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Case Number 56,2013

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

CORRECTED APPELLEE'S ANSWERING BRIEF

Dated: April 26, 2013

Sean J. Bellew (#4072)
David A. Felice (#4090)
Chad A. Flores (#5709)
Ballard Spahr LLP
919 N. Market Street, 11th Floor
Wilmington, DE 19801
Telephone: (302) 252-4465
Facsimile: (302) 252-4466

Attorneys for Plaintiff Below, Appellee

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NATURE AND STAGE OF THE PROCEEDINGS

Appellee Cornell Glasgow, LLC ("Plaintiff" or "Cornell") first commenced suit against Appellants LaGrange Communities, LLC and LaGrange Properties, LLC ("Defendants" or "LaGrange") in the Court of Chancery, Case No. 6202, on February 18, 2011, seeking temporary and preliminary injunctive relief against LaGrange, including specific performance of the Development Agreement. *Cornell Glasgow, LLC v. LaGrange Properties, LLC*, C.A. No. 6202-CC (filed February 18, 2011). By order dated March 8, 2011, Chancellor William B. Chandler, III issued a preliminary restraining order and established an expedited, limited discovery schedule followed by a permanent injunction hearing.

Discovery revealed that the remedy of specific performance was unrealistic because LaGrange did not have enough funds in its construction line of credit to satisfy the costs associated with discharging its obligations of delivering fully improved lots to Cornell. (*Id*.).

Accordingly, and pursuant to Cornell's request, by letter opinion and Order dated April 4, 2011, Chancellor Chandler transferred the action to the Complex Commercial Litigation Division of the Superior Court pursuant to 10 *Del. C.* § 1902. (*Id*.).

Cornell subsequently filed its action in the Superior Court seeking damages from LaGrange for its wrongful and unlawful actions including LaGrange's bad

faith conduct in breach of the Development Agreement (the "'016 Action"). In addition, Cornell initiated suit against LaGrange and other defendants arising from the improper sale and transfer of the Development's model home that Cornell constructed on Lot 206 (the "Lot 206 Action"). The '016 Action and the Lot 206 Action were assigned to Judge Joseph R. Slights, III.

After a five day bench trial and the parties' post-trial submissions, the Superior Court found that LaGrange breached the Development Agreement by wrongfully withholding payments due Cornell and by ousting Cornell from the Development. Judge Slights entered a verdict in Cornell's favor in the '016 Action, holding that LaGrange violated the Agreement by failing to reimburse Cornell for costs and expenses:

> With respect to Cornell's first breach claim involving LaGrange's alleged failure to reimburse costs and expenses, there appears to be little dispute that LaGrange failed to meet its contractual obligations. Pursuant to the agreement, LaGrange was obligated to reimburse Cornell for such soft costs relating to marketing, architecture and construction. Yet LaGrange failed to reimburse Cornell for soft costs dating back to 2010.

(December 7, 2012 Trial Court Memorandum Opinion at p. 44, Exhibit B to LaGrange Op. Brf., hereinafter cited in the form "Opinion at p. _"). Judge Slights further ruled that LaGrange breached the Agreement when it threw Cornell's employees off the project. At trial, LaGrange argued that it removed the Cornell

workers because of Cornell's breach by failing to maintain the sales pace for single-family homes. Slights rejected LaGrange's argument.

> The profitability of the project reflects Cornell's hard work and dedication to the project, is consistent with the overreaching goal of the project as reflected in the agreement, and is in keeping with the agreement's time is of the essence requirement, . . . There was no breach of this provision that would excuse LaGrange's ouster of Cornell from the project.

(Opinion at p. 48). Judge Slights also held that that LaGrange was liable for breach of contract arising from the wrongful conveyance of Lot 206.[1] Judge Slights ruled in Cornell's favor on its breach of contract claims, and against LaGrange on every counterclaim.

Ultimately, the Trial Court awarded Cornell damages of $1,966,745.00 in the '016 Action. With respect to the Lot 206 Action, the Trial Court also found that LaGrange was liable, in an amount of $192,281.00, for breach of contract and breach of the covenant of good faith and fair dealing arising from the wrongful conveyance of Lot 206 – the lot where Cornell constructed the Development's Model Home. In total, the Trial Court found LaGrange liable to Cornell in the amount of $2,159,026.00, plus costs and pre-judgment and post-judgment interest.

[1] LaGrange confirms that it has not appealed any issues dealing with the Superior Court's adjudication of the Lot 206 Action. (LaGrange Op. Brf. at 2).

On January 10, 2013, the Superior Court entered judgment for Cornell in the ’016 Action in the total amount of $2,186,231.24, plus post-judgment interest at a rate of 5.75%.

LaGrange filed its Notice of Appeal on February 7, 2013. On March 25, 2013, LaGrange filed its opening brief. This is Cornell’s answering brief.

SUMMARY OF ARGUMENT

I. The Trial Court properly awarded Cornell damages based on what it would have received had LaGrange not breached the Development Agreement since the Trial Court properly ruled that a "projection," as used in the Development Agreement, did not mean a firm deadline. Cornell therefore denies each and every allegation in paragraph 1 of LaGrange's Summary of Argument.

II. Cornell is not judicially estopped from asserting, in the separate Lot 206 Action that addressed different issues, that the contractual schedule for the sale of single family homes was not firm because Cornell never espoused this precise position nor did the Trial Court adopt any such argument or make any such ruling in its decision on LaGrange's Motion to Dismiss. Cornell therefore denies each and every allegation contained in paragraph 2 of LaGrange's Summary of Argument.

STATEMENT OF FACTS

A. The Parties' Development Agreement

On September 23, 2009 Cornell and LaGrange entered into the Development Agreement. (A-142-210). Pursuant to the Development Agreement, the parties agreed that Cornell would construct, market, sell and service 185 of the total 227 lots at the LaGrange development. The 185 lots included townhomes, duplexes and single-family homes. (A-147-149). LaGrange, at its sole cost and expense, was to complete all necessary site improvements and deliver to Cornell fully improved lots upon which Cornell could construct the homes. (A-146).

In addition, LaGrange was contractually required to reimburse Cornell expenses Cornell incurred in connection with the project, including: (i) marketing/sales expenses; (ii) architectural expenses; and (iii) construction expenses. (A-148). In addition to the reimbursement of expenses, LaGrange was contractually required to pay Cornell a management fee at the closing on the sale of each lot at a rate of $10,000 for each townhome, $11,000 for each duplex and $12,000 for each single-family home. (*Id.*; A-211-265). After the payment of construction expenses and management fees, if LaGrange's financial statements reflected a profit for the project above $2,237,892, the excess would be split – with 80% being paid to LaGrange and 20% being paid to Cornell as profit sharing. (A-148). If, however, at the end of 2010 and at the end of each calendar year

thereafter, "the options for Home(s) purchased by third-party buyers [fell] short of their projected average of $19,000 per home as set forth in Exhibit "E", the fees due to Cornell from LaGrange [would] be reduced by one-half of the reduced profits resulting from the difference between the projected options and the actual options purchased." (A-148-149).

B. The Sales Projection Schedule

As identified by the Trial Court prior to trial, the Development Agreement contains an express and unambiguous time is of the essence provision. (September 19, 2012 Opinion on Summary Judgment at 2:22-3:3, Exhibit A to Lagrange Op. Brf., cited hereafter in the form "J. Slights 9/9/12 Tele. Conf. Trans. _"). The Trial Court also recognized that the Development Agreement contains a grant of building rights "per the timeframes set forth in the Sales Projection Schedule attached hereto and made a part hereof as Exhibit 'A',[2] commencing on the date of this Agreement (the 'Term'), in accordance with the provisions of this Agreement." (A-153; A-142)(underlining in original). In addition to the projected timeframes identified in paragraph 1.A, the Development Agreement also contemplated that the development would proceed in separate phases. Pursuant to paragraph 1.B and Exhibit B, the parties contemplated as many as four separate

[2] Throughout its brief, Cornell uses Exhibit A and Schedule A, as reflected in various transcripts, interchangeably. In its argument section Cornell uses "Sales Projection Schedule," as it appears in the Development Agreement, to mean Exhibit A or Schedule A.

phases for the project – committing to LaGrange the discretion to "determine the sequence and physical order of the development. . . ." (A-143). If "timeframes" were requirements and "projections" were deadlines, one must question whether the parties' grant of discretion to LaGrange on phasing would be rendered illusory.

Exhibit A to the Development Agreement was expressly titled by the parties to read: "Sales Projection Schedule." (A-156). The parties' Exhibit A separately identified 185 lots, separating the lots amongst townhomes, duplexes and single-family homes. (*Id*.). The parties noted that the "sales pace begins ninety days from the date of obtaining the first building permit for each product." (*Id*.). In spite of their ability to do so, LaGrange did not use words such as deadlines, expected or required. Instead, the parties chose the word projection and Cornell understood it to mean exactly that, a projection of future results – not hard deadlines. Indeed, Greg Lingo ("Lingo"), Cornell's President, testified to the following at trial:

> Q. What was your understanding mechanically how that would work, in terms of the inclusion of Schedule A?
>
> A. Schedule A was the projection for how the community would perform.
>
> Q. And was that a hard deadline in your minds?
>
> A. Never. We have done deals with other developers and land sellers, that we do have definitive deadline in there. We certainly wouldn't have called them projections.

> Q. In the instances where they are hard deadlines, describe for the Court how that would be evidenced in a contract like this?
>
> A. Well, it would be a whole different agreement. We do what we would call lot option agreements where we put a deposit up, then we have to purchase X amount of lots per quarter. It is very specific that if we do not purchase those lots, provided the developer has developed the lots from their end, we would be in default and lose our deposit. In this case, we were working together, in my thought, long term, to maximize profitability of the whole project.

(B-150-152)(emphasis added); *see also* (B-1-30; B-65-146)(containing examples of contracts that do have fixed sales/draws).

In addition to explaining his understanding that the word "projection" meant projection and not some other, unexpressed, definition or requirement, Lingo also identified how Cornell understood the parties' projection to fit within the project.

> Q. There appears to be a fundamental difference about the significance of that document [Exhibit A]. It does have some significance, correct?
>
> A. Yes, it absolutely had significance.
>
> Q. It is just not illusory?
>
> A. We entered this agreement because in my career I have signed up over 15,000 lots. I understand the difference between a contract where there is definitive deadlines, where there is a contract that is not. What was appealing to us about the project was this was a projection on the pace of the community. At this time [late 2009] with such a tumultuous economy we are in the middle of there

> is no way we would have locked[,] put our company at risk financially, and if there was strict deadline on it. So we knew that we couldn't for a four-year projection, promise a pace. We could only project it.
>
> On Exhibit E -- Exhibit A if we didn't perform under Exhibit A, we would make much less money, both of us had obligations under our agreement. We both had to perform. Our performance, we feel, stands on its own in that we sold more homes than anyone else in the market at the time. We built our homes for less cost than we had projected. We contributed more profitability to the project than was originally projected. This community when we are going into it, it was such a big community, we knew we were going to have to, in a sense, work the different houses against one another so we could continue the pace. Mr. Nichols and I worked together to try to pull the products apart so that the person looking for a town wouldn't be incented the go to the bigger twin or incented to go to the single. We would try to feed three different market buyer profiles. That was the main reason why we held the weak links off until the end. They would have cannibalized the other products that we were building. So by us kind of manipulating together the price and the pace and what our offering were we would be able to work through the project and maximize the profitability of it, which was [always] our intention.

(B-164-166).

Mark McSorley ("McSorley"), Cornell's chief financial officer, had the same understanding of Exhibit A when the parties entered into the Development Agreement.

Q. Could you describe for the Court your understanding of what Exhibit A was intended to do?

A. Exhibit A was prepared by Mr. Mammoccio. He took the assumptions that we had sent him and compiled it in the manner as it is laid out here and it was my understanding it was his way of determining when products would start and when they would be sold out, and really for his purposes, his cash flow purposes of what our activity may be. It was a hypothetical projection of what the sales pace may be for different products.

Q. It uses the word projection, what is your understanding of what that is intended to signify?

A. We deal with projections when we do our annual business plan, when we do a [pro forma] for a community you have absolutely no idea what you may sell in a given month. So in order to us to run our staffing, in order for us to run other parts of our business, we project what our volume may be in any given year. This is just that, it is our best guess as to what that volume may be.

Q. Let me ask a direct question: When you read the word projection, as it related to Exhibit A, did you assign that some significance outside of the common parlance of what a projection would be?

A. No.

Q. Was it ever your understanding that there was hard deadline called for by Exhibit A?

A. Never.

(B-159-160).

Nichols was the only individual affiliated with LaGrange that had an understanding of the Development Agreement's terms and was called to testify at trial. When asked on direct examination as to the meaning and context of Exhibit A, Nichols only offered evidence of what LaGrange's banks might have thought.

> Q. It has been suggested that the word "projection" in the title of Exhibit A means that the sale schedule was not a firm obligation. Do you agree?
>
> A. No, I don't agree. We went into this with an expectation of timing and performance of what a contract is. Our lending institution would certainly not allow us to do that otherwise, nor would La Grange enter into such an agreement because we could virtually be under contract forever and no performance would be expected.
>
> Q. And no money –
>
> A. And no money would -- I mean, nobody would sign a deal like that.

(B-155-156). Nichols offered no testimony[3] as to what LaGrange understood the word projection to mean other than its ordinary and customary definition.

C. Notice and Cure Provision

In addition to the Sales Projection Schedule, the Development Agreement expressly contained a notice and cure provision. Pursuant to Development Agreement's express terms, the parties were required to identify an alleged default under the agreement and give the other party thirty days to cure the alleged default

[3] And Lowell McCoy, Nichols' other partner in Lagrange, testified he was not involved in negotiating the Development Agreement. (B-157-158).

before an "Event of Default" could be declared. Specifically, the Development Agreement sets forth the following:

> **DEFAULT**. The occurrence of one of more of the following, along with written notice thereof to the defaulting party identifying such default and demanding its remedy within thirty (30) days of such notice, shall constitute an "Event of Default", unless such occurrence is remedied within any applicable grace or cure period. . .

(A-149)(emphasis added). A party's right to seek monetary recourse from a court is contingent upon the occurrence of an Event of Default. The Development Agreement's remedies provision expressly sets forth that "[u]pon the occurrence of an Event of Default, as outlined in Section 6 hereof, the non-breaching party may [] declare immediately due and payable all payments required to be made under this Agreement . . . ." (A-150). LaGrange never sent Cornell notice of default prior to the commencement of litigation. When LaGrange's trial counsel finally did send what purported to be a notice of default, it lacked the requisite 30 days' notice to cure.

D. The Parties' Amendment to the Development Agreement

Initial financing obligations negotiated into the Development Agreement were also essential in getting the project off the ground. The Development Agreement was contingent upon: (i) LaGrange securing financing of $3,000,000.00 to satisfy its outstanding loan with a local bank and $1,800,000 to fund site improvements; and (ii) Cornell securing a revolving loan of $2,000,000 to

fund construction of the homes to be sold to third-party homebuyers. (A-142). Cornell obtained the requisite financing, LaGrange did not.

By November 2009, it became apparent to the parties that LaGrange was overleveraged and could not meet its commitment to obtain the financing required under the Development Agreement. The financing commitments were required to be in place no later than November 1, 2009. (A-142). While LaGrange's failure to obtain the requisite financing by November 1, 2009 would have constituted a material breach under the agreement given the express deadline and the time is of the essence provision, the parties continued to work the project in a way that would maximize profitability for both LaGrange and Cornell. This fact corroborates Cornell's position that profitability was held above pace.

To rectify LaGrange's failure to meet its financing commitments, the parties entered into an Amendment to Development Agreement (the "Amendment") on December 11, 2009. (B-31-45). The amended Development Agreement included, among other changes, the grant from LaGrange to Cornell of the exclusive right to construct, market, and sell all 227 lots at the Development, rather than the initial 185 lots.

Despite the fact that the parties now committed all 227 lots to be constructed, marketed, and sold by Cornell, LaGrange never required and the parties never thought to make corresponding amendments to the Sales Projection

Schedule to reflect the additional 42 lots. Instead, the parties only worked to amend Exhibit E to the Development Agreement (designating the amendment as Exhibit E1) to account for certain additional lots (the weak link townhomes) and the overall, projected profitability of their relationship. (A-175). Pursuant to Exhibit E1, the parties expected that Cornell would receive more than $2.4 million in management fees as originally outlined in the Development Agreement. (*Id*. at "Cornell Home Fee" line item). In fact, the Sales Projection Schedule was never amended because pace was not nearly as important as profitability. (B-153-154).

E. Profitability Trumps Pace

There is no dispute that Cornell sold townhomes and duplexes at a faster pace than the parties had originally projected. Indeed, Nichols testified that Cornell exceeded the projection with regard to the sale of townhomes and duplexes. (B-161-163). Entering into the Development Agreement profitability was and remained "absolutely critical." (B-147-149). The fact that profitability was paramount to any alleged deadlines for constructing, marketing, and selling the homes is clear from the parties' bargained-for inclusion of the word "projection" rather than "deadline" or some other incarnation of a specified date for completion.

As part of LaGrange's scheme to oust Cornell from the Development and secure future financing to continue the project, LaGrange solicited and obtained a

business plan from Mason Run Builders, LLC ("Mason Run").[4] The proposed business plan boasted that LaGrange was "a new home community of 227 homes located in Newark, DE that has had exceptional sales and settlements in 2010" that "far exceeded local and regional competition." (B-47-48).[5]

Cornell's marketing program was hugely successful and sales outpaced the sales projections forecasted in the Development Agreement, in both the overall quantity of units sold and the amount of revenue generated. In short, Cornell exceeded the profitability projections for the Development even though sales of single family detached homes lagged, due to the depressed residential real estate market.

Based on the trial record, the Trial Court found that the Sales Projection Schedule did not impose any deadlines on Cornell.

> The Court will not rewrite Exhibit A under the guise of interpreting it. Cornell's interpretation of Exhibit A is the more reasonable interpretation and will be applied here.

(Opinion at p. 35). The Trial Court likewise held:

> In so finding, the Court does not render the Agreement's time is of the essence provision surplusage. There remain deadlines in the Agreement that are modified by this provision. For example, a firm deadline is established in ¶ 1A. of the Agreement, which states

[4] Mason Run was owned by Drew McCoy, son of Defendant Lowell McCoy.

[5] The Mason Run business plan included a proposed marketing plan "[t]o increase revenue" through the projected sale of only 10 single-family homes (settling on 9) for all of 2011. (B-57). This projected sales/marketing plan was less than the projected pace under Exhibit A to the parties' Development Agreement. This fact corroborates Cornell's understanding that profitability was held above pace.

> 'Financing commitments from financial institutions providing for (i) and (ii) of this Section A must be in place by no later than November 1, 2009.' In fact, a failure to meet this deadline prompted the parties to amend the entire Agreement by way of the December 2009 Amendment.

(Opinion at p. 34). Despite the existence of a time is of the essence clause, that helped contextualize other areas of the Development Agreement, the Trial Court correctly found that the time is of the essence provision did not inform or control the Sales Projection Schedule:

> Nevertheless, Cornell was obliged to perform its work—construction, marketing and sales of new homes—with dispatch. Although it is clear that the sales of single family homes in the Development lagged behind the projections, it is also clear that Cornell's performance under the Agreement was yielding profits to the parties in excess of those projected at the outset of their relationship. The profitability of the project reflects Cornell's hard work and dedication to the project, is consistent with the overarching goal of the project as reflected in the Agreement, and is in keeping with the Agreement's time is of the essence requirement.

(Opinion at pp. 47-48). The Trial Court's decision and rationale is correct and well-founded in the record.

ARGUMENT

I. THE TRIAL COURT PROPERLY INTERPRETED THE SALES PROJECTION SCHEDULE IN AWARDING CORNELL DAMAGES FOR LAGRANGE'S UNDISPUTED BREACH OF THE DEVELOPMENT AGREEMENT

Question Presented

Whether the Trial Court properly awarded damages after determining the Development Agreement's bargained-for Sales Projection Schedule, that lacked any specific date for performance, failed to establish a firm deadline for Cornell to continue its good faith performance and satisfy its contractual obligations.

Scope of Review

Where a grant of summary judgment presents a question of law on appeal, the Supreme Court's review is *de novo*. *See Alfieri v. Martelli*, 647 A.2d 52, 53 (Del. 1994).

"In an appeal from the entry of a civil judgment following a Superior Court bench trial, this Court will uphold the judge's factual findings if they are sufficiently supported by the record and not clearly erroneous, and are the product of an orderly and logical deductive process. This Court reviews de novo the Superior Court's formulation and application of legal principles." *Lorenzetti v. Hodges*, 2013 WL 592923 at *3 (Del. 2013)

Merits of Argument

A. The Trial Court Correctly Held That The Sales Projection Schedule Did Not Establish A Firm Deadline For Cornell's Performance

The Trial Court correctly held that LaGrange was in breach of the Development Agreement by wrongfully withholding payments due Cornell and by ousting Cornell from the Development. The centerpiece of the Trial Court's decision was that (i) LaGrange failed to abide by the Development Agreement's notice and cure provisions where notice and cure was not futile[6], and (ii) LaGrange unlawfully ousted Cornell from the Development in breach of the Development Agreement. LaGrange argued it was justified in ousting Cornell because Cornell violated a Sales Projection Schedule establishing a hard deadline for Cornell's performance. (LaGrange Op. Brf. at pp. 14-16). Following substantial consideration during pre-trial motions, trial, and post-trial briefing, the Trial Court rejected this defense.

The Trial Court's decision and rationale that the Sales Projection Schedule did not establish a firm deadline for performance is well-founded in the record. "The Court will not rewrite Exhibit A under the guise of interpreting it. Cornell's interpretation of Exhibit A is the more reasonable interpretation and will be applied

[6] The Trial Court held that LaGrange did not provide Cornell the requisite notice and opportunity to cure provided for by the express terms of the Development Agreement. (Opinion at pp. 2-3). As a matter of law, Lagrange's conduct precluded LaGrange from prosecuting any breach of contract claim it potentially held against Cornell. Even if LaGrange was excused from the notice and cure provisions, LaGrange still failed to prove Cornell's alleged breach by a preponderance of the evidence. *Id*. LaGrange never appealed the predicate finding to pursue this defense.

here." (Opinion at p. 35). The Trial Court further accepted as persuasive Cornell's customary use of Lot Purchase Agreements, rather than sales projection schedules, when making a firm commitment to a specific sales pace. *Id.* The hard deadlines contained in the Lot Purchase Agreements "stand in stark contrast to the 'projections' set forth" in the Sales Projection Schedule. *Id.* Moreover, the Trial Court wisely relied on Lingo's representations regarding sound business practice; that is, Lingo emphasized, and the Trial Court agreed, that it would not be prudent for anyone in the real estate development industry to commit to hard deadlines during a famously depressed real estate market. *Id.*

Furthermore, as a basis for its decision, the Trial Court cites the failure to amend the Sales Projection Schedule when it had the opportunity; an essential fact that LaGrange ignores. Following LaGrange's inability to satisfy its financing obligations under the original Development Agreement, and the subsequent amendment of Exhibit E and the Development Agreement itself, both parties chose not to amend the Sales Projection Schedule. LaGrange's inability to reconcile the decision not to amend the Sales Projection Schedule in the face of an additional amendment to the Development Agreement, after the addition of 42 lots to Cornell's development obligations, further supports Cornell's understanding of the meaning of "projection" and the value of profit over pace. The Trial Court agreed.

Although the Development Agreement contains a time is of the essence clause, when coupled with the Sales Projection Schedule, it is not sufficient to establish with specificity and certainty a hard deadline for Cornell's performance. Indeed, Nichols has consistently been unable to offer a discernable, objective or subjective personal understanding of what "projection" was supposed to mean to the parties. When given the opportunity, Nichols instead defers to how lending institutions may have viewed the Development's obligations. The Development Agreement was negotiated at arm's length and the parties made an informed decision, a calculated choice, to characterize the sales targets as a "projection" as opposed to a "deadline." LaGrange has failed to offer any evidence to the contrary.

The Trial Court was correct, after carefully weighing the evidence, that the "'Sales Projection Schedule,' even when read in light of the Agreement's time is of the essence provisions, set forth aspirational projections, *not* deadlines…." (Opinion at p. 37). The Trial Court correctly ruled in Cornell's favor while flatly rejecting LaGrange's defenses.

B. LaGrange Fails To Show That The Sales Projection Scheduled Obligated Cornell To Perform By A Firm Deadline

The Sales Projection Schedule failed to establish a firm deadline for completion of the construction, marketing, and sale of homes in the Development. LaGrange argues that the ordinary and customary definition of "projection" means something firm. (Lagrange Op. Brf. at pp. 12-13). LaGrange's redefinition of the word "projection" is meritless and untenable. Because the word "projection" neither denotes or connotes a hard deadline for performance, Cornell could not have breached the Development Agreement's time is of the essence provision. For this reason, LaGrange's appeal should be denied.

The Court should be careful to parse the issues that are actually disputed. LaGrange's presentation of its argument is misleading: to be clear, the existence of a valid, unambiguous time is of the essence clause is not at issue. Cornell does not dispute the legal or equitable ramifications for failing to abide by a time is of the essence provision that properly references a specific date. However, here, the center of the argument, and the center of the Trial Court's decision, was that there was no specific date.

The Trial Court cited Merriam-Webster's online dictionary that "defines 'projection,' in relevant part, as 'an estimate of future possibilities based on a current trend.'" (Opinion at p. 35)(emphasis added). LaGrange takes issue with the Trial Court's selection of the ninth definition. However, when the ninth definition

on the website is the first relevant definition, then the Trial Court has proceeded appropriately with its analysis. For example, the first definition on the website is "A systematic presentation of intersecting coordinate lines on a flat surface upon which features from a curved surface (as of the earth of the celestial sphere) may be mapped…" http://meriam-webster.com/dictionary/projection. The second definition is "a transforming change" and the third is "the act of throwing or thrusting forward." *Id*.

LaGrange would like this Court to think that that the fourth definition, "the forming of a plan: SCHEMING" better informs its position. However, the very phrasing of this definition assumes something not yet in being. It's not a "plan" or "scheme" rather it is the act of "forming" a plan and "scheming." Additionally, LaGrange ignores the very definition of "scheming": "given to forming schemes; *especially*: DEVIOUS." *Id*. (emphasis in original). The Trial Court correctly adopted the ninth definition of "projection."

LaGrange further argues that the "estimate of future possibilities based on a current trend" definition is inapplicable because there existed no trend on which to base an estimate. (LaGrange Op. Brf. at p. 13). This argument is simply not tenable. LaGrange would have this Court believe that aside from sales experience at the LaGrange Development, neither party had access to market trends and behavior. That LaGrange, in fact, existed in a real estate development vacuum.

LaGrange improperly attempts to narrow the scope of "trend" to a LaGrange-specific application. In fact, LaGrange hired Cornell based on its expertise and history of success in constructing, marketing, and selling newly developed homes in similar residential communities. It is disingenuous for LaGrange to suggest that Cornell's experience, coupled with the rest of the real estate market, did not create sufficient basis to forecast a desirable sales pace based on projections that take into account market estimates and current trends.

With no dearth of definitions to select from, the Trial Court found further support in the "estimate" definition of projection in *In re Oracle Corp*., finding that, consistent with the term's ordinary meaning, "a projection is, at best, a good faith estimate of how a company might perform in the future; it is by no means a warranty that can be blindly relied upon." *In re Oracle Corp*., 867 A.2d 904, 940-41 (Del. Ch. 2004), aff'd sub nom., *In re Oracle Corp. Derivative Litig*., 872 A.2d 960 (Del. 2005). The Court of Chancery likewise found the word "projection" to fall significantly short of a firm deadline.

LaGrange cites *Peden v. Gray* presumably for the proposition that failure to abide by a time is of the essence provision can result in a material breach. *Peden v. Gray,* 886, A.2d 1278 (Del. 2005)(a real estate conveyance dispute where the buyers were unable to meet their settlement obligations on a specific, predetermined date). Neither the Trial Court or Cornell disputes this proposition.

Again, the Court should not be misled by the framing of the issues: there is no disagreement over the existence of a clear and unambiguous time is of the essence clause. Instead, Cornell believed, and the Trial Court agreed, that the Sales Projection Schedule did not establish a clearly specific deadline by which Cornell was expected to perform in accordance with the time is of the essence provision.

Further, the string citations that follow *Peden v. Gray* in LaGrange's brief are similarly irrelevant. For example, LaGrange's parenthetical to *Allen v. Rock* informs Cornell's point here: "where the contract stated that time is of the essence, the contract became null and void when the buyers could not obtain financing by the date specified and the buyers were entitled to return of their deposit". LaGrange Op. Brf. at p. 16 (emphasis added); citing *Allen v. Rock*, 2004 WL 1398838, at *5 (Del. Com. Pl.). The parties are not concerned here with a contract that included a specific date for performance; that is simply not the issue on appeal.

LaGrange's continued attempt to transform traditional sales projections into non-negotiated, hardline dates for performance falls flat. Through the projections (the profitability of which Cornell greatly exceeded), the negotiations between the parties and general market experience, it was Cornell's belief, and the Trial Court's view, that no required date of performance was established and the Development Agreement would be fully performed once every house in the Development was constructed and sold.

II. CORNELL IS NOT JUDICIALLY ESTOPPED FROM CONTESTING A STRICT CONSTRUCTION OF THE SALES PROJECTION SCHEDULE

Question Presented

Whether Cornell's argument that a reasonable time for performance precludes the application of the Rule Against Perpetuities relating to an Escrow Deed judicially estops Cornell from later arguing, and the Court ruling, that a time is of the essence provision does not apply to a Sales Projection Schedule that fails to provide a strict date for performance.

Scope of Review

Whether judicial estoppel supports relief on appeal is reviewed *de novo*. *Motorola, Inc. v. Amkor Technology, Inc*., 958 A.2d 852, 859 (Del. 2008).

Merits of Argument

A. The Doctrine of Judicial Estoppel Does Not Apply

Judicial estoppel is inapplicable because (i) Cornell is not now asserting an inconsistent position previously taken and (ii) the Trial Court did not previously rely on the alleged inconsistent position as a basis for its ruling on the Motion to Dismiss in the Lot 206 Action. For these reasons, the Court should deny LaGrange's appeal.

"Judicial estoppel acts to preclude a party from asserting a position inconsistent with a position previously taken in the same or earlier legal proceeding," and "prevents a litigant from advancing an argument that contradicts

a position previously taken that the court was persuaded to accept as the basis for its ruling." *Motorola Inc. v. Amkor Tech.*, 958 A.2d 852, 859 (Del. 2008). To establish judicial estoppel, a party must therefore show that the opposing party took a position that "contradicts another position that the litigant previously took and the Court was successfully induced to adopt in a judicial ruling." *Id.* at 859-60 (quoting *Siegman v. Palomar Med. Techs., Inc.*, 1998 WL 409352, at *3 (Del. Ch.) (emphasis in original)).

Furthermore, judicial estoppel is an "equitable doctrine invoked by the Court at its discretion," and "[t]he primary concern of the doctrine of judicial estoppel is to protect the integrity of the judicial process." *Banther v. State*, 977 A.2d 870, 884 (Del. 2009) (other citations omitted).[7]

The crux of Cornell's argument in opposition to LaGrange's Motion to Dismiss was that the self-effectuating transfer of the Lot 206 deed satisfies the time limits under the Rule Against Perpetuities and the Rule Against Perpetuities has been severely restricted in the commercial real estate context. In properly denying LaGrange's motion, the Trial Court held that it was:

> …satisfied that the contracts between these sophisticated parties created a reasonable time (well within twenty-one (21) years) within which a request for the release of the deeds held in escrow had to be exercised…

[7] Notably, LaGrange refrains from citing the judicial estoppel elements in its opening brief. When specifically enumerated, it is clear that the well-accepted elements of judicial estoppel greatly undermine LaGrange's position.

(A-95-96). The Trial Court's barebones ruling that "the parties contemplated an end to their relationship and defaults stemming therefrom could not go on in perpetuity" is in no way inconsistent with the position Cornell now takes. Cornell does not support the interpretation of an indefinite contract with an indefinite time for performance. Cornell's insistence that a projection is not a firm deadline is not mutually exclusive with the position that the time for performance is less than twenty-one years.

Even if Cornell had argued for an absolute adherence to a pre-established and strict time for performance, LaGrange's argument would still fall flat. For judicial estoppel to apply, the Trial Court must have adopted Cornell's position. That is, LaGrange must show not only that (a) Cornell argued that the time is of the essence clause applies to the Sales Projection Schedule in such a way that requires strict compliance with performance dates <u>but also</u> that (b) Cornell persuaded the Trial Court to adopt its position when ruling. In his opinion on Summary Judgment, Judge Slights could not have been any clearer in disposing of LaGrange's shot-in-the-dark judicial estoppel argument:

> And finally on the judicial estoppel issue, I did go back and read the Court's opinion. I did, as I have today, find that the contract was subject to "time is of the essence" provision. I did look to the schedule as evidence of how the parties intended that provision to be enforced, <u>but I did not conclude there nor do I here</u> that that exhibit clearly and unambiguously sets those projects as firm deadlines. (emphasis added). I simply said that it was

> clear from the parties' contract that performance would have been completed prior to the Rule Against Perpetuities period that was applicable under Delaware law; so I don't find that there's an estoppel issue here.

(J. Slights 9/19/12 Tele Conf. Trans. 5:1-14). Cornell never argued that a reasonable timeframe or reasonable interpretation of "projection" contemplated a scenario whereby construction, marketing, and sale of homes in the Development would even remotely approach the twenty-one year Rule Against Perpetuities period. The crux of Cornell's argument, therefore, was not that there was a firm deadline for completion, but rather that completion of the project was certainly intended to be finished within twenty-one years. Regardless, the Trial Court did not adopt, rely, or base its ruling upon any finding regarding the meaning of "projection" as used in the Development Agreement.

CONCLUSION

For the reasons set forth herein, Plaintiff Below, Appellee Cornell Glasgow, LLC respectfully requests that this Court affirm the Trial Court's decision.

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/s/ Chad A. Flores

Sean J. Bellew (#4072)
David A. Felice (#4090)
Chad A. Flores (#5709)
Ballard Spahr LLP
919 N. Market Street, 11th Floor
Wilmington, DE 19801
Telephone: (302) 252-4465
Facsimile: (302) 252-4466

Attorneys for Plaintiff Below, Appellee