plaintiffs also argue, in the alternative, that the doctrine of substantial performance is applicable to this case. I decline to reach this issue, based on my findings on the first two questions presented.

promising unencumbered, good and marketable title.[129] Nothing is more material to the purchase of real property than the seller's title. If a third party owns an undivided, 1/8 interest in real property, then the parcel *as a whole* is encumbered.

2. Breach as of the Contract Closing Date

The question, therefore, is whether a breach of the obligation to provide clear title occurred on the date provided by Agreement for closing, July 25, 2006. Here, under the Agreement, the seller did not have an obligation to deliver marketable title until closing or settlement.[130] In a contract where both parties are bound to render performance at the same time, each party's performance is a "concurrent condition" to the other party's performance.[131] Therefore each party's duty to perform is conditioned on the other party's performance, or manifested, present ability to perform, under the contract.[132] Actual tender of performance may be excused in the case where an obligee has manifested to the obligor that any tender made would not be accepted.[133] Instead, to demonstrate a breach "what is

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[129] *Child Found. v. Cmty. Hous., Inc.*, 1977 WL 5181, at *2 (Del. Ch. Dec. 1, 1977).
[130] Compl. Ex. A, Ag. § 9(a)(i).
[131] Restatement of Contracts § 251. *See also Foster v. Nat'l Bank*, 113 A. 908, 911 (Del. 1921)("If payment and giving of the deed are concurrent, as they are in this case, for the words 'balance of seven hundred dollars to be paid upon delivery of the deed,' mean, at least, this, the seller cannot rescind for nonpayment of the purchase money, unless he tenders a deed in accordance with the provisions of the contract, and demands performance of the purchaser.").
[132] Restatement (Second) of Contracts § 238. *See also Brasby v. Morris*, 2007 WL 949485, at *4 (Del. Super. Mar. 29, 2007) ("Delaware law firmly supports the principle that 'a party [to a contract] is excused from performance . . . if the other party is in material breach' of his contractual obligations.")(quoting *BioLife Solutions, Inc. v. Endocare, Inc.*, 838 A.2d 268, 278 (Del. Ch. 2003)).
[133] 28 Williston on Contracts § 72:47; 15 Williston on Contracts § 47:5.

essential is that it shall appear to the court and shall have been made clear to the other party to the contract that the agreed upon exchange would be carried out immediately if the other party performs."[134] Such a showing requires the plaintiff to demonstrate that it was able to perform under the contract.[135]

If actual tender has been waived by contract, one party must still make an offer to perform in order to trigger the other party's duty.[136] "Until a party has at least made such an offer . . . the other party is under no duty to perform, and if both parties fail to make such an offer, neither party's failure is a breach."[137] For an offer to perform to be effective, it "must be accompanied with manifested present ability to make it good, but the offeror need not go so far as actually to hold out that which he is to deliver."[138]

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[134] 15 Williston on Contracts § 47:5.
[135] *Id.*
[136] *See* Restatement (Second) of Contracts § 238 ("Where all or part of the performances to be exchanged under an exchange of promises are due simultaneously, it is a condition of each party's duties to render such performance that the other party either render or, with manifested present ability to do so, offer performance of his part of the simultaneous exchange."). Though the parties did not discuss this issue in the briefing, an offer for performance is not the same as a formal tender. *See* Restatement (Second) of Contracts § 238 cmt. b ("[T]he requirement of this Section is less exacting than that of tender . . . Any conduct, including tender, that goes beyond an offer of performance will, of course, also satisfy the requirement."). Therefore, though the parties here waived formal tender—i.e., Lewes Investment's bringing a letter of credit to the place of closing on July 26, 2006—Lewes Investment was still required to make a credible offer of performance.
[137] Restatement (Second) of Contracts § 238 cmt. a.
[138] Restatement (Second) of Contracts § 238 cmt. b.

Here, the parties waived actual tender of performance in the Agreement.[139] However, the Agreement required the Graves to deliver marketable title at closing.[140] Likewise, Lewes Investment was obligated to deliver the purchase price at closing.[141] Each party's performance was both conditioned on and a condition to the other party's performance.[142] Under this scenario, in order to trigger the Graves' duty to perform at closing, Lewes Investment must have made an "offer to perform," accompanied by a manifested, present ability to perform under the Agreement.[143]

There was no closing in this case.[144] When asked if the parties went to closing at trial, Stout responded that they did not, because the Defendants did not have good and marketable title. Yet the Defendants had no obligation to have good and marketable title, because Lewes Investment had not made it manifest that it would, or even could, tender the remainder of the purchase price.[145] Stout testified that he had received an oral commitment from Discover for an $8 million loan. No commitment letter was obtained, however. Nor did Stout and Teague

[139] Compl. Ex. A, Ag. § 9(a)(i); *id.* at § 4(a).
[140] *Id.* at 9(a)(i).
[141] *Id.* at § 2(b).
[142] *See* Restatement (Second) of Contracts § 238.
[143] *See id.* ("[I]t is a condition of each party's duties to render such performance that the other party either render or, with manifested present ability to do so, offer performance of his part of the simultaneous exchange.").
[144] *See* Trial Tr. Vol. II 20:16-17; *id.* at 28:7-12.
[145] *See* 15 Williston on Contracts § 47:5 ("[W]hat is essential is that it shall appear to the court and shall have been made clear to the other party to the contract that the agreed upon exchange would be carried out immediately if the other party performs.").

obtain the necessary personal guarantees to obtain a loan, or act otherwise (i.e., sell other real estate as proposed in the June Meeting) to be able to close on July 26, 2006. Importantly, Stout's statements at the June meeting indicated to the Graves that Lewes Investment likely had neither ability nor intent to close in July.

In order for there to have been a breach, Lewes Investment would have had to manifest an intent and ability to go to the location for closing, at the agreed upon time, and make payment to the sellers, who were nonetheless unable to provide good title.[146] The evidence suggests the contrary. This deal spanned years. The time for closing was two years after the Agreement's signing.[147] One month before closing was supposed to take place, Lewes Investment repeatedly asked the Graves for an additional two years' time to perform.[148] Stout told the Graves that he had no formal financing in place for the project, and to perform, he would have had to sell several properties.[149] Likewise, at the September Meeting, Stout told the Graves that Lewes Investment's lender was no longer willing to do the deal in September.[150] Thus, Lewes Investment would have me believe that it was unwilling to perform in June and unable to perform in September, but somehow it was willing and able to perform in July. That characterization strains credulity. If

[146] *See id.*; 28 Williston on Contracts § 72:47.
[147] Compl. Ex. A, Ag. § 3(a).
[148] *See generally* June Mtg. Tr.
[149] *Id.* at 75-76.
[150] Sept. Mtg. Tr. 19.

anything, the market was deteriorating from June to July 2006.[151] The Toll Brothers deal, worth $30 million to Lewes Investment to develop the Graves' Property, was in jeopardy in June 2006.[152] By September, that deal was no longer available.[153] Likewise, although (according to Stout) Discover had orally agreed to lend $8 million to Lewes Investment, Lewes Investment's principals would have had to raise an additional $4.5 million personally to close the deal. This financing problem leads me to conclude that Lewes Investment was not able to perform on July 26, 2006. That conclusion, I find, was manifest to the Graves in July 2006 as well.

Furthermore, even if Lewes Investment had been able to perform, I am not convinced that it was willing to perform on July 26, 2006. The regulatory hurdles, while not a condition precedent to Lewes Investment's performance, were progressing at a rate that Stout suggested made him extremely uncomfortable with proceeding. Stout repeatedly told the Graves, at the June Meeting, that moving forward on the original timetable would be difficult if not impossible for him to accomplish. At trial, Lewes Investment's engineering expert testified, on cross-examination, that the project would have needed at least a year-and-a-half and

[151] *See id.* at 23-24 (discussing the market changes that Lewes Investment was dealing with during the relevant time period).
[152] June Mtg Tr. 32-34.
[153] Sept. Mtg. Tr. 49 ("Nothing would've made me happier than if we'd been able to sell it to Toll Brothers for that contract amount, and believe me, if we could have we would [have].").

likely longer, until it was ready for construction to begin.[154] In fact, at the September Meeting, Stout asked the Graves for an additional three years' extension before closing. Even though self-interest invited Stout to assert that Lewes Investment was prepared to consummate on July 26, 2006, he conceded to the Graves that Lewes Investment may have been unwilling to close at that time.[155] These facts lead me to conclude that Lewes Investment would not have been willing to close on schedule. Thus, judging by the evidence, I find that Lewes Investment was not in a position to close on the closing date. Likewise, having failed to clear title, the Graves were unable to close at that time as well.

3. Time was not of the Essence, and the Graves were not in breach as of August 28, 2006.

a. The Contractual Language

The Agreement did not specify that the date of closing was of the essence. Time is generally not of the essence in contracts for the sale of land.[156] If the contract does not expressly say time is of the essence, "settlement dates in contracts without this language [are], at best, good faith estimates of when the transaction will be consummated."[157] To determine if time is of the essence, the

[154] Trial Tr. Vol. I 190-91.
[155] Sept. Mtg. Tr. at 23.
[156] *Bryan v. Moore*, 863 A.2d 258, 261 (Del. Ch. 2004); *Silver Props. LLC v. Megee*, 2000 WL 567870, at *2 (Del. Ch. Apr. 27, 2000).
[157] *Silver Props.*, 2000 WL 567870, at *2.

Court may look to the course of dealing between the parties.[158] If time is not of the essence, it can be made to be so "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."[159] This rule applies to contracts for the sale of real property.[160] The notice binds not only the party receiving the notice, but also the party sending the notice: "the party serving it must perform within the time stated or thereafter be unable to require counter performance."[161] Thus, once again, a plaintiff's demonstration of breach is conditioned on its ability to perform within the stated time period.

Here, the Agreement specified that time was of the essence with respect to the $25,000 per month extension payments.[162] The Agreement was otherwise silent about time being of the essence. This suggests that time was not of the essence with respect to closing, but that the Graves wanted to be compensated for delaying the deal longer than 18 months.

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[158] *Id.*
[159] 15 Williston on Contracts 46:16. *See also Coyle v. Kierski*, 89 A. 598, 600 (Del. Ch. 1913) ("If time is not originally made by the parties of the essence of the contract, yet it may become so by notice, if the other party is afterwards guilty of improper delays in completing the purchase.").
[160] 15 Williston on Contracts 46:16.
[161] *Id.*
[162] Compl. Ex. A, Ag. § 3(a).

b. Lewes Investment Did Not Make Time of the Essence by its Demand.

Even though time was not of the essence under the Agreement, it may have been 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."[163] Lewes Investment attempted to make time of the essence by providing the Graves with 30 days to produce title.[164] Here, Lewes Investment did not perform or tender performance; it argues instead that it made time of the essence under the second scenario: a "demand by a party not in default who is ready to perform."[165] Tatusko's July 2006 letter made a demand that the Graves clear title within thirty days. This notice binds not only the party receiving the notice (the Graves), but also the party sending the notice (Lewes Investment).[166] Lewes Investment must have offered performance "within the time stated," 30 days.[167] Otherwise, Lewes Investment will be "unable to require counter

[163] 15 Williston on Contracts 46:16.
[164] Lewes Investment's position here that it made time of the essence is somewhat contradicted by Tatusko's July letter purporting to make time of the essence. In that letter, Tatusko explicitly stated that time was not of the essence. Joint Trial Ex. 13, at 2. Stout contradicted that position at trial, but the parties' course of dealing—Stout's repeated request for more time—makes clear to me that time was not of the essence in this case.
[165] *Id.*
[166] *See* 15 Williston on Contracts 46:16
[167] *See id.*

performance."[168] As described above, the record fails to demonstrate that Lewes Investment was willing or able to close in August 2006.

After the 30-day period had passed, Tatusko wrote to Smith on August 28, 2006 and purported to terminate the agreement. Yet there 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. Furthermore, the August Tatusko letter did not say "The Graves are now in breach, and Lewes Investment wants its money back." Instead, it said that Lewes Investment wanted to work out a mutually agreeable extension to closing. Additionally, there is no evidence that Lewes Investment's regulatory or financial situation had changed between June and August 2006. Therefore, I find that Lewes Investment was not ready, willing, and able to close on August 26, 2006.

Instead, it seems clear to me that Lewes Investment was using the Graves' failure to cure title as a bargaining chip to buy itself more time: time to gain regulatory approvals, time to gain additional financing for the deal, time to find a new downstream buyer for their subdivision, and (most importantly in hindsight) time to see if the real estate market would rebound.

[168] *See id.*

Here are the facts as I find them. In June 2006, Lewes Investment was considering walking away from the deal if *the Graves* forced it to close in July 2006. The only question to be ironed out at the end of the June Meeting was how much Lewes Investment would pay the Graves, on a monthly basis, to keep the Agreement open. Then, sometime between June 29, 2006 and July 20, 2006, Lewes Investment decided to use the Graves' title issue to attempt to protect its $1 million investment in the deal. Lewes Investment had taken a substantial risk in signing the Agreement with the Graves. Lewes Investment had to navigate several possible pitfalls that could cause the whole deal to become unprofitable: the market could continue to decline, the regulatory approvals could prove not obtainable, the sewer system deal might not be in place for nine years, the Department of Transportation might not sign off on the designs, etc. Under the terms of the Agreement, if Lewes Investment walked away from the deal, it would be out its out-of-pocket development costs in addition to the non-refundable $650,000 down payment it had made to the Graves. If it could create a record indicating that the *Graves* were in breach, if any of Lewes Investment's potential nightmares came to be, Lewes Investment would have an "out" on the Agreement at zero cost to it. The Graves would have to repay Lewes Investment, not only for the down payment, but also for the costs expended on developing the property. On the other hand, if the market rebounded and Lewes Investment was able to sell the

property to a major developer, the Lewes Investment partners stood to make over a 100% return on their investment of $13 million.[169] Thus, by putting the Graves' title defect in writing, Lewes Investment was attempting to take a contract for the sale of land, which was effectively an option to purchase in exchange for $650,000, and turn it into a cost-free option contract, under which, depending on the market, it could either make a substantial profit or walk away completely unscathed.[170]

The evidence for this viewpoint is supported throughout the record, but particularly in the transcript of the September Meeting. At that point, Lewes Investment wanted to continue towards developing the Graves property. Lewes Investment continued to pay invoices for its engineering consultants working on the Property and also continued to meet with state officials. These actions are inconsistent with any arguments that time was of the essence or that the Graves

[169] Lewes Investment's original Toll Brothers deal to develop the Graves' Property, which had fallen through by September 2006, was for $30 million. June Mtg. Tr. 32-34; Sept. Mtg. Tr. 49.

[170] This conclusion is supported by the record. At trial, when Stout was asked whether he would have said that the contract existed after Closing if he received a high offer for the property, Stout forthrightly replied that he would have argued that the contract was valid, despite the Tatusko letters purporting to terminate the agreement. Stout also told the Graves that Lewes Investment was "in the option business," and that it was playing on "opposite sides of the same bet" as the Graves. June Mtg. Tr. 41 ("[E]ssentially, we're somewhat in the option business. In other words, we hope to put in a million dollars and make 10. And we – every so often, they fall out."). Stout testified at trial that he was *not* looking to get his money back in September, after the purported Closing date had passed. Trial Tr. Vol. I 156. Furthermore, Lewes Investment was interested in continuing its relationship with the Graves, as is evidenced by its meetings with the Graves and state officials in September 2006 and its continued engineering and development work through the spring of 2006.

breached the Agreement by failing to have good title in hand as of August 28, 2006.[171]

Williston has described a situation similar to what happened in this case: if the plaintiff cannot show an ability to perform, a situation may arise where no right of action ever arises against either party.[172]

> Since a conditional tender is necessary to put either party in default, so long as both parties remain inactive, neither is liable and neither has acquired a right of action. . . . Plaintiffs had a concurrent duty to perform; they did not perform. Their failure to perform was not excused. They have no right to bring an action for contract damages. The same law that applies to plaintiffs applies to defendants. If defendants have not performed, they cannot bring an action for the liquidated damages available from breach of the agreement. . . .[173]

In September 2006, this is the situation that the Graves and Lewes Investment were faced with. Neither party had the right to bring a cause of action against the other, because neither party was willing and able to perform. However, in February 2007, the parties' situation changed. The Graves cleared the title and informed Lewes Investment that it had done so.

> The possibility of either party putting the other in default will also cease if the delay is too long. It may be supposed that, by the terms of the contract, the concurrent performances were to be rendered on a fixed day, or it may be supposed that no time was stated for the performance. Under the first supposition, if time was of the essence,

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[171] *See Goldstein v. Buiano*, 1962 WL 69603, at *1 (Del. Ch. Oct. 31, 1962)("[T]ime as of the essence may be waived by inconsistent conduct subsequent to the time fixed for performance."). Moreover, even had I found that the Graves were in breach as of the summer of 2006, I would find that they cured within a reasonable time, for the reasons below.

[172] *See* 15 Williston on Contracts § 47:2.

[173] *Id.* (internal quotation marks omitted).

> both parties will be discharged unless one or the other takes the initiative and makes a conditional tender at or about the time stated in the contract. Even though time is not of the essence, or if no time is mentioned in the contract for its performance, the lapse of an unreasonable time must necessarily deprive the parties of the possibility of thereafter making an effective tender.[174]

Time was not of the essence, here, and the Graves cured the title defect within six or seven months. A few weeks later, the Graves demanded performance from Lewes Investment after receiving some sign that Lewes Investment would not go through with the Agreement. I discuss below whether the Graves perfection of title and demand to close were within a reasonable time.

B. The Graves' Counterclaim for Breach of Contract

The burden is on the Graves to demonstrate that Lewes Investment breached the Agreement, and damages.

The Graves put Lewes investment on notice that they had clear title on February 12, 2007—more than six months after the closing date called for in the Agreement. Lewes Investment refused to go to closing after this time, and after a formal demand that Lewes Investment close was made by the Graves six weeks later, filed this action. Was this lapse of time so long as to preclude effective tender, so as to relieve Lewes Investment's duty to perform? What constitutes a

[174] *Id.*

"reasonable time" is a question of fact, dependent on the circumstances of the case.[175]

The parties continued to communicate with each other and work towards closing after the July 2006 closing date. For example, the parties met in September to discuss their relationship and the status of the Agreement. The Graves were working to clear the title defect.[176] Likewise, Lewes Investment was also still working towards developing the property: its advisors continued to bill work towards the project through April 2007, and Stout continued to meet with state and local government officials to discuss the project.[177] As a result, although Lewes Investment attempted to fix August 25, 2006 as the new time for performance, the parties proceeded toward performance under the Agreement after that date.

In determining whether the Graves cured their breach in a reasonable time, the relevant time elapsed is not, as Lewes Investment conceded at argument, the thirty-day period demanded by Tatusko. Rather, I must determine whether, based on the circumstances here, the Graves' six-month delay in clearing the title defect was reasonable.[178]

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[175] *Bryan*, 863 A.2d at 261 ("The court will consider the circumstances of the transaction when determining if the extension of time is reasonable."); *Coyle*, 89 A. at 601.
[176] *See generally* Sept Mtg. Tr. 1-17 (describing the origins of the title defect and the steps the Graves were taking to cure the defect).
[177] *Id.* at 25.
[178] *See Brasby*, 2007 WL 949485, at *3 ("The reasonable time for performance is given 'regardless of whether the contract designates a specific date on which such performance is to be tendered.'"(quoting *Novozymes v. Codexis, Inc.*, 2005 WL 1278355, at *3 (Del. Ch. May 26,

Here, I have relied on the parties' course of dealing in determining (1) that 30 days is not the outer limit to a reasonable time for the Graves performance, and (2) that seven months, under the circumstances, was reasonable. As I have noted before, this deal spanned several years, and could potentially have taken several more before coming to fruition. The written Agreement called for closing to occur 18 months after the Agreement's signing. Lewes Investment exercised a six-month extension. At the end of that six-month extension, the Graves wanted the Agreement to close as soon as possible. Had Lewes Investment been ready to perform, the Graves would have gladly done so.[179] However, that was not the case. Lewes Investment indicated repeatedly to the Graves that it would not be ready to close on July 26 and wanted more time to close the deal. As of June 29, 2006, based on the requests made by Stout, the Graves were looking at a closing date in, perhaps, July 2008 for an Agreement they signed in July 2004. Two years passed from the time Fuqua raised the title defect with Smith in August 2004 until the defect was again mentioned to Smith in June 2006. During the June 2006 Meeting,

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2005))). *See also Kittinger v. Rossman*, 112 A. 388, 390 (Del. Ch. 1921) ("If the delay arises from a defect in his title, which the vendor finally cures, or from a difficulty in making the title good, such as the vendee has a right to demand . . . and time is not an essential element of the contract . . . then the delay thus occasioned, or the lapse of time while the vendor is engaged in making his title good, will not prevent him from obtaining a decree of specific performance against the purchaser. . . . But a court of equity will not extend this favor to a vendor who has not done all that was in his power to make out a good title within a reasonable time . . . .") (citing Pomeroy on Spec. Perf. § 421).

[179] The evidence at trial indicated that, at any given point, the Graves could have provided clear title within a month of tendered performance by Lewes Investment. Trial Tr., Vol. II at 84-90.

Stout's remarks about the title defect were unconcerned. He acknowledged that the defect would have to be cured, but he did not seem to be in any hurry.[180] Therefore, even after receiving the letters from Lewes Investment's counsel, the Graves (and Smith) were confident that they did not have to act on the title defect with expedition. This confidence appeared to be justified in September 2006,[181] since Lewes Investment then asked the Graves to delay closing for three years. Furthermore, Stout has been candid in saying that his preference, at all relevant times, was for closing to be postponed to the latest day possible. Finally, Lewes Investment's letters purporting to terminate the Agreement also asked for an extension on closing. These factors, taken in their entirety, tell me that it did not matter to Stout and Teague when the title defect was cleared as long as it was cleared before Lewes Investment was ready to close, potentially several years in the future.

Under these circumstances, it seems that, in a rising—even a static—market, the Graves could have cleared the title as late as 2008, and Lewes Investment would have been happy with that. Judging by the parties' course of conduct, 30 days cannot be considered the outer bounds of what is reasonable under these

[180] I recognize that Lewes Investment's representatives were in a delicate situation in attempting to negotiate with the Graves after sending the Graves termination letters. Stout and Teague may have said things during the June and September Meetings that they regret, in an effort to buy some good will from the Graves in the negotiating process. Nonetheless, those statements were made, and they provide me with ample evidence that Lewes Investment did not consider the title defect a serious obstacle to closing in June, July, August, or September of 2006.

[181] Demonstrating that justification is no validation of wisdom.

circumstances. Rather, because Stout asked the Graves for a two-year extension on closing in June, it was reasonable for the Graves to clear the title by February 2007, six months after Lewes Investment's August 2006 closing date. In other contexts, such a delay may be far too long to be considered "reasonable." But here, where Lewes Investment repeatedly asked the Graves for years' more time, I find that six or even eight months—the date the Graves closing demand issued—is reasonable under the circumstances.

Smith contacted Fuqua in February 2007 to inform him that the Graves had cleared the title defect. Stout responded by email, apparently alleging that there was no longer an Agreement.[182] The Graves responded to this email by letter, demanding settlement within thirty days.[183] At that point, the parties' positions had reversed, and Lewes Investment was entitled to a reasonable time to perform under the Agreement before any breach was found. Instead, Lewes Investment elected to file suit in this Court. Lewes Investment is in breach. As I have described above, the Agreement limits the Graves' remedy to retention of the down payments.[184] As a result, I find that the Graves are entitled to retain the $650,000 that Lewes Investment paid as down payment for the property.

[182] *See* Letter from Craig A. Karsnitz to Richard D. Stout 1, April 2, 2007.
[183] *Id.*
[184] *See* Compl. Ex. A, Ag. § 13.

V. CONCLUSION

Lewes Investment cannot recover from the Graves for breach of contract, since neither party was ready, willing and able to perform on the date set for closing. In the alternative, I have found that the Graves cured any breach within a reasonable time. The Graves cured the title defect by February 2007 and attempted to set a date for closing in April 2007. At that point, Lewes Investment was entitled to a reasonable time to close. Instead, Lewes Investment brought this action, and is in breach. The Graves are entitled to retain the down payment as liquidated damages under the Agreement. The Graves' attorney should submit an appropriate order reflecting my decision in this opinion.