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COURT OF CHANCERY
OF THE
STATE OF DELAWARE

COURT OF CHANCERY COURTHOUSE
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GEORGETOWN, DELAWARE 19947

Submitted: February 1, 2011
Decided: February 7, 2011

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Re: *Snug Harbor Condominum Council v. Dorothy D. Sullivan, Trustee*
Civil Action No. 5915-CC

Dear Counsel:

Petitioner Snug Harbor Condominium Council seeks specific performance of a "settlement agreement and mutual release" that was entered into by the parties to resolve a lawsuit pending in the Delaware Superior Court. (*Dorothy D. Sullivan McBride, Trustee of the Dorothy Devlin Sullivan Revocable Trust v. Snug Harbor Condominum Council*, C.A. No. 08C-04-0007THG). Respondent Dorothy D. Sullivan has answered the complaint for specific performance. There are no issues of material fact in dispute and, thus, the matter is ripe for summary judgment. This is my decision on the petition for specific performance and petitioner's motion for summary judgment.

At some point during the trial on the underlying dispute in the Superior Court, the parties reached an agreement to settle their dispute. That agreement was reduced to writing and made an Order of the Superior Court. The parties then engaged in an effort to draft a comprehensive settlement agreement and mutual release that would settle all of the disputes among the parties. This effort consisted of several months of negotiations and discussions, beginning in January 2010 and ending in late August 2010. In July 2010, the petitioner forwarded a check in the amount of $28,391.70 to respondent's attorney, which was one of the conditions of performance under the terms of the

agreement. Respondent signed the settlement agreement and mutual release around August 10, 2010, and forwarded it to petitioner's counsel. It was eventually signed by petitioner's president (Dr. Gray) around August 18, 2010. Under the terms of the agreement, petitioner's counsel was required to "prepare the first draft of any and all amendments to the condominium documents, a copy of which shall be provided within fifteen (15) days of the effective date to: [respondent's attorney].

Petitioner's attorney began to prepare the required amendments to the recorded condominium documents in accordance with the settlement agreement. In order to do so, a title search was required to determine the next generation of amendments to the condominium documents. The draft amendments were forwarded to respondent's counsel on September 15, 2010. More than two weeks later, respondent's counsel advised petitioner that respondent would not approve of any amendments to the condominium documents because the "drafts" were prepared more than fifteen (15) days from the effective date of the agreement. Thus, respondent took the position that she did not have to consent to the amendments even though she had accepted full payment from the petitioner as part of the executed settlement agreement.

This dispute turns on the clear language of the settlement agreement. Respondent first argues that the proposed amendment was not approved by all the unit owners and, thus, a condition of the settlement agreement was not satisfied by the proposed "draft" amendment submitted by petitioner's counsel. This argument fails for at least two reasons. First, the amendment does not alter the percentage interest of unit owners in common elements and, therefore, it is not subject to unanimous approval of unit owners under 25 *Del. C.* § 2205. Second, nothing in the agreement grants the respondent the right to unilaterally withhold her consent to the amendment based on some alleged deficiency in the approval from other unit owners. If respondent so believed, she should refund the $28,391.70 that was tendered to her as part of the settlement and mutual release.

Next, respondent insists that the course of dealing between the parties makes it clear that time was of the essence and that the failure to provide the draft amendments within fifteen (15) days of the effective date of the agreement, excuses respondent from performance of her obligation under the agreement. This contention, in my opinion, is frivolous. Nothing in the agreement explicitly states that time is of the essence, even though the agreement was the subject of intense negotiations and drafting by experienced counsel on both sides. Had there been an intention of any party to make time of the essence with respect to any aspect of the settlement agreement and release, it could have been stated so clearly. In addition, nothing in the agreement makes clear that failure to comply by a certain date results in a forfeiture. That is the effect of respondent's position, that she has the right to keep the $28,391.70 that was tendered to her as part of the settlement without having to perform her part of the obligation under the settlement

agreement. The law abhors a forfeiture. Nor is there any indication that respondent's position was somehow prejudiced because of the delay in receiving the draft amendments from petitioner's counsel. Finally, with respect to the purported "course of dealing" between the parties that implies that time was of the essence, the only "course of dealing" is the reference to an email exchange between respondent's counsel and petitioner's counsel after the settlement agreement and release was received from petitioner's president. Respondent's counsel advised petitioner's counsel by an email that the fifteen (15) day period mentioned in the agreement for a submission of a draft amendment began to run from August 20, 2010. Petitioner's counsel responded that he understood. Nothing about this exchange between lawyers for the parties after an agreement had been executed by all parties can fairly be said to represent a "course of dealing" between the parties that would modify or alter the plain terms of the agreement. On the contrary, the course of dealing of these parties over the preceding year indicates an utter disregard for timeliness, with the respondent in particular resorting to endless quibbles that delayed the ultimate execution of a settlement agreement. This can hardly be said to suggest an intention by the parties to make time of the essence with respect to any aspect of their agreement and mutual release.

Finally, I note that a decision by Vice Chancellor Short in 1971 (*Tessett, Inc. v. Gerett, Inc.*, 1971 LEXIS 174 (Del. Ch. Feb. 5, 1971) involved a very similar set of circumstances to those here. In *Tessett*, the parties tried to settle their differences and entered into an agreement dated December 1, 1966. The settlement agreement originally provided for the petitioner's performance to be completed on or before December 5, 1966. At the petitioner's request, however, the date was changed to December 15, 1966. Notwithstanding the extension of time for performance, the petitioner did not actually deliver a general release and corporate resolution until April 1967. The respondent refused to accept the petitioner's performance, contending that the agreement was based upon a time of the essence understanding. Vice Chancellor Short rejected this argument, noting that neither the agreement nor the circumstances rendered time to be essential or of the essence, despite the deadline set forth in the parties' agreement. Vice Chancellor Short also noted that the respondent was not prejudiced by any delay. Accordingly, the Court specifically enforced the parties' settlement agreement.

Vice Chancellor Short's reasoning in *Tessett* applies with equal force in this case. Our law favors the voluntary settlement of contested lawsuits. And when parties agree to settle a lawsuit, a binding contract is deemed to have been created. The agreement is then construed using principals of ordinary contract interpretation. In this particular case, the parties reached an agreement under which the petitioner was required to pay the respondent a sum of money. That sum of money has been paid in full. The respondent likewise agreed to consent to an amendment of the condominium declaration in order to resolve the underlying dispute, as well as to eliminate future ambiguity over the allocation of financial responsibility between the Condominium Association and the

homeowners to pay for the replacement of windows and doors serving the condominium units. Nothing in the agreement made time of the essence. Nothing in the agreement indicates that a failure to comply with a certain deadline will excuse either party from full performance of the settlement agreement. The fact that respondent failed even to address *Tessett* in her answering brief is telling.

For all of the foregoing reasons, the petitioner's motion to enforce the settlement agreement and mutual release will be granted. And finally, I also grant petitioner's request for its attorney's fees in connection with filing this enforcement litigation. Respondent accepted full payment under the settlement agreement, and then in bad faith attempted to renege on her obligation to approve the amendments. Nothing in the negotiations between the parties leading up to the final settlement agreement and mutual release and nothing in the actual terms of the settlement agreement and mutual release support respondent's position in this litigation. Respondent's acceptance of full payment from petitioner and thereafter her refusal to comply with her own obligation under the agreement is a clear indicia of bad faith. Based on my determination that respondent's position in this litigation was vexatious and in bad faith, I award reasonable attorney's fees to the petitioner to be paid by respondent. *See Dover Historical Soc'y, Inc. v. City of Dover Planning Comm'n*, 902 A.2d 1084 (Del. 2006). Petitioner's counsel shall draft an appropriate form of order implementing this ruling. Petitioner shall submit a form of affidavit regarding the attorney's fees incurred in this litigation and respondent's counsel shall reply to the affidavit at the same time as the order and affidavit are submitted to the Court.

IT IS SO ORDERED.

Very truly yours,

William B. Chandler III

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