NO. COA09-880

NORTH CAROLINA COURT OF APPEALS

Filed: 17 August 2010

CROSLAND ARDREY WOODS, LLC
Plaintiff,

v. Mecklenburg County
No. 08 CVS 12240

BEAZER HOMES CORPORATION,
Defendant.

Appeal by Defendant from Judgment and Order entered 10 March 2009 by Judge Robert P. Johnston in Superior Court, Mecklenburg County. Heard in the Court of Appeals 14 January 2010.

Parker Poe Adams and Bernstein LLP, by John W. Francisco, for Plaintiff-Appellee.

Hunton & Williams LLP, by Kenneth D. Bell, John D. Burns, and William M. Flynn, for Defendant-Appellant.

STEPHENS, Judge.

I. Factual Background and Procedural History

This case arises out of the development, sale, and ownership of certain real property located in Ardrey Woods, a residential subdivision in Mecklenburg County, North Carolina. Crosland Ardrey Woods, LLC ("Crosland" or "Seller") is a land developer, and Beazer Homes Corporation ("Beazer" or "Builder") is in the business of building and selling single-family homes. On 26 April 2005, Beazer entered into a written contract to purchase lots ("the contract") in Ardrey Woods, which was being developed by Crosland. The

general terms of this contract provided that Crosland would subdivide its Ardrey Woods acreage and perform certain land development services, and Beazer would purchase all of the lots developed by Crosland in several phases. The contract provided that Crosland would convey fee simple and marketable title to the Ardrey Woods lots to Beazer over time.

Under the contract, Beazer was required to secure its performance obligations by depositing earnest money with Crosland in the total amount of $1.3 million: $650,000 in cash and $650,000 in the form of an irrevocable and unconditional letter of credit ("the earnest money"). In the event of an uncured default by Crosland of any of its obligations as seller and developer under the contract, section 13(b) provided that Beazer,

> as its sole and exclusive remedy either: (i) seek specific performance of Seller's obligations; (ii) proceed with the purchase of Lots and waive Seller's default; or (iii) declare this Contract null and void and receive a return of the Earnest Money whereupon Builder shall be released of any further obligation to purchase Lots hereunder.

Crosland's remedies for a default by Beazer were addressed in section 13(a) of the contract, which provided as follows:

> [13(a)(1)] If Builder fails to close on the Lots within the time frames set forth in this Contract, . . . and if Builder has not cured such default within five (5) days of notice thereof, then Seller shall be entitled to retain the cash portion of the Earnest Money and may draw upon the Letter of Credit and retain the proceeds thereof as liquidated damages as a result of Builder's default. The parties agree that the damages to Seller as a result of Builder's default would be difficult if not impossible to measure and that the liquidated damages set forth in the prior

> sentence are a reasonable estimate of the damages Seller may suffer on account of Builder's breach. In addition, Seller may terminate this Contract.
>
> (2) Except as set forth in Section 13(a)(1) above, if Builder defaults under any other provision of this Contract, Seller shall notify Builder of such default. If Builder has not cured such default within the time specified elsewhere in this Contract for Builder's receipt of notice thereof, then Builder shall be deemed in default under this Contract and Seller may retain the cash portion of the Earnest Money and draw upon the Letter of Credit and retain the proceeds thereof as liquidated damages. The parties hereby acknowledge that the actual damages suffered by Seller on account of Builder's default would be difficult if not impossible to measure and that the liquidated damages set forth in the previous sentence are a reasonable estimate of the damages Seller may suffer on account of Builder's breach. In addition, Seller may terminate this Contract. If such default cannot be reasonably cured within such ten (10) day period, then Builder shall have such additional time (not to exceed an additional 30 days) as is reasonably necessary for Builder to effect a cure so long as Builder is diligently working towards a cure. Notwithstanding the above, if Builder defaults in any of its indemnification or hold harmless obligations under Section 12(k), 15(h) or 15(n) of this Contract, then Seller may, in addition to retaining the Earnest Money, pursue all remedies available at law or in equity against Builder as a result of such breach.

The contract further provided that in the event Beazer decided to not build a home on any lot purchased from Crosland, then Beazer would not attempt to sell such lot to third-party builders without first obtaining Crosland's permission to do so. Section 15(a) of the contract provided that:

> Builder may not assign this Contract and its respective rights and obligations hereunder

> without Seller's prior written consent, in its sole discretion . . . In addition, Builder covenants not to sell any Lots closed on by Builder under this Contract to a builder or other party that intends to construct a house thereon without the Seller's prior written consent, which consent may be withheld in Seller's sole discretion. If Builder breaches this covenant, Builder shall be deemed in default under this Contract. Seller may not assign this Contract and its respective rights and obligations hereunder without Builder's prior written consent[.]

In May 2006, Beazer closed on 20 lots and was to close on additional lots each quarter in accordance with a "take-down schedule" specified in the contract. After Beazer's purchase of the initial 20 lots, Beazer purchased 72 additional lots, and the parties closed on the purchase of each of these lots. Beazer built and sold houses on 65 of the 92 lots Beazer had purchased from Crosland, leaving 27 of the purchased lots unbuilt upon and unsold. In May 2007, Beazer did not purchase additional lots. On 31 May and 10 September 2007, Crosland notified Beazer by letter that Beazer was in default of the contract for its failure to close on additional lots as required by the take-down schedule in the parties' contract. On 10 January 2008, Crosland again notified Beazer by letter that its failure to purchase and "take down" additional lots constituted a breach of the contract. By its letter, Crosland elected to "terminate the Contract and retain the Earnest Money as liquidated damages in accordance with its right to do so as set forth in Section 13(a)."

In or about May 2008, Beazer contracted to sell the remaining 27 lots it had purchased from Crosland to Brentwood Homes, Inc.

("Brentwood") at a discounted price 25-30% below the price at which Crosland was marketing the 216 lots in Ardrey Woods that Crosland retained as a result of Beazer's breach. Brentwood informed Crosland of its contract with Beazer by letter on 23 May 2008. By letter dated 27 May 2008, Crosland asserted that Beazer's proposed transfer of the lots would violate section 15(a) of the contract, that Crosland denied its consent to the sales, and that Beazer was "in breach of . . . the Contract." Crosland's letter also demanded that Beazer cease and desist from selling the 27 lots to anyone.

On 29 May 2008, Crosland filed the complaint which forms the basis for this matter and a Notice of *Lis Pendens*. In its judgment and order entered 10 March 2009, the trial court granted summary judgment for Crosland and issued an injunction against Beazer. The trial court ordered Beazer "to immediately cease and desist from attempting to sell or from selling any of the 27 Lots to Brentwood Homes Corporation, or from otherwise assigning or transferring its possessory or ownership interest and rights to any of those 27 Lots to Brentwood Homes Corporation." In addition, the trial court enjoined Beazer from

> (1) assigning the Contract and its respective rights and obligations thereunder without Crosland's prior written consent, in its sole discretion; and/or (2) selling any of the 27 Lots at issue in this action to a builder or other party that intends to construct a house thereon without Crosland's prior written consent, which consent may be withheld in Crosland's sole discretion.

From the trial court's judgment and order, Beazer appeals.

II. Discussion

Our Court reviews a trial court's order allowing summary judgment *de novo*. *Builders Mut. Ins. Co. v. N. Main Constr., Ltd.*, 361 N.C. 85, 88, 637 S.E.2d 528, 530 (2006). "Summary judgment is appropriate when 'there is no genuine issue as to any material fact' and 'any party is entitled to a judgment as a matter of law.'" *Id.* (quoting N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005)).

A. Contract Interpretation

> As in all cases of contract interpretation, it is the duty of this Court to ascertain the intention of the parties at the time the contract was executed. In most cases when the intention of the parties is ambiguous the question of what the parties intended is best left for the jury. However, in cases where the language used is clear and unambiguous, construction is a matter of law for the court. In those cases, the court's only duty is to determine the legal effect of the language used and to enforce the agreement as written.

Computer Sales Int'l., Inc. v. Forsyth Mem'l Hosp., Inc., 112 N.C. App. 633, 634-35, 436 S.E.2d 263, 264-65 (1993).

Beazer argues that the trial court incorrectly interpreted the parties' contract to provide for a remedy of injunctive relief in addition to the only remedies expressly set out in the contract for Beazer's default: liquidated damages and termination of the contract. Beazer argues the court should not modify the bargain reached by the parties as described in the remedies provision of the contract.[1] Beazer contends the remedies provision of the

[1] "[N]o court should strike down a reasonable liquidated damage agreement based on foresight that has proved on hindsight to have contained an inaccurate estimation of the probable loss." *Coastal Leasing Corp. v. T-Bar S Corp.*, 128 N.C. App. 379, 383, 496 S.E.2d 795, 798 (1998) (quoting 3A Hawkland and Miller, Uniform Commercial Code Services § 2A-504:02 (1993)).

contract clearly shows the parties' consensual estimated allocation of risk: "The parties agree that the damages to [Crosland] as a result of [Beazer's] default would be difficult if not impossible to measure and that the liquidated damages are a reasonable estimate of the damages [Crosland] may suffer on account of [Beazer's] breach."

Specifically, Beazer contends that section 13(a) of the parties' contract limited the remedies available to Crosland in the event of a breach by Beazer, and that Crosland's exclusive remedies are retention of the $1,300,000 earnest money as liquidated damages and termination of the contract. Beazer points out that Section 13(a)(2) of the contract expressly provides for additional remedies only with respect to breaches of three identified covenants: section 12(k), which provides for Beazer's sediment control obligations; section 15(h), which provides that Beazer shall be liable for brokerage fees incurred by Beazer; and section 15(n), which details Beazer's responsibilities for property damage or personal injury, mechanic's liens, claims by homebuyers from Beazer, and maintenance of insurance (collectively, "the Indemnification and Insurance covenants"). In the event of a breach of the Indemnification and Insurance covenants, the contract provides that "Seller may, in addition to retaining the Earnest Money, pursue all remedies available at law or in equity against Builder as a result of such breach." Crosland did not assert a breach of the Indemnification and Insurance covenants, and thus, Beazer contends Crosland's remedies are limited to retention of the

earnest money and termination of the contract.

We note that Crosland employs a similar argument in support of its contention that its remedies are *not* limited to retention of the earnest money and termination of the contract. Crosland compares the language of section 13(b), which sets out Beazer's remedies in the event of a breach by Crosland, to the language of section 13(a). Pursuant to section 13(b) of the contract, in the event of Crosland's default, Beazer "may as its *sole and exclusive* remedy" seek specific performance of Crosland's obligations, proceed with the purchase of the lots, or terminate the contract and have the earnest money returned. (Emphasis added). Crosland argues that because the parties included the phrase, "sole and exclusive remedy," to set out the remedies available for Beazer, the exclusion of this phrase to describe Crosland's remedies under the contract evidences the parties' intent to not limit Crosland's remedies to those expressly written.

We conclude that the parties' contract did not limit Crosland's remedies to liquidated damages and contract termination. Our conclusion is supported by the decision of our Supreme Court in *U-Haul Co. of North Carolina, Inc. v. Jones*, 269 N.C. 284, 152 S.E.2d 65 (1967). In *U-Haul*, the contract between U-Haul and the dealer, Jones, provided that either party could terminate the contract upon violation of any of the promises or conditions therein,

> with the exception that the Dealer warrants, covenants and agrees that, within the geographical limits of the county of his place of business, he will not represent or render

> any service in any capacity for any other persons, firm or corporation engaged in the trailer rental business for the duration of the then existing telephone directory listing, plus a period of one year from the termination of such telephone directory listing. In addition, upon violation by Dealer of the covenants contained in this paragraph, Dealer promises and agrees to pay to U-Haul Co. the sum of Five Hundred ($500.00) Dollars as liquidated damages, and not as a penalty.

U-Haul, 269 N.C. at 285, 152 S.E.2d at 66. Upon breach by Jones, U-Haul terminated the contract. *Id.* Thereafter, Jones represented other persons, firms, or corporations engaged in the trailer rental business in violation of the non-compete section of the parties' contract. *Id.* U-Haul filed suit and was awarded $500.00 in liquidated damages by the trial court. *Id.* at 286, 152 S.E.2d at 67. In addition, Jones was enjoined from engaging in the trailer rental business until further orders of the court. *Id.*

On appeal, the Supreme Court affirmed the trial court's judgment, noting: "Defendant's contention that plaintiff is not entitled to injunctive relief because the contract provision for liquidated damages provides an adequate remedy at law is untenable." *Id.* at 287, 152 S.E.2d at 67.

> The mere insertion in the contract of a clause describing the sum to be recovered for a breach as liquidated damages, but which were not intended to be payable in return for the privilege of doing the acts forbidden by the contract, will not exclude the equitable remedy, and is regarded as put there for the purpose of settling the damages if there should be a suit and recovery for a breach. There may also be an action in the nature of a bill in equity, for what substantially would be a specific enforcement of the contract and restraining any further violation of it.

Id. at 287, 152 S.E.2d 67-68 (internal citations and quotation marks omitted).

Beazer contends that injunctive relief, as a remedy, was excluded from the contract, and therefore, the trial court rewrote the terms of the contract by granting a remedy that the contract excluded. It is well established that a court may not rewrite the terms of the parties' contract. *See Weyerhaeuser Co. v. Carolina Power & Light Co.*, 257 N.C. 717, 719, 127 S.E.2d 539, 541 (1962) ("[T]he court, under the guise of constructions, cannot reject what the parties inserted or insert what the parties elected to omit."). We disagree, however, with Beazer's contention that the trial court here rewrote Beazer's contract with Crosland.

In the present case, like *U-Haul*, Beazer agreed that Crosland would keep the earnest money as liquidated damages in the event of a breach and neither party expressly provided for an equitable remedy for the type of breach at issue. However, in neither case did the parties expressly state that an equitable remedy was *not* available. Beazer argues *U-Haul* is distinguishable from the present case because *U-Haul* dealt with a temporary injunction while this case deals with a permanent injunction. This is a distinction without a difference. Nothing expressly written in the parties' contract prevents Crosland from retaining both the earnest money, as a remedy for Beazer's first breach under section 13(a) for failing to take down the 124 additional lots, and from obtaining an injunction to prevent Beazer from engaging in further violations of the agreement by continuing to sell lots to a third party without

Crosland's consent, that is, "doing the acts forbidden by the contract." *U-Haul*, 269 N.C. at 287, 152 S.E.2d at 67-68 (internal citation and quotation marks omitted). Based on the Supreme Court's holding in *U-Haul*, North Carolina principles of contract construction support equitable relief, in addition to liquidated damages and contract termination, for Beazer's second breach under section 15(a) of the contract. Beazer's argument is overruled.

B. Equitable Relief

Beazer also argues that even if the contract allows for equitable relief, Crosland is not entitled to injunctive relief. "A plaintiff is entitled to injunctive relief when there is no adequate remedy at law and irreparable harm will result if the injunction is not granted." *Vest v. Easley*, 145 N.C. App. 70, 76, 549 S.E.2d 568, 574 (2001). Beazer maintains any loss Crosland may suffer due to Beazer's selling the unbuilt lots to a third party would not result in irreparable harm to Crosland, and Crosland's remedy at law would be monetary damages. *See Whalehead Properties v. Coastland Corp.*, 299 N.C. 270, 282-83, 261 S.E.2d 899, 907-08 (1980) (Monetary damages are considered a legal remedy.). Beazer contends Crosland's damages could be calculated by comparing the total sales proceeds ultimately received by Crosland to the price payable by Beazer under the contract, plus incidental damages. We disagree.

A party may show that it will suffer "irreparable harm" for which it has no adequate remedy at law in the event where, like here, monetary damages are difficult to calculate and cannot be

ascertained with certainty. *See, e.g., A.E.P. Industries, Inc. v. McClure*, 308 N.C. 393, 406-07, 302 S.E.2d 754, 762 (1983) ("[O]ne factor used in determining the adequacy of a remedy at law for money damages is the difficulty and uncertainty in determining the amount of damages to be awarded for defendant's breach.").

> To constitute irreparable injury it is not essential that it be shown that the injury is beyond the possibility of repair or possible compensation in damages, but that the injury is one to which the complainant should not be required to submit or the other party permitted to inflict, and is of such continuous and frequent recurrence that no reasonable redress can be had in a court of law.

Hooks v. Int'l Speedways, Inc., 263 N.C. 686, 691, 140 S.E.2d 387, 391 (1965) (internal quotation marks omitted). "An injury is irreparable, within the law of injunctions, where it is of a 'peculiar nature, so that compensation in money cannot atone for it.'" *Hodge v. North Carolina Dept. of Transp.*, 137 N.C. App. 247, 252, 528 S.E.2d 22, 26 (2000), *rev'd on other grounds*, 352 N.C. 664, 535 S.E.2d 32 (2000) (internal quotation marks omitted).

In this case, it is apparent that had the trial court not granted Crosland's injunction, Crosland would have suffered irreparable injury without an adequate remedy at law. The damages calculation offered by Beazer does not accurately reflect the damages that would arise in the event that Beazer was allowed to sell the 27 unbuilt lots to a third party at values much lower than their fair market price. Rather, the damage calculation offered by Beazer equals the monetary damages arising from Beazer's first breach of contract, not taking down the 124 additional lots.

Crosland retained the earnest money as liquidated damages in lieu of actual damages for Beazer's first breach.

It is the second breach by Beazer, arising out of Beazer's attempt to sell the 27 unbuilt lots on the market to a third party, that will result in irreparable harm to Crosland. Specifically, Crosland's ability to sell the 124 additional lots, which Beazer failed to take down, will be damaged if Beazer is able to sell the 27 unbuilt lots well below market value to a third party. The unbuilt lots will take up a significant amount of potential demand in the current market for undeveloped lots in the community, thus interfering with, if not destroying, Crosland's ability to fairly price and sell any of the 124 additional lots for an unknown length of time. Additionally, Beazer's intended sale of the 27 unbuilt lots at prices significantly lower than the fair market price will diminish the property values for Crosland and the 65 other homeowners in the community, in a way that cannot be currently known or calculated, but is certain to happen. Crosland will also be injured by Beazer's intended sale as this will bring a new and unapproved third-party builder into the community and will result in a loss of quality control and uniformity in the community, to the detriment of overall home values.

It is difficult, if not impossible, to calculate the monetary damage that could result to the community, and to Crosland's continued ownership interests in the community, in the event that a third party starts constructing houses on the 27 unbuilt lots. Accordingly, the trial court did not err by granting Crosland's

motion for summary judgment and permanently enjoining Beazer from further breaching its contractual obligations, when it is impossible to determine at this time how much monetary damage will result from Beazer's breach.

C. Double Compensation

Beazer next argues the earnest money is Crosland's compensation for Beazer's breach and awarding Crosland the injunction, in effect, will result in double compensation for Crosland. In *Handex of the Carolinas, Inc. v. County of Haywood*, 168 N.C. App. 1, 5, 607 S.E.2d 25, 28 (2005), a contractor entered into a contract with Haywood County to extend an existing landfill. *Id.* at 21-22, 607 S.E.2d at 37. The parties' contract provided that the contractor would have 180 days to achieve "Substantial Completion" of the landfill and 45 days after "Substantial Completion" to achieve "Final Completion." *Id.* at 6, 607 S.E.2d at 28-29. The contract stated that if the contractor did not complete the job within the prescribed time limitation, the County would retain liquidated damages for each day the contractor was late in reaching "Substantial Completion" or "Final Completion." *Id.* at 6, 607 S.E.2d at 29. The contractor completed the work 103 days late. *Id.* At trial, the jury awarded the County $16,000 in liquidated damages and $8,880 for extra engineering fees. *Id.* at 20, 607 S.E.2d at 37. The trial court ruled "the County was not entitled to the engineering fees in addition to liquidated damages." *Id.* This Court affirmed the trial court's ruling, holding that

> [o]ur Supreme Court has long held that liquidated damages, when not a penalty, may be

> awarded as both parties' measure of the estimated, actual damages that would arise in the event of a breach. Therefore, while liquidated damages may still be awarded even if no actual damages arise from the breach, they cannot be awarded in addition to actual damages because this would constitute double recovery.

Id. at 20-21, 607 S.E.2d at 37 (internal citation omitted). This Court further stated that the liquidated damages provision was "a substitute for any actual damages suffered by the County due to Handex's delay." *Id.* at 21, 607 S.E.2d 37. We held "that any liquidated damages found under the contract cannot be increased by actual damages proved at trial." *Id.* at 22, 607 S.E.2d at 38. *Handex* is distinguishable.

In the present case, the parties' contract provided Crosland would retain the earnest money as liquidated damages if Beazer failed to take down the 124 additional lots. The liquidated damages provision operated as a complete substitute for any actual damages that Crosland may have suffered when Beazer failed to take down the 124 additional lots. Unlike in *Handex*, however, the parties' contract did not specify a "substitute" remedy in the event Beazer attempted to sell 27 unbuilt lots to a third party without Crosland's consent. Accordingly, Crosland is entitled to injunctive relief to compensate Crosland for Beazer's breach of section 15(a).

The injunctive relief is distinct from, and in addition to, Crosland's retention of earnest money, and there is no "double compensation" for Crosland. The earnest money compensated Crosland for Beazer's first breach of section 13(a), and the injunctive

relief compensated Crosland for Beazer's second breach, violating section 15(a). We thus hold that the trial court properly granted Crosland injunctive relief for Beazer's breach of section 15(a) of the contract.

D. Unlawful Restraint on the Alienation of Real Property

Contrary to Beazer's contention, we conclude that the permanent injunction, prohibiting Beazer from conveying 27 unbuilt lots, is not an unlawful restraint on the alienation of real property.

Restraints on the alienation of real property are void *per se* under North Carolina law, with a few exceptions. *See Crockett v. First Fed. Sav. & Loan Ass'n.*, 289 N.C. 620, 624, 224 S.E.2d 580, 584 (1976) (stating charitable grants or trusts and a woman's separate estate are exceptions to the void *per se* rule); *see also Smith v. Mitchell*, 301 N.C. 58, 61, 269 S.E.2d 608, 610 (1980) ("Certain such restrictions on alienability, if defined as preemptive rights and if carefully limited in duration and price, are not void per se and will be enforced if reasonable."); *Williams v. McPherson*, 216 N.C. 565, 566, 5 S.E.2d 830, 831 (1939) ("The principle that a restraint upon alienation is contrary to public policy and void is well recognized and applied in numerous decisions of this Court."). Beazer argues the trial court should not have entered the injunction because section 15(a) does not fall under any of the void *per se* exceptions, and therefore, section 15(a) is void *per se*. *See Lee v. Oates*, 171 N.C. 717, 724, 88 S.E. 889, 892 (1916). Crosland argues that even though the injunction

may have the effect of "chilling" demand on the lots owned by Beazer, the injunction does not improperly prevent the free alienation of real property.

In *Crockett*, *supra*, the plaintiffs ("borrowers") brought an action to permanently restrain the defendant ("lender") from enforcing the "due-on-sale" clause in the parties' loan, which would accelerate the total amount of principal due upon the borrower's attempted sale of the property. *Crockett*, 289 N.C. at 620-22, 224 S.E.2d at 581-82. The borrowers desired to convey the real estate to prospective purchasers, who would expressly assume the outstanding debt under the note. *Id.* at 622, 224 S.E.2d at 582. The borrowers wanted to avoid the effect of the "due-on-sale" clause by obtaining the lender's approval for the sale of the property to the prospective purchasers. *Id.* The lender would only consent to the sale and agree not to enforce the "due-on-sale" clause if the prospective purchasers would agree to pay a significantly higher interest rate on the loan. *Id.* The borrowers argued that this tactic by the lender amounted to an unlawful restraint on alienation of the property. *Id.* at 622, 224 S.E.2d at 582-83.

According to our Supreme Court in *Crockett*, the "due-on-sale" clause was not a direct restraint on the alienation of real property, which would be wrongful under North Carolina law. *Id.* at 625-26, 224 S.E.2d at 584-85. The Court acknowledged that the "due-on-sale" clause might have the practical effect of "chilling" demand by *indirectly* preventing the free alienation of the

property. However, the Supreme Court noted that any indirect effect could be avoided by the borrowers paying off the loan, as they originally agreed to do. *Id.* at 625, 224 S.E.2d at 584. By paying off the loan, the borrowers could have complied with the clause and ensured that upon alienation, the purchasers would not lose the property by an exercise of the lender's right to foreclosure. *Id.* The lender was not attempting to extract an extra "penalty" from the borrowers by requiring the loan to be paid off in full. *Id.* If the bank received the loan payment in full, then there would be no "freezing of assets" or discouragement of property improvement or transfer. *Id.*

The present case is analogous to *Crockett* because Beazer, like the borrowers in *Crockett*, was in control of alienating the property. Any *indirect* restraint on alienation could be avoided if Beazer built a home on the unbuilt lots, as Beazer agreed to do in the contract. Once Beazer built a home, Beazer would be free to sell the lot to a third party without Crosland retaining any legal right to or control over the sale, exercising an option of first refusal, or exercising a forfeiture of the realty on account of such action. While Beazer would not be forced to construct homes on all of the unbuilt lots, when Beazer voluntarily opted not to build, Beazer would be permitted only to (1) obtain Crosland's permission to sell the unbuilt lots, or (2) "get in line" behind Crosland with respect to selling vacant lots in the community. Accordingly, the injunction is not a direct restraint on Beazer's ability to alienate the property. Therefore, the injunction

entered by the trial court does not operate as an unlawful restraint on Beazer's ability to alienate the property.

E. Contract Termination

Beazer lastly argues that the terms of section 15(a) should not be enforced because the contract was no longer in effect at the time of the alleged breach. Beazer contends Beazer was discharged of Beazer's *executory* obligations under section 15(a), upon termination of the contract by Crosland. Accordingly, Crosland's subsequent attempt to enjoin Beazer from selling the 27 lots to Brentwood, by way of this action, should fail as a matter of law. We disagree.

Beazer's contractual obligations under section 15(a) were not eliminated by Crosland's termination of the contract. Regardless of termination, Beazer must still comply with the executed, not executory, portions of the contract.

> An "executory contract" is one in which a party binds himself to do or not to do a particular thing *[i]n the future*. When all future performances have occurred and there is no outstanding promise calling for fulfillment by either party, the contract is no longer "executory", but is "executed."

Whitt v. Whitt, 32 N.C. App. 125, 129-30, 230 S.E.2d 793, 796 (1977). According to the clear language of the contract on 10 January 2008, the date of termination by Crosland, Beazer's optional contractual right to take down the 124 additional lots was "executory." However, Beazer's obligation to honor section 15(a), the covenant to refrain from selling unbuilt lots Beazer had already purchased, was binding and in existence based on Beazer's

prior performance. Therefore, section 15(a) of the contract was executed, not executory, as to the lots that had already been closed upon.

One party's termination of a contract does not terminate all the rights and obligations set forth in that contract. *See U-Haul*, 269 N.C. 284, 152 S.E.2d 65. In *U-Haul*, the plaintiffs brought an action to restrain defendant from breaching a covenant not to compete. *Id.* at 284, 152 S.E.2d at 66. The franchise agreement in *U-Haul* provided that the agreement may be terminated by either party "upon violation by the opposite party of any of the promises or conditions." *Id.* at 284, 152 S.E.2d at 65. When the franchisee failed and refused to make payments required by the contract, the plaintiff-franchisor terminated the contract and attempted to retain the liquidated damages. *Id.* at 285-86, 152 S.E.2d at 66-67. As in the present case, after that termination, the franchisee continued to engage in additional, wrongful actions in violation of the covenant not to compete. *Id.* The plaintiff-franchisor then filed a lawsuit to retain the liquidated damages and to also obtain equitable relief in the form of an injunction to prevent the defendant from continuing to violate the covenant. *Id.* at 285-86, 152 S.E.2d at 67. According to our Supreme Court, the covenant prohibiting continuing competition by the franchisee was enforceable even after termination of the agreement by the franchisor. *Id.* at 287, 152 S.E.2d at 68.

In the present case, the covenant at issue prohibiting Beazer from selling the unbuilt lots to a third party is valid and

enforceable even after termination by Crosland. As in *U-Haul*, Crosland still has the right to enforce the covenant. Crosland's right to enforce section 15(a) of the option contract became executed upon the closing for each purchased lot and survived the closing of each purchased lot. Crosland's termination of executory rights under the contract did not terminate Crosland's executed rights arising from the closing on the unbuilt lots. Accordingly, Crosland did not discharge Beazer from all of Beazer's contractual obligations upon termination of the contract.

III. Conclusion

For the foregoing reasons, we affirm the trial court's judgment and order entered on 10 March 2009.

AFFIRMED.

Judges CALABRIA and GEER concur.

Report per Rule 30(e).