IN THE SUPREME COURT OF THE STATE OF DELAWARE

WILLIAM T. PEDEN, III and KAREN B. PEDEN,	§	
	§	No. 188, 2005
Plaintiffs Below, Appellants,	§	Court Below: Court of Chancery of the State of Delaware in and for Sussex County
v.	§	
GERARD F. GRAY,	§	C. A. No. 040-S
Defendant Below, Appellee.	§	

Submitted: September 20, 2005
Decided: October 14, 2005

Before **HOLLAND, BERGER** and **JACOBS,** Justices.

O R D E R

This 14th day of October 2005, upon consideration of the briefs of the parties and the record in this case, it appears to the Court that:

1. This appeal arises out of a dispute over a failed contract for the purchase of real estate between the buyers, William T. and Karen B. Peden ("the Pedens"), and the property owner, Gerard F. Gray ("Gray"). The Pedens filed an action in the Court of Chancery seeking specific performance of the contract. After trial, the Court of Chancery dismissed the case and entered final judgment in favor of the owner, Gray. The issue is whether the Court of Chancery properly considered parol evidence in determining an appropriate settlement date for the

contract, where the closing date specified in the original written contract had passed, but the parties continued to negotiate under an addendum that did not specify a new closing date. Because of the ambiguity surrounding the closing date, the Vice Chancellor properly considered parol evidence to determine a new settlement date—a deadline that the buyers missed. Nor did the Vice Chancellor abuse his discretion in concluding that the buyers had not sustained their burden of proof to show their entitlement to specific performance by clear and convincing evidence. Because the Court of Chancery committed no error of law or fact, we affirm.

2. Gerard Gray listed his home in Georgetown, Delaware, for sale through a realtor. The Pedens offered $175,000 for the property. Gray accepted that offer on August 1, 2003.

3. The real estate contract ("the Agreement") contained several critical provisions. First, it provided that if the buyers did not secure financing on or before August 29, 2003, then either party could terminate the contract. Second, the Agreement contained a "time is of the essence" clause, which provided that the parties must abide by the agreed-upon dates and that a failure to do so could result in default or a waiver of contractual rights. Under the Agreement, settlement would occur on September 18, 2003, but provided, however, that if additional time was necessary to "secure a survey, or to prepare the necessary legal and financial

settlement documents, the date of settlement shall be extended for a reasonable time to effect these conditions."[1] Finally, the Agreement contained an "integration" clause, providing that the Agreement and any addenda constituted the entire contract, and could not be modified except by written agreement signed by all parties.

4. Six days before settlement, on September 12, 2003, the buyers prepared and submitted to the owner an addendum that did not provide for any extension of the settlement date.[2] The lender had denied financing to the buyers on August 29, but the buyers did not disclose that denial to the owner, as the Agreement explicitly required. The owner agreed to the addendum in writing on September 30. At trial, the owner testified that he told his realtor (who in turn had told the buyers' attorney) that he (Gray) had accepted the addendum on the condition that settlement would occur quickly.

5. On October 3, Eric Howard, the buyers' attorney, wrote a letter to the owner disclosing that the buyers had not obtained financing. Attorney Howard

[1] Residential Contract of Sale at A-174.

[2] The addendum proposed to reduce the purchase price from $175,000 to $165,000 to compensate for the necessary replacement of the foundation, allegedly to satisfy the lender's concerns about a property appraisal that uncovered structural problems. The owner agreed to the addendum in return for a quick settlement and also on the condition that the buyers produce evidence of this defect.

stated that the buyers were continuing to seek financing and that settlement would occur as quickly as reasonably possible after they obtained financing.

6. After receiving the October 3 letter, the owner and Howard agreed (by telephone) to a settlement date during the week of October 20. The owner confirmed that in a follow up letter to Howard on October 9. In that letter the owner asked Howard to inform him "if there is anything else he could do to ensure that closing is completed during the week of October 20."[3] That same day, Howard ordered a title search to be performed by October 20, 2003. The title search was not completed until October 31, 2003, however. There is no evidence that arrangements could not have been made for the title search to be completed by the week of October 20.

7. The week of October 20, 2003 passed without any word from the buyers or their attorney. Ultimately, on October 30, the owner instructed his realtor to declare the Agreement null and void. On November 4, after learning of this, Howard immediately advised Gray, the owner, that the buyers were ready, willing, and able to perform. At trial, however, Howard admitted that he had not prepared any documents for settlement, nor had he received any documents from the lender as of November 4.

[3] October 9, 2003 letter at A-191.

8. The buyers brought this specific performance action on November 5, 2003. The Court of Chancery dismissed the buyers' claim on the grounds that the buyers were twice in breach of the contract and had not proven their entitlement to specific performance by clear and convincing evidence. The Court entered final judgment in favor of the owner, from which the buyers have appealed.

9. The buyers advance two claims of error on appeal. First, they contend that the Court of Chancery erred by considering parol evidence to determine a new settlement date. Second, they claim that the Court erred in concluding that the buyers were not ready, willing, and able to perform their part of the Agreement.

10. This Court reviews *de novo* a trial court's use of parol evidence in contract interpretation, because the question presented is one of law.[4] The parol evidence rule bars "evidence of additional terms to a written contract, when that contract is a complete integration of the agreement of the parties."[5] Parol evidence may not be used to interpret a contract or search for the parties' intentions where

[4] *Honeywell Int'l Inc. v. Air Prod. & Chem., Inc*., 872 A.2d 944, 950 (Del. 2005).

[5] *Teeven v. Kearns*, No. 93L-04-032, 1993 WL 1626514, at *3 (Del. Super. Ct. Dec. 3, 1993), *citing Husband (P.J.O.) v. Wife (L.O.)*, 418 A.2d 994, 996 (Del. 1980).

the contract is clear and unambiguous on its face.[6] On the other hand, parol evidence is admissible to resolve a contractual term that is ambiguous.[7]

11. Here, the trial court found that the omission from the addendum of a new settlement date and the absence of any reference to the "time is of the essence" clause in the Agreement, coupled with the parties' continuing negotiations over a new settlement date, created an ambiguity. Ambiguity in a contract must be resolved against the drafter.[8] The buyers' argument that parol evidence was improperly considered in interpreting the contract fails because they drafted the addendum containing the ambiguity. Because the addendum was ambiguous on its face, the Court of Chancery correctly considered extrinsic evidence to determine the contracting parties' intent.

12. Where a trial court's interpretation of a contract is based on factual findings extrinsic to the contract or inferences drawn from those findings, this Court will defer to the trial court's findings so long as they are supported by the

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[6] *Teeven*, 1993 WL 1626514, at *3, *citing Pellaton v. Bank of New York*, 592 A.2d 473, 478 (Del. 1991).

[7] *Eagle Industries, Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997) ("When the provisions in controversy are fairly susceptible of different interpretations or may have two or more different meanings, there is ambiguity. Then the interpreting court must look beyond the language of the contract to ascertain the parties' intentions.").

[8] *Hudson v. D & V Mason Contractors, Inc*., 252 A.2d 166, 168 (Del. Super. Ct. 1969).

record and are the product of an orderly or logical deductive process.[9] The buyers contend that the only proper construction of the addendum is that it operated as a waiver of the "time is of the essence" clause because it specified no new closing date. As a consequence (the buyers argue), they were entitled to a reasonable period of time in which to perform their obligations under the contract,[10] and the Court of Chancery erred in limiting the (extended) settlement date to the week of October 20, 2003.

13. The Court of Chancery did not abuse its discretion in concluding that the "time is of the essence" clause was not waived, because there was no contract language or extrinsic evidence supportive of an intent to waive that provision. Moreover, the contract explicitly allowed a reasonable extension of time for surveys and preparation of documents, and the seller had acceded to a 42-day extension to the buyers. That extension, the trial court found, was reasonable, yet the buyers failed to perform within that extended period.[11]

14. The Court of Chancery found as fact that, after signing the addendum, the parties had agreed to the week of October 20, 2003 as the new closing date.

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[9] *Honeywell*, 872 A.2d at 950, *citing Klair v. Reese*, 531 A.2d 219 (Del. 1987).

[10] *Bryan v. Moore*, 863 A.2d 258, 261 (Del. Ch. 2004) (If time is not of the essence in a contract, the court will allow a reasonable time to perform.).

[11] A thirty-day extension has been held a reasonable amount of time to perform when time was not of the essence. *Bryan*, 863 A.2d at 261.

That finding was based on conversations and correspondence between the owner and the buyers' attorney, all of which are supported by the record. Therefore, the Court of Chancery did not err in concluding that the buyers' failure to perform by October 20, 2003 exceeded the reasonable grace period found to have been agreed to by the parties.

15. This Court reviews a trial court's grant or denial of specific performance for abuse of discretion,[12] because specific performance is a matter of grace that rests in the sound discretion of the court.[13] To merit an award of specific performance, a party must prove that "he has a valid contract to purchase real property and that he is ready, willing, and able to perform his obligations under the contract."[14] Specific performance will not be granted to a party who is in default of a material obligation under the contract, unless that party is excused from performance of that obligation.[15] The party seeking specific performance has the burden of proving entitlement by clear and convincing evidence.[16]

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[12] *Behrens v. Behrens*, 829 A.2d 935, No. 12, 2003, 2003 WL 21730131, at *2 (Del. July 24, 2003).

[13] *Safe Harbor Fishing Club v. Safe Harbor Realty Co.*, 107 A.2d 635, 638 (Del. Ch. 1953).

[14] *Bryan*, 863 A.2d at 260.

[15] *Safe Harbor*, 107 A.2d at 637.

[16] *In re IBP, Inc. Shareholders Litigation*, 789 A.2d 14, 31 (Del. Ch. 2001).

16. The Court of Chancery's determination that the buyers failed to establish their entitlement to specific performance by clear and convincing evidence is supported by the record. The Court of Chancery found that the Agreement (as modified by the addendum) was a valid and enforceable contract, and that the buyers had not proven that they were ready, willing and able to proceed to settlement by the agreed-upon extended date.

17. Specifically, the Court of Chancery determined that: (1) time remained of the essence and the buyers were aware of that; (2) the buyers breached the financing condition in the contract, and had actively concealed that fact from the owner; and that (3) although the buyers knew they would be unable to meet the settlement deadline (because they lacked financing), they drafted an ambiguous addendum that they later attempted to use in an effort to avoid the effect of the "time is of the essence" clause. Because specific performance will not be granted to a party in breach of the agreement sought to be enforced, those factual findings amply support the Court's denial of specific performance.

18. Finally, the Court of Chancery found that the buyers were not ready to proceed to settlement on October 20, and indeed were unprepared to do so even by November 4, 2003. That failure to perform was not excused, the trial court found, because the title search could have been performed on time, and (if the buyers' attorney had moved more expeditiously) the settlement and financial documents

could have been prepared by the extended settlement date. Because these findings are supported by the record, the Court of Chancery did not abuse its discretion in denying specific relief to the buyers.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Court of Chancery is **AFFIRMED.**

BY THE COURT:

/s/ Jack B. Jacobs
Justice