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Re: Brandywine River Properties, LLC v. Maffett
C.A. No. 2655-VCN
Date Submitted: November 28, 2007

Dear Counsel:

On September 5, 2007, the Court directed specific performance of the Option Agreement and the Agreement of Sale concerning the warehouse property located at 1330 East 12th Street in Wilmington, Delaware (the "Property").¹ Its goal was to fashion a remedy that would place the parties in substantially the same position as if they had performed in accordance with Plaintiff Brandywine River

¹ *Brandywine River Props., LLC v. Maffett*, C.A. No. 2655-VCN (Sept. 5, 2007) (TRANSCRIPT).

Properties, LLC's ("BRP") exercise on April 29, 2006, of the option to purchase the Property. Accordingly, the parties were instructed to confer with each other, in light of the Court's decision, to work out certain financial details and to submit a form of order implementing the Court's decision. The parties have come to an understanding on all of the outstanding issues, except for the question of which one of them bears responsibility for repairing or replacing the dilapidated roof on the warehouse located on the Property.² This is the Court's resolution of that issue following an evidentiary hearing on November 28, 2007.

I. FACTUAL BACKGROUND

BRP, as tenant, took possession of the Property on May 1, 2004. At the time, it was negotiating a series of documents concerning the Property with its owners, Defendants Carol and Sidney Maffett (the "Maffetts"): a two-year

² The warehouse has a flat ethylene-propylene-diene-terpolymer ("EPDM") roofing system—essentially sheets of a rubber material, sealed at the seams, and laid over a substratum of steel roof decking. The owners installed a "new" roof in 1994, but at least some of the materials had been manufactured some time earlier and, thus, an "outdated" technology was used. Over the years, the outer membrane of the system had been breached in a number of places resulting in leaks inside the warehouse. Despite numerous attempts to patch the outer layer of the roof, water is "in the system." That water vaporizes in warm temperatures resulting in pressure on the seams that will eventually cause additional breaches in the outer membrane thereby leading to more leaks inside the warehouse. In addition, water "ponding" in the system leads to rusting of the underlying roof decking in spots. Thus, given a life expectancy of ten to fifteen years for the EPDM system, the roof was nearing the end of its usable life in 2004. A new roof is estimated to cost between six and eight dollars per square foot; the area of the warehouse is in excess of 40,000 square feet.

commercial lease agreement,³ an option to purchase,⁴ and an agreement of sale⁵ if the option was exercised.⁶ The Property was generally in need of considerable repair, and the dilapidated and deteriorating condition of the roof was well known to the parties. Indeed, responsibility for the roof was specifically part of the negotiations between the parties, although the net result of those negotiations is not clear.

A. *The Documents Negotiated by the Parties*

The parties addressed the issue of liability for the roof in both the Lease Agreement and the Agreement of Sale. Under the lease, BRP assumed “responsibility for the roof” in exchange for a two month rent abatement and waiver of the security deposit on the Property.⁷ Both parties agree that BRP was responsible for maintaining the roof during the term of its tenancy. The nature of BRP’s “responsibility,” however, is disputed.

BRP contends that its responsibility was limited to patching roof leaks. To that end, it made three patch repairs to the roof between May 2004 and November

³ Plaintiff’s Trial Exhibit (“PX”) 1.

⁴ PX 2.

⁵ *See id.*

⁶ The documents were negotiated simultaneously and executed on or about August 1, 2004. All parties were represented by counsel throughout the negotiations.

⁷ Rent was \$8,333.33 per month. The amount of the security deposit was \$8,334.

2006 at a cost of approximately \$9,000. Given the age and condition of the roof on the Property, patching leaks was a losing proposition; therefore, BRP did not consider itself obligated to continue sinking money into repairing the roof despite having received a substantial credit from the Maffetts to do just that.⁸

The Maffetts, on the other hand, contend that not only did BRP obligate itself to repair the leaks, it committed to “completely do” (i.e., replace) the roof. During the negotiations, BRP sent a memorandum, dated July 12, 2004, to the Maffetts detailing a number of problems at the warehouse and seeking reimbursement or credits for certain repairs and renovations, including the roof. Specifically, with respect to the roof, BRP stated:

Despite [the Maffetts’] best efforts, continued patching of the roof is just not working. There are at least two, possibly three, places in the roof where the steel has become rusted and ‘spongy’ due to continued water incursion. There are currently more than 20 different leaks into the warehouse. Werner’s paperboard packaged product has gotten wet due to those leaks. I have a roofer that is willing to let me purchase the materials required from one of Werner’s customers who is a roofing wholesaler and charge me only labor to *completely do* the roof. If I am able to accomplish a greater savings than currently

⁸ BRP also incurred the expense, as part of its responsibility for dealing with the leaks, of moving around the materials in the warehouse in order to avoid the leaks. BRP did not notify the Maffetts that it was no longer repairing the roof, nor did it refund the unused portion of the credit to the Maffetts.

estimated, the price will be lowered proportionately. Not to exceed estimate for complete roof: \$25,000.00.⁹

Thus, the Maffetts granted BRP credits of \$25,000 under the Lease Agreement to enable BRP to take care of the roof problem at the Property.

At the same time the lease was negotiated, however, the parties also were negotiating the Agreement of Sale in the event that BRP exercised the option to purchase the Property. Under that agreement, the Maffetts warranted that the roof of the Property would be “free from leaks at the time of final settlement.” Mr. Maffett claims that he never promised BRP a new roof for the property and did not intend the warranty regarding roof leaks to obligate him to provide that. Indeed, the Property was otherwise being sold in “as-is” condition and (presumably) was priced accordingly.¹⁰ Nevertheless, there is a tension between the Lease Agreement and the Agreement of Sale with respect to which party is ultimately liable for the roof.

⁹ Defendants’ Evidentiary Hearing Exhibit (“Maffett”) 1 (underlining in original) (other emphasis added).

¹⁰ Despite the fact that there are separate documents governing the various aspects of this transaction, in essence, the parties were negotiating a single lease/purchase agreement in the summer of 2004, and probably did not fully appreciate the possible interplay between the Lease Agreement and the Agreement of Sale with respect to apportioning liability for repairing or replacing the roof. It may well be that the parties expected that BRP would take the Property “as-is” in 2004, would purchase it by April 2006, and would be responsible for all of the maintenance, including structural repairs or replacements. The documents (as drafted), however, do not necessarily bear that result out.

B. *The Current Condition of the Roof*

Both parties presented credible expert testimony about the current condition of the roof and whether it could be repaired. Both experts agreed that the roof was in its last stage of life, but they differed in their opinion as to how much life the roof had left. BRP's expert, Leonard Bafundo, opined that the roof was in such poor condition that repair would be a pointless expenditure and that the roof ought to be replaced immediately. He noted fifteen to twenty different leaks during his inspection of the roof and significant damage to the underlying steel roof decking. In addition, he speculated that there was a significant amount of "water in the system" with a consequence that merely repairing the roof could never remedy the problem; repairs would offer only a fleeting solution, at best. Moreover, he estimated that the necessary repairs would cost nearly \$90,000¹¹ while replacement of the roof would cost around \$230,000. Given the substantial problems with the roof, Mr. Bafundo concluded that the former expenditure would be a waste of money.

The Maffetts' expert, Steven Paris, essentially agreed with Mr. Bafundo that the roof should be replaced sooner rather than later, but he expressed the view that

¹¹ This number apparently would be the cost of resealing all of the seams.

the roof could possibly last an additional three years (at the most) with proper repairs. Mr. Paris noted only two leaks during his inspection, though he admitted that Mr. Bafundo was able to investigate the interior of the warehouse more thoroughly. Given the two leaks he noted during his inspection, he estimated that the leaks could be repaired for approximately \$1,800.

II. THE PARTIES' ARGUMENTS

BRP argues that the Agreement of Sale is the controlling document governing the parties' relationship at this point. Under the Agreement of Sale, the Maffetts warranted that the roof would be free from leaks at the time of final settlement. In order to make good on that warranty, given the current condition of the roof, the Maffetts must replace the roof because repairs simply will not ensure that it is "free from leaks" for any meaningful period of time.

The Maffetts disagree and present a twofold argument to avoid liability for replacing the roof. First, they argue that under the Agreement of Sale, the warranty that the roof would be free from leaks means just that—no leaks (i.e. breaches in the outer membrane of the roof) on the date of the settlement, not a new roof that would be free from leaks for another ten years. Thus, to the extent they have any liability to BRP for the roof on the Property, it is limited strictly to repairing

breaches in the outer membrane where water could enter the roofing system. Second, the Maffetts argue that BRP assumed responsibility for replacing the roof under the lease, and, in fact, they gave BRP \$25,000, as requested, to do just that. BRP never fulfilled its promise to “completely do” the roof and, instead, pocketed most of the \$25,000 credit and allowed the roof to continue deteriorating throughout the tenancy and over the past eighteen months since it exercised the option to purchase the Property. Moreover, insofar as they are required to repair leaks under the Agreement of Sale, BRP exacerbated the current problems by shirking its responsibility during the lease.

III. ANALYSIS

The document governing the parties’ relationship at this point is the Agreement of Sale through which the Maffetts have warranted that the roof would be free from leaks at the time of final settlement. The Court has previously noted that it assumes a hypothetical final settlement date of July 1, 2006. Thus, the Court is confronted with three issues to resolve this dispute. First, the Court must determine the meaning of “free from leaks at time of final settlement” under the Agreement of Sale. Second, the Court must determine the condition of the roof on

July 1, 2006, the date of the hypothetical final settlement. Third, the Court must determine an appropriate remedy in light of the parties' agreement.

A. *The Maffetts' Obligation Under the Agreement of Sale*

The goal of contract interpretation is to ascertain the shared intent of the parties. Delaware adheres to the objective theory of contracts.¹² Thus, where contract language is "clear and unambiguous," the ordinary meaning of the words chosen by the parties will generally establish their intent.¹³ Where the terms of a contract are subject to different meanings, however, the contract is ambiguous, and the Court may examine extrinsic evidence to ascertain the parties' shared intent.

The Agreement of Sale is ambiguous with respect to the meaning of "free from leaks at the time of final settlement." One reasonable interpretation, articulated by BRP, is that the Maffetts are obligated to provide a new roof to fulfill the warranty because any repairs they might make to the roof would not render it free from leaks given the likelihood that additional leaks will develop because of the age of the roofing system and the water already in the system.

Another reasonable interpretation, set forth by the Maffetts, is that they need only

¹² See, e.g., *Seidensticker v. Gasparilla Inn, Inc.*, 2007 WL 4054473, at *2 (Del. Ch. Nov. 8, 2007); *West Willow-Bay Court, LLC v. Robino-Bay Court, LLC*, 2007 WL 3317551, at *9 n.81 (Del. Ch. Nov. 2, 2007).

¹³ See generally *West Willow-Bay Court, LLC*, 2007 WL 3317551, at *9.

deliver the Property at final settlement with a roof that literally is free from leaks—in other words, a patched roof that does not have any openings through which water could enter the roofing system and the warehouse on the date of final settlement. Additionally, it is not clear from the face of the contract for how long the roof must remain leak free—it could be that BRP is entitled to some reasonable period of time without leaks or it could be that BRP is not entitled to any guarantee of a leak-free roof after final settlement. The Court, therefore, must look to extrinsic evidence to determine the parties' shared intent with respect to the meaning of the phrase "free from leaks at the time of final settlement."

The Court concludes that in warranting the roof to be free from leaks at the time of final settlement, the Maffetts assumed only a minimal duty to deliver the Property under the Agreement of Sale with a roof that did not have holes (or separated seams or other breaches in the outer membrane) through which water could enter the roofing system. The roof on the warehouse was in poor condition and nearly in need of replacement in 2004 when the parties negotiated this deal. Both parties were well aware of the condition of the roof, and they negotiated their agreement accordingly. In light of BRP's July 2004 memorandum to the Maffetts and its offer to "completely do the roof" for \$25,000, which the Maffetts accepted,

BRP assumed some obligation under its lease to attempt to deal with the roof problem. Despite BRP's efforts during its tenancy, leaks still existed in the roof on July 1, 2006.

Although BRP's memorandum written in advance to its receipt of a credit from the Maffetts under the Lease Agreement suggested that it would "completely do" the roof, the Lease Agreement only recites BRP's accepting responsibility for the roof during the term of its tenancy. In addition, the interim lease agreement, executed in July 2006, refers to BRP's continuing repair obligation.¹⁴ The parties' understanding in July 2006 that BRP had only undertaken a repair obligation is persuasive evidence that BRP had not undertaken to replace the roof. Thus, it is unreasonable to interpret the Lease Agreement as reflecting the parties' understanding that BRP would be installing a new roof. This conclusion is reinforced by the terms of the Agreement of Sale which, as noted, include a warranty from the Maffetts that the roof be "free from leaks." If the parties had anticipated a new roof, such a warranty would seem to be of little purpose. Instead, it indicates that the Maffetts had some residual responsibility for the roof.

¹⁴ PX 7. Paragraph 18 of the Lease Summary Page provides: "Tenant continues to assume responsibility for roof repairs."

There is, however, nothing in the extrinsic evidence or the terms of their various agreements to indicate that the Maffetts were obligated to put a new roof on the warehouse. Given the parties' understanding that the roof was in bad condition and the lack of any extrinsic evidence that would suggest the parties were contemplating a replacement of the roof by the Maffetts, the better interpretation of the Agreement of Sale is that a roof free from leaks means just that: that the roof as of the date of settlement (or a theoretical settlement date of July 1, 2006) would be free from leaks as a result of patching, not replacement. To find otherwise, would unreasonably subject the Maffetts to a liability which they neither assumed nor had any reason to believe would be imposed upon them. On the other hand, they did assume in the controlling Agreement of Sale the obligation to provide a roof free from leaks. The scope of that effort must now be assessed.

B. *The Condition of the Roof on July 1, 2006*

The dilapidated condition of the roof has changed little since BRP took possession of the Property in 2004. Perhaps more water has entered the roofing system causing additional damage to the roof decking below the outer membrane, but the roof is not in substantially worse condition today, at least with respect to breaches in the outer membrane, than it has been over the course of the past three

and one-half years.¹⁵ Indeed, BRP reported “twenty different leaks” in its July 2004 memorandum, and its expert witness reported between fifteen and twenty leaks during his recent inspection in November 2007. The Court therefore concludes that on July 1, 2006, there were twenty leaks that needed patching.¹⁶

The Maffetts must compensate BRP for those.

C. *BRP’s Credit for Patching the Roof under the Maffetts’ Warranty in the Agreement of Sale*

Mr. Paris stated that it would take one day of labor and cost approximately \$1,800 to patch the two leaks that he noted during his inspection of the roof. Mr. Bafundo agreed that his price for patching the roof, on a per diem basis, was “not far off” the estimate given by Mr. Paris.¹⁷ The Court, therefore, concludes that an award of \$1,000 per leak is appropriate compensation for the patching of the roof.¹⁸ Thus, the Court finds that a reasonable projection of the cost of patching

¹⁵ Without doubt, there has been some deterioration with the passage of time.

¹⁶ Thus, it makes little, if any, difference whether the pertinent date is April 30, 2006, July 1, 2006, or now.

¹⁷ Although it may be somewhat simplistic, it would generally be fair to describe the debate between the experts over patching as a choice between applying sealant (1) to the area of the leak or (2) to all of the seams.

¹⁸ Resealing of all seams has not been shown to be necessary to satisfy the Maffetts’ warranty.

the twenty leaks in the roof to be \$20,000. BRP is entitled to a credit in that amount.¹⁹

IV. CONCLUSION

For the foregoing reasons, the Court concludes that BRP is to receive from the Maffetts a credit, at the time of settlement, in the amount of \$20,000.

With this issue resolved, the parties can now close on the sale of the Property. Closing will occur on or before December 17, 2007. Counsel shall submit a form of order implementing the Court's decisions by 5:00 p.m. on December 6, 2007.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K

¹⁹ The Maffetts gave BRP a \$25,000 credit (if one considers both rent abatement and waiver of a security deposit) under the Lease Agreement for taking "responsibility" for the roof. BRP spent only approximately \$9,050 of that credit for work on the roof of the Property during its tenancy. Thus, it can be argued BRP has a surplus of \$15,950 remaining from the Maffetts for maintaining the roof under the lease. This argument ultimately fails, however, because the Agreement of Sale and the Lease Agreement are separate contracts. The Maffetts have the obligation under the Agreement of Sale to deliver the Property at final settlement with a roof that is free from leaks. Indeed, they conceded as much at the evidentiary hearing.