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OF THE
STATE OF DELAWARE

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Re: DeMarie v. Neff
C.A. No. 2077-S
Date Submitted: December 13, 2004

Dear Counsel:

Plaintiff Peter P. DeMarie, II ("DeMarie") seeks specific performance of a contract to purchase Defendant Joan S. Neff's ("Neff") interest in a parcel of land in Bethany Beach, Delaware. This post-trial letter opinion conveys the Court's findings of fact and conclusions of law.

I.

As of spring 1998, Neff and her mother, Regina C. Paroni, each owned a one-half interest in a parcel of undeveloped land, claimed to be two acres in area,

in Bethany Beach (the "Parcel").[1] The Christian Church (the "Church") owned lands adjacent to the Parcel (the "Church Lands"). The Parcel and the Church Lands were subject to a boundary line dispute. Approximately one-half of the Parcel was within the record boundaries of the Church Lands, but Neff and her mother claimed title to the area of overlap by adverse possession.

DeMarie, a licensed real estate broker and real estate developer, had previously assisted Neff in the sale of various real estate holdings. In late 1997, Neff decided to sell the Parcel and again called on DeMarie. She informed DeMarie that the Parcel's sale price would be $400,000. Eventually, instead of facilitating the sale of the Parcel, DeMarie proposed to purchase the Parcel himself. DeMarie also had been discussing with the Church whether it would agree to sell the Church Lands to him. If DeMarie could acquire both parcels, it would solve the boundary line dispute and it would create the last large parcel (approximately 5 acres) for development in Bethany Beach.

[1] Mrs. Paroni has since passed away. Her one-half interest was devised in equal shares to Neff and her sister, Adele Paroni. Thus, Neff holds a three-quarter interest in the Parcel.

On June 27, 1998, DeMarie, as buyer, and Neff, as seller, for herself and purportedly for her mother, executed an agreement of sale (the "Agreement")[2] for the Parcel. The Agreement was executed at the conclusion of a meeting attended by DeMarie, Neff, and her son at Neff's home. DeMarie had prepared the Agreement on a preprinted realtor's contract form. Neff inserted her name, her mother's name, and their addresses. She also wrote in paragraph 29, as an addendum, the following: "Seller +/or Purchaser to cooperate with Seller on tax manuevers (sic)." Otherwise, the draft was prepared (or the standard form was filled out) exclusively by DeMarie.[3] The Agreement established a purchase price of $400,000 and required a "deposit upon signing the contact" of $1,000. No escrow agent for holding the deposit was designated. No settlement date was prescribed; instead, settlement was to occur "30 days after all contingencies [were] met."

The following conditions were all handwritten by DeMarie in paragraph 28 of the Agreement:

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[2] PX 1.

[3] In one of many factual disputes, DeMarie testified that the Agreement had been submitted to Neff's attorney before signing. Neff denies that.

> Sale Contingent on Church lands next door being sold to Peter DeMarie.
>
> Sale Contingent on Dispute of Land between parties being settled.
>
> Sale contingent on Rezoning of land to B-1.
>
> Sale contingent on Wet-Land (sic) Delenation (sic).
>
> No commission Due on this contract.

DeMarie had brought only the original of the Agreement to the meeting with Neff; he took the signed original with him when he left and never provided a copy of it to Neff. He did forward a copy of it to the law firm representing Neff; perhaps infelicitously, that law firm also represented DeMarie.

The Agreement required DeMarie to pay a $1,000 deposit. In his Verified Complaint for Declaratory Judgment and Specific Performance (the "Complaint"), DeMarie averred: "Concurrent with signing the contract, Buyer tendered to Sellers the sum of One Thousand Dollars ($1,000.00) toward the purchase price, but Sellers refused the funds at that time for tax planning reasons. See Exhibit '2.'"[4] Exhibit 2 to the Complaint was DeMarie's check number 1845 (the "Check").[5]

[4] Compl. ¶ 8.
[5] PX 2.

That paragraph fairly alleges that DeMarie tendered the Check to Neff on signing of the Agreement. That is not what happened.

At his deposition, DeMarie testified as follows:

> Q: [By Mr. Griffin:] What does the document before you [the Agreement] require, as far as payment of a deposit?
>
> A. [DeMarie:] $1,000.
>
> Q: When does it require that to be paid?
>
> A: At the signing of this contract.
>
> Q: And you brought with you a check for $1,000, payable to Joan Neff?
>
> A: Yes.
>
> Q: And that is the original check [referring to the Check]?
>
> A: Yes.
>
> Q: On what date did you actually write that check?
>
> A: June 27, 1998.[6]

[6] DX 5 at 7-8. The deposition was taken on February 23, 2001, shortly after this action was filed on December 5, 2000, and, as will be seen, shortly after he wrote the Check.

DeMarie's deposition testimony that he brought with him to the meeting at which the Agreement was signed a check in the amount of $1,000, payable to Joan Neff, and his testimony that he "actually" wrote that check on June 27, 1998, were false.

At trial, DeMarie conceded that he did not write the Check on June 27, 1998,[7] but he claimed that he did not know when he had written it.[8]

The Check is dated June 27, 1998. DeMarie's bank statement for the account on which the Check was written reveals that, in June 1998, checks numbered in the range of 1620 to 1637 were negotiated.[9] His December 2000 bank statement reflects the processing of checks numbered between 1839 and 1844.[10] Thus, it is more probable than not that DeMarie wrote the Check (number 1845) in December (or possibly late November) 2000 but dated it as of June 27, 1998.[11]

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[7] Trial Transcript ("Tr.") 23, 57-58.
[8] Tr. 23, 68-69. DeMarie professed to not even knowing the year in which he wrote the Check. Tr. 59.
[9] DX 4 (bank statement for period 6/11/98-7/13/98).
[10] *Id.* (bank statement for period 11/13/00-12/13/00).
[11] It is conceivable, perhaps, that he randomly pulled check 1845 from one of the "red boxes," which contained his blank checks. However, a review of his bank statements demonstrates that his checks were generally written in numerical order.

DeMarie sought to justify his post-dating of the Check on his "keeping a record" of his efforts to pay the deposit.[12] Post-dating a check by as much as 30 months is, at best, a strange way of memorializing events.

The story of the Check is important because Neff testified that DeMarie neither paid to her nor offered to pay to her the $1,000 deposit. DeMarie conceded at trial that he did not pay the deposit to Neff on signing of the Agreement in June 1998. He testified that he had his checkbook with him and that he offered to pay Neff but that she refused for "tax reasons."[13] He also testified that he offered to pay the deposit on at least two other occasions but that, again, Neff refused to accept the deposit.[14] DeMarie asserted that, following one unsuccessful attempt to give the deposit to Neff, they agreed that "friendship" could be the equivalent of the deposit. Neff denies both the post-signing efforts by DeMarie to pay the deposit and the discussion regarding "friendship" as a substitute for a cash deposit.

[12] When asked at trial why he wrote the Check, DeMarie responded: "For the record. To keep a record that I had a check and I put it in the file promptly." Tr. 71.
[13] Tr. 73.
[14] Tr. 23-24.

The Court credits Neff's testimony that no deposit was ever paid or offered to her. It is perplexing that DeMarie did not pay the required $1,000 deposit because it is a trifling sum to support a $400,000 real estate contract.[15] DeMarie, however, simply has no credibility with respect to the payment of the deposit. His inability or unwillingness to provide the truth on separate occasions regarding the Check calls into question any testimony that he may have given about the deposit.[16]

Neff, as will be discussed, acted as if she were a party to a binding agreement for the sale of the Parcel. She never asked DeMarie about the deposit because she assumed that DeMarie had taken care of the deposit. Her reliance, however misplaced, was reasonable in light of her previous dealings with DeMarie and his status as a licensed real estate broker. It was not until late winter of 1999-

[15] Although the account on which the Check was written frequently had a balance less than $1,000, DeMarie had overdraft protection and, thus, had the wherewithal to pay the deposit.

[16] This, of course, implicates the maxim "*falsus in uno, falsus in omnibus*." *See Filiaggi v. Garrett*, 1995 WL 945555, at *4 (Del. Super. Aug. 11, 1995) ("[I]f the jurors find a witness knowingly gives false testimony, they might, as a factual matter, naturally be inclined to look with suspicion on all the testimony of that person."). The Court's assessment of DeMarie's credibility is, of course, not based simply on some maxim. Instead, it is the product of listening to, and observing, both DeMarie and Neff as trial witnesses.

2000 when she received a copy of the Agreement from the law firm that represented her that she realized that no deposit had been paid.

Both DeMarie and Neff understood when they executed the Agreement that settlement might not occur for some extended period of time. The transaction was conditioned upon DeMarie's acquisition of the Church Lands. That effort depended not only upon securing the necessary approval within the Church bureaucracy but also on resolution of questions involving a restriction binding the Church Lands that limited use of that parcel to religious purposes. Neff met at least once with DeMarie and representatives of the Church to address these concerns.

DeMarie had pursued acquisition of the Church Lands even before entering into an agreement with Neff.[17] In April 1998, he submitted an offer.[18] In January 1999, the Church informed him that it could not at that time consider his offer because of title questions, presumably involving the restriction regarding religious

[17] PX 3; PX 4.
[18] PX 5.

use.[19] DeMarie submitted another offer to purchase the Church Lands in August 1999.[20] Other options, including a long-term lease of the Church Lands, were considered.[21] However, in February 2000, the Church rejected his offer.[22]

In addition to pursuing acquisition of the Church Lands, DeMarie took other steps toward settlement. He initiated a wetlands delineation study. He had performed some very preliminary site planning work.[23] He directed, after consulting with Neff, a partial clearing of the Parcel at a cost of $2,390.[24] These efforts, in the context of a transaction of the size of the one anticipated by the Agreement, were minimal.

On March 17, 2000, Neff sent DeMarie a letter disavowing any contractual obligations to him regarding the Parcel.[25] She cited a host of failures, most notably the failure to pay the $1,000 deposit. On March 28, 2000, DeMarie responded

[19] PX 6.
[20] PX 8.
[21] PX 9.
[22] PX 11.
[23] PX 12. This work consisted of a rudimentary site plan and was submitted to DeMarie on March 1, 2000.
[24] PX 10.
[25] PX 13.

with a letter offering to remove all contingencies except for the obligation to provide clear title.[26] On April 7, 2000, Neff sent DeMarie a check, which he returned to her, to reimburse him for the expenses he had incurred in clearing a portion of the Parcel.[27]

On December 5, 2000, DeMarie filed this action seeking specific performance of the Agreement.[28] He did not seek an award of damages.

On November 17, 2000, Neff and her sister agreed to sell the Parcel to the Town of Bethany Beach (the "Town") for $475,000.[29] The Town had in the interim agreed to acquire the Church Lands. On August 11, 2004, the Town agreed to purchase the Parcel from Neff and her sister for $690,400,[30] almost $300,000 more than the purchase price which DeMarie had agreed to pay under the Agreement.[31]

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[26] PX 17.
[27] PX 14; PX 15.
[28] This action was brought against Neff and her sister. Summary judgment was entered in favor of the sister because Neff lacked the authority to bind her mother when she signed the Agreement. Thus, only Neff's three-quarter interest in the Parcel is at issue in this litigation.
[29] DX 2.
[30] DX 3.
[31] When Neff sent the letter purporting to terminate the Agreement, she was aware that the Church had rejected DeMarie's efforts to purchase the Church Lands. What is not clear is whether she knew that the Town was going to purchase the Church Lands and would be

II.

DeMarie seeks specific performance of a real estate purchase agreement. When the remedy at law is not adequate, this Court has jurisdiction to enforce specifically a contract for the sale of land.[32] Specific performance is a remedy that is particularly suitable for land given its unique characteristics.[33] "To grant specific performance, there must be proof of a valid contract to purchase real property and proof that plaintiff was ready, willing and able to perform his contractual obligations. In addition, the Court must determine whether the 'balance of equities' tips in favor of specific performance."[34] The burden of proving that a valid contract existed – and its terms – is on the party seeking to

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interested in acquiring the Parcel. It is, however, reasonable to infer, and the Court, perhaps unnecessarily, does infer, that Neff's letter of March 17, 2000, was motivated by an expectation of a higher offer from the Town and perhaps one without the aggravation of having to address the boundary overlap problem.

[32] *See, e.g., Old Time Petroleum Co. v. Turcol*, 153 A. 562 (Del. Ch. 1931).

[33] *See Robert J. Smith Companies, Inc. v. Barke*, 1997 WL 294442, at *2 (Del. Ch. May 28, 1997) (citations omitted) ("[L]and has been deemed to be a unique form of property and a proper subject of specific performance since the time of the English Chancellors.").

[34] *Morabito v. Harris*, 2002 WL 550117, at *2 (Del. Ch. Mar. 26, 2002) (citation omitted).

enforce the contract, as well as the burden to convince this Court that specific performance is equitably warranted.[35]

First on the list of issues raised in this action are questions regarding the $1,000 deposit. What effect does the failure to fulfill one's obligation to pay a deposit have? What if the deposit could be fairly characterized as *de minimis* in relation to the purchase price? What if the party who was to receive the deposit continued to act as if the contract was in full force (*i.e.*, the party who was to receive the deposit acted as if her nonreceipt of the deposit did not make a difference)? Substantial failure to live up to the material terms of a valid contract nullifies that contract. "'[A] party may terminate or rescind a contract because of substantial nonperformance or breach by the other party.' Not all breaches will authorize the other party to abandon or refuse further performance. To justify termination, 'it is necessary that the failure of performance on the part of the other

[35] *See Kowal v. Clark*, 2000 WL 739250, at *3 (Del. Ch. June 2, 2000) ("[T]he buyers have 'the burden of proving the existence and terms of an enforceable contract by clear and convincing evidence.' Moreover, the remedy of specific performance of contracts for the sale of land is a matter squarely within this Court's discretion.") (citation omitted).

go to the substance of the contract.'"[36] "[M]odern courts, and the Restatement (Second) of Contracts, recognize that something more than mere default is ordinarily necessary to excuse the other party's performance in the typical situation, subscribing to the general rule that where the performance of one party is due before that of the other party, such as when the former party's performance requires a period of time, an uncured failure of performance by the former can suspend or discharge the latter's duty of performance only if the failure is *material or substantial*."[37] Thus, although a material breach excuses performance of a

[36] *Saienni v. G & C Capital Group, Inc.*, 1997 WL 363919, at *3 (Del. Super. May 1, 1997) (citations omitted); *see also Bryan v. Moore*, 2004 WL 2271614 (Del. Ch. Sept. 28, 2004) (discussing the argument that "[i]n response, the sellers concede that the buyer was ready, willing and able to perform on March 27, 2002, but argue that time was of the essence in these contracts, and the buyer's failure to settle on February 28, 2002 was a *material breach that caused the contracts to be null and void*") (emphasis added); *Dickinson Medical Group v. Foote*, 1989 Del. Super. LEXIS 156 (Mar. 23, 1989) (holding that medical group's failure to compensate a physician for services as delineated in her contract was a material breach, which excused her continued employment, where a physician had an employment contract for a defined term).

[37] 14 WILLISTON ON CONTRACTS 43:15 (4th ed. 2004) (footnotes omitted) (emphasis added); *see also Jefferson Chem. Co. v. Mobay Chem. Co.*, 267 A.2d 635, 637 (Del. Ch. 1970) ("[Equity] will disregard a forfeiture occasioned by failure to comply with the very letter of an agreement when it has been substantially performed."); *Safe Harbor Fishing Club v. Safe Harbor Realty Co.*, 107 A.2d 635, 638 (Del. Ch. 1953) (noting that this Court will not award the remedy of specific performance to a party "who fails to show either substantial performance on his part or that he offered to discharge the duty imposed upon him by his contract").

contract, a nonmaterial – or *de minimis* – breach will not allow the non-breaching party to avoid its obligations under the contract.

The question still remains: even if a buyer forfeits his rights by not performing under the contract, is the contract void or merely voidable by the seller? Williston provides the answer:

> Where there has been a material failure of performance by one party to a contract, so that a condition precedent to the duty of the other party's performance has not occurred, the latter party has the choice to continue to perform under the contract or to cease to perform, and conduct indicating an intention to continue the contract in effect will constitute a conclusive election, in effect waiving the right to assert that the breach discharged any obligation to perform. In other words, the general rule that one party's uncured, material failure of performance will suspend or discharge the other party's duty to perform does not apply where the latter party, with knowledge of the facts, either performs or indicates a willingness to do so, despite the breach, or insists that the defaulting party continue to render future performance.[38]

[38] 14 WILLISTON ON CONTRACTS at 43:15 (footnotes omitted); *see also SLMSoft.Com, Inc. v. Cross Country Bank*, 2003 WL 1769770, at *11 (Del. Super. Apr. 2, 2003) ("[T]his Court holds that an obligor who (1) asserts a material breach that arises from an anti-assignment provision that allegedly renders the underlying contract voidable, and (2) fails to void that contract while continuing to perform for assignees, and (3) then admits to the ongoing validity of such contract as against subsequent assignees, is estopped from arguing voidability."); *Berdel, Inc. v. Berman Real Estate Mgmt., Inc.*, 1997 WL 793088, at *9 (Del. Ch. Dec. 15, 1997) ("Absent evidence of an alleged oral agreement, there is no factual basis for the Court to find that the six documents signed by the Bermans are void or voidable on the grounds of fraud, misrepresentation or breach of contract or of fiduciary duty.").

Thus, as an exception to the general rule, the nonbreaching party may not, on the one hand, preserve or accept the benefits of a contract, while on the other hand, assert that contract is void and unenforceable.[39]

III.

With these principles in mind, it is necessary to return to the Agreement in an effort to determine the role of the deposit. The payment terms of the Agreement unambiguously specify that the $1,000 deposit was to be paid on signing. DeMarie breached that obligation; he did not pay the deposit. Paragraph 11 of the Agreement sets forth the parties' understanding as to the consequences of a default: "Should [DeMarie] fail to make payments . . . as specified above . . . or fail to perform any of the terms or conditions of this Contract, then [Neff] shall have the right and option to declare this Contract null and void . . . ." The $1,000 deposit was one of the "payments . . . specified above." Accordingly, DeMarie's failure to pay the deposit entitled Neff "to declare [the Agreement] null and void," which she did through her letter of March 17, 2000. That, however, does not end the Court's inquiry.

[39] *See SLMSoft.Com*, 2003 WL 1769770, at *11.

First, Neff could have agreed that DeMarie need not pay the deposit. The Court, however, has found as a matter of fact that she made no such agreement.[40] Second, if Neff knew that the deposit had not been paid but continued acted as if the transaction were going forward, she might be estopped from invoking DeMarie's default as the basis for exiting the Agreement. Although Neff continued to act as if the Agreement remained in effect, the Court has found that she did not know that no deposit had been made until shortly before she sent her termination letter and that her reliance upon DeMarie, in the circumstances, was reasonable.[41]

Finally, there is the question of whether the failure to pay a $1,000 deposit a $400,000 purchase price is such a small divergence from the Agreement's requirements as to preclude reliance upon it for avoiding the Agreement. A

[40] Thus, the Court does not address Neff's argument that any such agreement would have required a formal, written modification of the Agreement.

[41] Neff did not waive her right to the deposit. A "[w]aiver is the voluntary and intentional relinquishment of a known right." *Realty Growth Investors v. Council of Unit Owners*, 453 A.2d 450, 456 (Del. 1982). Because she did not know that DeMarie had failed to pay the deposit, she did not waive the right to a deposit. *See also Norberg v. Security Storage Co. of Wash.*, 2000 WL 1375868, at *7 (Del. Ch. Sept. 19, 2000) ("For the doctrine of waiver to apply, the Court must be persuaded that the party intended to voluntarily relinquish a known right.").

deposit to "bind" a real estate agreement has both economic and symbolic importance. The parties expressly agreed that failure to make any required payment – and the deposit was one of the required payments – would be grounds for termination. Although a relatively small amount, $1,000 is not a nominal sum. In short, the Court is reluctant, without any principled basis, to conclude that a $1,000 deposit simply is of no moment. Indeed, the best evidence of the relative importance of the deposit may be DeMarie's own conduct in post-dating the Check and his testimony about it. Accordingly, DeMarie's failure to make timely payment of the deposit entitles Neff to avoid the Agreement and Neff's subsequent conduct does not deprive her of the opportunity to take this position.[42]

In conclusion, DeMarie's failure to comply with the terms of the Agreement precludes the award of specific performance.[43]

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[42] It is not clear whether DeMarie has also sought a declaratory judgment with respect to his rights under the Agreement, separate and apart from a request for specific performance. To the extent that there is such a claim, the Court concludes that Neff's letter of March 17, 2000, effectively terminated whatever remaining rights DeMarie may have had under the Agreement.

[43] Thus, it is unnecessary to consider the numerous other arguments raised by Neff as to why DeMarie is not entitled to the relief which he has sought.

IV.

For the foregoing reasons, judgment is entered in favor of Neff and against DeMarie with the consequence that all relief sought by DeMarie is denied. Costs are awarded to Neff.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-S