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COURT OF CHANCERY
OF THE
STATE OF DELAWARE

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Re: West Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC, et al.
C.A. No. 2742-VCN
Date Submitted: December 6, 2007

Dear Counsel:

Defendants Robino-Bay Court Plaza, LLC and Robino-Bay Court Pad, LLC (collectively, "Robino") have moved, pursuant to Supreme Court Rule 42, for certification of an interlocutory appeal of the Court's Order of November 20, 2007, that implemented its Memorandum Opinion of November 2, 2007.[1] Plaintiff West

[1] *West Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC*, 2007 WL 3317551 (Del. Ch. Nov. 2, 2007).

Willow-Bay Court, LLC ("West Willow") opposes certification. For the following reasons, an order denying Robino's motion will be entered.

Robino and West Willow entered into the Real Property Purchase Agreement, as amended (the "Agreement"), for the transfer of a pad site at a shopping center in Dover, Delaware from Robino to West Willow. The Agreement contemplated that West Willow would lease the pad site to Wawa, Inc. and Wawa would develop a convenience store with gasoline service on the site. Another tenant in the shopping center, however, had a preexisting lease with Robino that arguably could be interpreted to require that tenant's consent before West Willow and Wawa could develop the property as they intended.

The Memorandum Opinion, responding to cross-motions for summary judgment, addressed whether or not the Agreement unconditionally obligated Robino to secure that tenant's consent. The question of liability and the question of damages had been bifurcated. Arguing that the Agreement unconditionally obligated West Willow to obtain necessary or desirable third-party consents, West Willow sought a declaration that Robino had breached the Agreement by not obtaining the third-party tenant's consent. Robino, in turn, argued that it was obligated only to exercise its "best efforts" to obtain that consent, a standard Robino

asserted that it had met. Each party contended in the first instance that the Agreement unambiguously mandated its favored result; each also argued in the alternative that in the event the Court found the Agreement to be ambiguous, the extrinsic evidence recommended its favored result as well. The Order granted West Willow's motion for summary judgment in part, holding that Robino had breached the Agreement, which, the Court concluded, was not ambiguous.[2] Trial of damages, expected to take one day, has been scheduled for March 17, 2008.

Because the Court found the Agreement to be clear and unambiguous, it declined to consider extrinsic evidence. Interpreting the Agreement's plain language, the Court determined that Robino had contracted to secure unconditionally the third-party tenant's consent, an obligation Robino had failed to meet. Robino seeks appellate review of the Court's conclusion that the Agreement is not ambiguous and, as a consequence, its decision not to consider extrinsic evidence.

Robino contends that the Delaware Supreme Court's recent opinion in *Appriva Shareholder Litigation Company, LLC v. EV3, Inc.*[3] has bearing on this

[2] The Order also denied the motion in part, by declaring that specific performance was not a suitable remedy.
[3] 2007 WL 3208783 (Del. Nov. 1, 2007).

Court's decision and that resolution of the proper application and meaning of *Appriva* will clarify an issue of general importance to the administration of justice. In *Appriva*, an opinion issued a day before this Court's Memorandum Opinion, the Supreme Court recited settled Delaware contract law: "If there is more than one reasonable interpretation of a disputed contract term, consideration of extrinsic evidence is required . . . ."[4] The Court also quoted from *Klair v. Reese*:[5]

> In interpreting an integrated agreement, attention is directed to the meaning of the written terms in light of the surrounding circumstances. As long as the court is aware that doubts and uncertainty lurk in the meaning and application of agreed language, it will consider testimony pertaining to antecedent agreements, communications and other factors which bear on the issue. The primary search is for the common meaning of the parties, not a meaning imposed on them by law.[6]

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[4] *Id.* at *10.
[5] 531 A.2d 219 (Del. 1987).
[6] *Appriva*, 2007 WL 320873, at *11 (quoting *Klair*, 531 A.2d at 223). Summarizing *Klair*, the Court continued:

> In *Klair*, this Court concluded that the trial court had erroneously interpreted the meaning of a contract term without considering the extrinsic evidence bearing on the issue. The interpretation in *Klair* that excluded consideration of extrinsic evidence was reversed on appeal, because the meaning that the trial court had found "clear" was only one of two reasonable interpretations. In deciding a motion to dismiss, the trial court cannot choose between two differing reasonable interpretations of ambiguous provisions.

Id. (footnotes and quotations omitted).

Robino asserts that, by invoking *Klair*, the Supreme Court arguably altered the law regarding when it is appropriate for a court to consider extrinsic evidence.

Supreme Court Rule 42 sets forth the standards for certification of interlocutory appeals by a trial court. Under the Rule, no interlocutory appeal may be certified unless the order from which appeal is to be taken (1) determines a substantial issue, (2) establishes a legal right, and (3) meets at least one of the criteria enumerated in Supreme Court Rule 42(b)(i)-(v). Usually, the Supreme Court accepts interlocutory appeals only where the circumstances are "extraordinary" or "exceptional."[7]

In the Memorandum Opinion and implementing Order, the Court determined a substantial issue and established a legal right.[8] Robino's motion for certification raises the question of whether the Court's decision meets one of the enumerated criteria in Supreme Court Rule 42(b)(i)-(v). Robino urges that *Appriva* has raised questions as to the proper role of extrinsic evidence in contract interpretation that

[7] DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY §14-4, at 14-6 (2007).

[8] A court resolves a substantial issue where it resolves at least one substantive legal issue; a court establishes a legal right when it determines an essential issue regarding the merits of a case. *In re Kent County Adequate Public Facilities Ordinances Litig.*, 2007 WL 2875204, at *2 (Del. Ch. Sept. 26, 2007). The Court resolved a substantial legal issue and established a legal right in holding that the Agreement was not ambiguous and that Robino had breached the Agreement, a determination allowing the litigation to proceed to the damages phase.

are of general importance to the administration of justice and the Court's interlocutory decision therefore meets the requirements of Supreme Court Rule 42(b)(i) & (v).[9] The Court disagrees.

Supreme Court Rule 42(b)(i) incorporates by reference the criteria listed in Supreme Court Rule 41, namely, that the trial court's interlocutory opinion (1) involves an original question of law of "first instance in this State"; (2) involves an issue on which "the trial courts are conflicting upon the question of law"; or (3) involves a question of law relating "to the constitutionality, construction or application" of a Delaware statute that has not been settled by the Supreme Court. None of these criteria is met here. No issue of first impression exists. There is no conflict among trial courts. Delaware contract law in this context is well settled—Delaware follows the objective theory of contract.[10] Further, no Delaware statute is implicated.

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[9] Robino does not rely upon subsections (ii), (iii), or (iv) of Supreme Court Rule 42.

[10] *Progressive Int'l Corp. v. E.I. du Pont de Nemours & Co.*, 2002 WL 1558382, at *7 (Del. Ch. July 9, 2002). Under that theory, the language the parties chose to order their relationship governs so long as it is not ambiguous. Thus, courts may consult extrinsic evidence in aid of contract interpretation only if the contract language is ambiguous. *E.g.*, *NAMA Holdings v. World Mkt. Ctr. Venture, LLC*, 2007 WL 2088851, at *6 (Del. Ch. July 20, 2007). A contract is ambiguous when the provision or provisions in dispute are reasonably susceptible of different interpretations. *O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 288 (Del. 2001).

The Court notes that *Appriva* likely did not alter this rubric. Robino focuses on the attention *Appriva* pays to *Klair*, a case the Supreme Court had disapproved of in *Eagle Industries v.*

Alternatively, Supreme Court Rule 42(b)(v) provides for certification of an interlocutory order where review of that "order may terminate the litigation or may otherwise serve considerations of justice." Robino has similarly failed to persuade the Court that these grounds exist in this case. A review of this Court's interlocutory order would not end the litigation or otherwise serve considerations of

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DeVilbiss Heath Care, Inc., 702 A.2d 1228 (Del. 1997). In *Eagle Industries*, the Supreme Court sharply limited *Klair*:

> In *Klair v. Reese*, this Court reversed the Court of Chancery and held that the court should consider extrinsic evidence. Unfortunately, certain language in the Court's opinion is overbroad on the issue of when extrinsic evidence should be considered. To the extent that such language may be read to be broader than, or at variance with, the principles set forth in this opinion, it is disapproved. The *Klair* opinion should be construed narrowly to conform with this opinion.

Id. at 1233 n.7. This Court has already considered the possible implications of *Appriva* and concluded that the Supreme Court's opinion did not alter Delaware law relating to the interpretation of contracts or portend a shift away from the objective theory of contract. In *Seidensticker v. Gaspirilla Inn, Inc.*, 2007 WL 4054473 (Del. Ch. Nov. 8, 2007), the Chancellor wrote:

> The Supreme Court's recent decision in *Appriva Shareholder Litigation Co. v. EV3, Inc.* does not set forth a new or different standard. There, the Supreme Court held that a trial court may not, on a Rule 12(b)(6) motion to dismiss, choose between two differing reasonable interpretations of ambiguous provisions. Where a contract term is objectively clear and there is only one reasonable interpretation, it is well within the province of this Court to rule as a matter of law. The Supreme Court may have quoted language suggesting a subjective theory of contracts from *Klair v. Reese*, but *Appriva* does not rely on a subjective theory to reach its holding. Because of this, and because the Supreme Court has—in an earlier opinion neither distinguished nor cited in *Appriva*—expressly disapproved of the overbroad language of *Klair*, I cannot determine that Appriva alters Delaware's stalwart and longstanding adherence to an objective theory of contracts.

Id. at *3.

justice. If Robino is successful on appeal, the matter would likely be remanded to this Court for a determination of whether Robino had used "best efforts" under the Agreement. If Robino is unsuccessful, a determination of damages will be necessary. Moreover, there is no indication that the pending damages phase in this Court will be unduly burdensome, and no other "considerations of justice" have been identified by Robino.

At core, Robino argues that the Court's decision was wrong because it believes that the Court should have considered and relied upon the extrinsic evidence. No novel or unsettled law, however, informed the Court's reading of the Agreement. That a trial court may have been (or was) wrong is not the standard for interlocutory review.[11]

[11] All interlocutory orders resulting from "wrong" decisions will generate some unnecessary costs and inefficiencies, to be suffered not only by the parties but also by the trial court. Indeed, if liability is improperly imposed in a setting, as here, where liability and damages have been bifurcated, the ensuing damages trial and its associated costs will be for naught. Adopting Robino's view would almost always allow for interlocutory appeal from the liability phase in cases where liability and damages are addressed separately. The interlocutory appeal process does not function to cure this problem. Indeed, piecemeal appeals, which would result if a different approach were taken, can be hugely expensive and unhelpful as well. *See, e.g.*, *E.I. du Pont de Nemours & Co. v. Allstate Ins. Co.*, 686 A.2d 1015, 1016 (Del. 1997) ("At the same time, the Court warned that interlocutory appeals interrupted the progress of litigation and are counter-productive if they delay the final resolution of the case. The decision to grant interlocutory review is discretionary and highly case-specific. The goal, in all events, is to facilitate the orderly disposition of claims without inadvertently promoting a piecemeal approach to litigation.") (citation omitted).

Accordingly, Robino has not satisfied Supreme Court Rule 42; an order denying certification of interlocutory appeal will be entered.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K