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Case Number 156,2013

IN THE SUPREME COURT OF THE STATE OF DELAWARE

LEWES INVESTMENT COMPANY, L.L.C.,	:	
Plaintiff-Below, Appellant,	:	
v.	:	No. 156, 2013
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,	:	APPEAL FROM THE COURT OF CHANCERY OF THE STATE OF DELAWARE C.A. No. 2893- VCG
Defendants-Below, Appellees.	:	

APPELLANT'S REPLY BRIEF

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While the Opening and Answering Briefs reveal a number of differences between the parties, the central issue is whether the Court of Chancery correctly held that Lewes Investment was not legally capable of declaring time to be of the essence. The Court reasoned that, because Lewes Investment itself was not prepared to close, its demand that the Graves be prepared to convey good title in 30 days was ineffective. Were it otherwise – if Lewes Investment's notice to the Graves *was* effective and if neither party could perform on the 30th day – the Court should have granted rescission.

I. The Court of Chancery erred in concluding that Lewes Investment's ability to close disabled it from demanding that the Graves cure their title defect in 30 days.

In its search for guidance from Professor Williston, the Court of Chancery cited two of three sets of circumstances under which a party may insist upon timely performance. *See* Memorandum Opinion at p. 38.[1] Those two tests require that the party demanding its counterparty's performance must itself either perform, tender performance, or be ready to perform. *Id.* (citing 15 *Williston on Contracts* § 46:16). Finding that Lewes Investment was *not* ready to perform, the Court

[1]The February 12, 2013 Memorandum Opinion of Vice Chancellor Glasscock is attached as Exhibit A to Lewes Investment's Opening Brief to this Court, citations thereto appear in the same format as in the Opening Brief: [Memorandum Opinion] at [page number].

concluded that Lewes Investment's July 25, 2006 letter[2] was ineffective to require that the Graves solve their title problem within 30 days. In the Opening Brief, we pointed out that the Court overlooked a third set of circumstances under which, according to Professor Williston, a party not yet ready to perform could, nevertheless, set a deadline for the other party's performance:

> [Time] may also be made of the essence by one of the parties fixing a reasonable time for the completion of the contract and giving notice to the other party of an intention to abandon the contract unless it is completed within the specified time.

15 *Williston on Contracts* § 46:16.

Under this test, a court does not ask whether the demanding party itself is prepared to perform. Indeed, the absence of that inquiry is the material difference between this third test and the two cited by the Court of Chancery. Put another way, if a party must itself be ready to perform under all three tests, why would Professor Williston have separately articulated a third test? We submit that the analysis in his treatise would be incomplete if it did not describe the circumstances under which a party, itself not ready to perform, may nevertheless declare time to the essence and set a reasonable deadline for performance. The Graves apparently disagree, but cite no authority for their proposition that Lewes Investment needed to be able to perform when it sent its July 25 Letter.

[2] *See* July 25, 2005 letter from Wayne Tatusko to George Smith (the "July 25 Letter"), located in the Appendix to Appellant's Opening Brief at A-184-186. Citations to that appendix appear in the same format as in the Opening Brief: [A]-[appendix number].

Nor is there any unfairness if a party, itself not able to close, imposes a reasonable deadline for performance by both parties. If neither party was able to perform on the 30th day, then the contract was "abandoned," as Professor Williston puts it, and each party should have left with that with which they arrived – the essence of rescissory damages. *See* 15 *Williston on Contracts* § 47:2.

The alternative to recognition that the Agreement was abandoned on the 30th day is neither logical nor fair. Instead, it posits that the contract drifts on, with neither party being certain of their respective rights and duties, until someone finally *is* ready to perform. But the law understands that when concurrent conditions are present, the inability of the parties to perform timely "[d]oes not leave the contract open for an indefinite period so that either party can tender performance at his leisure." *Pittman v. Canham*, 2 Cal. App. 4th 556, 559-60 (2nd Dist. 1992). Instead, "[t]he failure of both parties to perform concurrent conditions during the time for performance results in the discharge of both parties' duty to perform. Thus, where the parties have made time the essence of the contract, at the expiration of time without tender by either party, both parties are discharged." *Id.*

In their Answering Brief, the Graves spend little time attempting to explain away the Court of Chancery's failure to discuss, let alone apply, Professor Williston's third test. Instead, they offer a variety of arguments in defense of the decision below:

A. the July 25 Letter was technically defective;

B. even if the July 25 Letter might have otherwise been effective, Lewes Investment waived its right to abandon the Agreement because it:

   i. continued to discuss purchase of the Property after its purported termination of the Agreement;

   ii. had its design professionals perform modest services after its purported termination of the Agreement;

   iii. chose not to quarrel, at a meeting held to see whether a deal could yet be done, with an assertion made by Graves' counsel that the first contract was still in effect;

C. 30 days was unreasonable; and

D. Lewes Investment abandoned its request for rescission on the eve of trial.

None of these arguments provide a basis on which to affirm the Court of Chancery's decision. Instead, Lewes Investment properly abandoned the Agreement and, even when leaving the fact findings unchallenged, is entitled to rescissory damages – *i.e.* the return of its deposit.

II. Lewes Investment set a reasonable time within which the Graves could cure their defective title.

The Graves posit that the July 25 Letter was ineffective because "30 days was not a reasonable time for completion of the contract." Ans. Br. at 20.[3] But, in support of that proposition, they assert facts that have nothing to do with whether it was reasonable to expect *them* to solve their title defect in 30 days. Instead, they return to whether Lewes Investment was "financially or logistically prepared to go to closing within that time period, or at any time in the near future." *Id.*

Their deflection is understandable because there is no dispute in the record about whether it was reasonable to expect the Graves to perform in 30 days. The Master found, and the Court of Chancery did not disagree, that 30 days was reasonable. Indeed, the Graves's own expert testified at trial that the Graves could reasonably be expected to cure their title defect in 30 days. And, while the Graves now claim that 30 days was not reasonable, they did not make that claim when responding to the July 25 Letter. *See* Letter from George Smith to James Fuqua dated July 31, 2006, at A-187. With all that in mind, it is difficult to argue that 30 days was not reasonable.

[3] Citations to the Graves' Answering Brief before this Court appear in the following format: [Ans. Br.] at [page number].

III. The July 25 Letter was technically sufficient to declare time to be of the essence.

The Graves argue that the July 25 Letter was deficient because it did not explicitly state that the Agreement would be terminated if the Graves did not produce good title within the 30 days. We assume all parties would agree that the question is: what would a reasonable person have understood from receiving the July 25 Letter? After asking for "more information about the status of this title matter," the July 25 Letter acknowledges that, because time was not made of the essence in the Agreement, the Graves are entitled to "a reasonable adjournment of the closing date" and proposes 30 days. *See* July 25 Letter, at A-185. After reciting remedies provided by the Agreement if the Graves are "unable to deliver good title," the letter explains that Lewes Investment "would prefer to negotiate a mutually acceptable extension of the Agreement." *Id.* Failing that, "Purchaser is left with no alternative but to exercise the remedies" provided by the Agreement. *Id.*, at A-186. Thus, the July 25 Letter was very clear about Lewes Investment's intention to abandon the Agreement if no agreement could be reached about an extension.

The Graves argue that Lewes Investment's willingness to negotiate a mutually acceptable extension of the Agreement somehow rendered the July 25 Letter non-compliant with the notice described by Professor Williston. But the Graves offer no authority for their position that a party who invites an alternative

to the expensive prospect of dispute and litigation somehow forfeits its rights if its overtures are rejected. Lewes Investment's unsuccessful invitation to negotiate was perfectly consistent with abandonment of the Agreement in the absence of an extension. "[W]here the original contract does not make time of the essence but the vendors subsequently do make time of the essence and demand closing by a particular date, and where such date passes without closing ***or extension***, the contract is deemed to be at an end." 77 Am Jur. § 75 (emphasis added).

Nor did the response by the Graves' attorney suggest any different view: "[a]ssuming that [the title issue] can be resolved quickly, [the Graves] expect either a speedy closing or an extension." *See* Letter from George Smith to James Fuqua dated July 31, 2006, at A-187. But a speedy closing did not occur within the 30 days, and the Graves concede that no extension or tolling agreement was ever reached by the parties. *See* Ans. Br. at 11. Thus, the Agreement was at an end.

The Graves last *post hoc* attack on the adequacy of the July 25 Letter is their complaint that a specific time and location for closing was not set by the letter. *See* Ans. Br. at 21. In other words, the Graves say that it is not enough to set a new deadline 30 days beyond the old one. Instead, one must designate the time of day and the location for the closing. Once again, the Graves cite no authority for this rather tedious suggestion, and Professor Williston does not require it. The July 25 Letter set a definitive time period for performance and completion of the

Agreement – 30 days – making August 24, 2006 the date for closing. The July 25 Letter, therefore, includes each of the elements required to satisfy Professor Williston's third test for making time of the essence.

IV. Lewes Investment's conduct did not work as waiver of its demand for timely performance.

The Graves claim that Lewes Investment waived its ability to make time of the essence through its conduct which, according to the Graves, was inconsistent with an intention to abandon the Agreement in the event the Graves did not cure their title defect in 30 days. For the convenience of the Court, we reprint the Graves' bulleted arguments found on page 22 of the Answering Brief, followed by Lewes Investment's reply:

- *Lewes Investment sent a letter on August 28, 2006, that referenced Lewes Investment's reservation of rights under the Agreement.*

On August 28, 2006, 33 days after the July 25 Letter, Lewes Investment informed the Graves that it was terminating the Agreement. In their Answering Brief, the Graves argue that the phrase "Purchaser reserves all its rights under the Agreement," meant Lewes Investment intended to perform, rather than abandon, the Agreement. Hardly so. At that time (and to this day), Lewes Investment believed it was entitled to all remedies provided under the Agreement in the event of Seller default. So it was natural for Lewes Investment, while proposing that the parties "negotiate a mutually acceptable agreement with the Sellers for the purchase of the property," to caution that it reserved all its remedies under the Agreement during any such negotiations. *See* Letter from Wayne Tatusko to George Smith dated August 28, 2006, at A-189. In fact, the Graves pled in another

court that the August 28, 2006 letter was a notice of termination. *See Graves, et al. v. Smith, et al.* Complaint, ¶ 22, at A-197. They cannot say differently now.

- *Lewes Investment met with the Graves in September 2006 to try to work out an extension for closing under the Agreement.*

The Graves confuse Lewes Investment's efforts to secure a new agreement with any extension of the old one. Lewes Investment does not dispute that it was still interested in purchasing the property after it terminated the Agreement in August 2006. Like the August 28, 2006 notice of termination letter said, Lewes Investment wanted to "negotiate a mutually acceptable agreement with the Sellers for the purchase of the property." Indeed, the parties spent half of the September 2006 meeting negotiating terms fundamentally different from the Agreement with respect to time, money, and other considerations. There was no inconsistency between Lewes Investment's termination of the old agreement and its efforts to seek a new one.

- *Lewes Investment stated at the September 2006 meeting that an alternative to extending the Agreement was to cancel it and pursue litigation.*

Rick Stout did, indeed, seek a new agreement with a new date for closing (and other new terms as well). The statement recalled by the Graves merely confirms that, if negotiations for a new deal failed, Lewes Investment would pursue its rights under Paragraph 14 of the Agreement.

- *Lewes Investment failed to correct counsel for the Graves when he stated that the parties still had a contract and called Stout a "contract purchaser" at the September 2006 meeting.*

Rick Stout attended the September 2006 meeting with the objective of working out a different purchase agreement with the Graves. The fact that he chose not to quarrel with the Graves' lawyer does not constitute an affirmation of the Graves' position.

- *Lewes Investment continued to have its engineering and design consultants work on and bill for the development project through March 2007.*

With both parties apparently eager to continue their relationship and get the land sold, it is not surprising that Lewes Investment chose to preserve the investment already made in the work product of design professionals. These modest expenditures hardly revived the terminated Agreement. Instead, they were made in the hope that a new agreement would be struck.

- *Lewes Investment continued to meet with State officials in September 2006 and possibly later:*

Like its response to the above claim, Lewes Investment continued its working relationship with State officials because it hoped that the parties would strike a new deal. Maintaining contact and discussion with the State served the parties' continued interests in a new deal, *not* the resurrection of the terminated Agreement.

V. Rescission is the appropriate remedy and was maintained by Lewes Investment.

Lewes Investment did not abandon its claim for rescission. It has always sought the return of its deposit monies and has consistently explained that its actions and inquiry at trial supported not only its claim for monetary damages under a theory of breach, but also its claim for rescission.

The return of deposit monies was requested by Lewes Investment in the pretrial order. The order doesn't mention rescission, but that is because Lewes Investment was seeking *more* than rescissory damages, and naturally focused on breach as the appropriate remedy. After the pretrial order to which the Graves refer, Lewes Investment made clear that its claim for rescission remained outstanding. In briefing on the Graves' Exceptions to the Master's Final Report, Lewes Investment confirmed that the rescission claim was alive and well. *See* Plaintiff's Answering Brief in opposition to Defendants' Exceptions to the Master's Final Report dated November 7, 2012, at A-592.

Rescission is the appropriate remedy where both parties fail to perform timely. *See* 15 *Williston on Contracts* § 47:2. It applies here because both the Graves and Lewes Investment failed to perform at the end of the 30-day period set by the July 25 Letter. The law recognizes that where this occurs, the parties are to be returned to their pre-contract positions. *Id.* Lewes Investment is therefore entitled to the return of its deposit monies.

CONCLUSION

The July 25 Letter properly made time of the essence of the Agreement. Because both parties failed to perform timely, both parties were in breach and each, therefore, was unable to sue the other for default under the contract. In such stalemate situations, equity requires that the parties be restored to their pre-agreement positions: the Graves with their land, and Lewes Investment with the monies paid to the Graves under the Agreement. If otherwise, inequitable forfeiture would result whereby the Graves would profit despite their failure to perform within the period of time set for performance.

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