IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

JOHN W. MCDOWELL, JR.,	)	
	)	
PLAINTIFF,	)	
	)	
v.	)	C.A. No. 1420-MA
	)	
NORMAN H. GREENFIELD, JR., And NORMAN H. GREENFIELD, JR., trading as ALLIED ASSOCIATES, LTD.	)	
	)	
DEFENDANT.	)	

MASTER'S REPORT

Date Submitted: January 3, 2007
Draft Report: July 6, 2007
Final Report: April 30, 2008

William B. Wilgus, Esquire, 221 East Dupont Highway, Millsboro, DE 19966, Attorney for the Petitioner

And

Steven Schwartz, Esquire, Schwartz & Schwartz, 1140 South State Street, Dover, DE 19901, Attorney for the Respondent

AYVAZIAN, Master

On June 15, 2005, Plaintiff John W. McDowell, Jr. filed a complaint for specific performance of a Lease Purchase Agreement ("Agreement") against Defendant Norman H. Greenfield, Jr., trading as Allied Associates, Inc., the record owner of real estate identified as 331 North Bradford Street, Dover, Delaware ("the property"). The defendant counterclaimed for possession of the property and a money judgment for unpaid rents and late fees. After a trial on January 3, 2007, and the submission of post-trial legal memoranda, I issued a draft report.

In my draft report I reviewed the record to determine whether the plaintiff had demonstrated by clear and convincing evidence that he had a valid contract to purchase real property, and that he had been ready, willing, and able to perform his contractual obligations. *See Demarie v. Neff*, 2005 WL 89403 (Del. Ch. Jan. 12, 2005). I found that the crux of the dispute between the parties was whether the plaintiff had tendered sufficient funds on the date scheduled for settlement. The defendant contended that the funds were insufficient, and that he was owed an additional $2,000 for the sale of the property. I determined that the written Agreement was ambiguous as to the purpose of an initial non-refundable $2,000 payment. Since the defendant had drafted the Agreement, I interpreted the ambiguous provision against him, rejecting defendant's argument that the initial non-

refundable $2,000 payment was only consideration for the purchase option, and was not meant to serve as a down payment. As a result, I found that the plaintiff had tendered sufficient funds and, thus, had been ready, willing and able to purchase the property on April 22, 2005, the date scheduled for settlement.

I also found that the balance of the equities favored the plaintiff because he had made substantial improvements to the house, garage and grounds with the expectation that he was going to own the property. Denying the plaintiff specific performance of his contract, I concluded, "would work and inequitable forfeiture of [his] reasonable expectations and interests." *Dittrick v. Chalfant*, 2007 WL 1039548, mem. op. at *6 (Del. Ch. April 4, 2007). For the defendant, on the other hand, the property had been an investment that he planned to sell after two years before proceeding to his next real estate transaction. Forcing the defendant to fulfill an agreement to sell an investment property would impose no special hardship on him. Therefore, I concluded that the plaintiff was entitled to specific performance of the Agreement.

The defendant has taken to exception to the draft report on five grounds. He argues: (1) if the Agreement is ambiguous, it is ambiguous with respect to an essential term, i.e., the purchase price, and thus specific

performance is unavailable to the plaintiff; (2) even if an Agreement is unambiguous with respect to an essential term, specific performance is unavailable if judicial discretion is required to determine what is "reasonable" for the parties; (3) the Agreement is unambiguous; (4) the draft report erroneously analyzed the extrinsic evidence; and (5) the draft report fails to provide the defendant with certain payments to which he is entitled even under the Court's interpretation of the Agreement. After consideration of the briefs of the parties on the exceptions, together with the record in this matter, this is my final report, modified as set forth below.

Facts and Background

In early 2003, the plaintiff wanted to purchase a home for himself. He had been renting a house in Harrington, Delaware for four years, but had been unable to convince the owner to sell it to him. When the plaintiff read an advertisement about the property, he made an appointment to meet the defendant at 331 North Bradford Street. As soon as the plaintiff saw the property – a semi-detached brick house containing three bedrooms and one bath – he liked it and told the defendant he would purchase it. The defendant said, "fine," but he told the plaintiff that he could not sell the property for two years for tax purposes.[1] Although the plaintiff had wanted

[1] Trial Transcript at 7-8.

to buy the property at that time, he agreed to a two-year lease purchase arrangement because "for tax purposes, that's the way [the defendant] did things."[2]

The defendant prepared a document entitled "LEASE PURCHASE AGREEMENT" that he and the plaintiff signed on March 19, 2003. The Agreement provides in pertinent part:

> LEASE PURCHASE AGREEMENT FOR 331 NORTH BRADFORD STREET, DELAWARE. FULL SALES PRICE OF $92,500 (NINTY-TWO [SIC] THOUSAND FIVE HUNDRED DOLLARS).
>
> I, JOHN W. MCDOWELL, JR., AGREE TO BEGIN PURCHASING THIS PROPERTY ON OR BEFORE TWO YEARS AND THREE MONTHS FROM THE DATE OF COMMENCEMENT OF MY LEASE WITH ALLIED ASSOCIATES, LTD. I HAVE PAID A NON-REFUNDABLE $2,000 (TWO THOUSAND DOLLARS) FOR A PURCHASE OPTION TO THIS PROPERTY. I UNDERSTAND THIS IS NOT A RENT DEPOSIT.
>
> I UNDERSTAND THAT ALLIED ASSOCIATES, LTD. HAS REQUIRED A TWO-YEAR LEASE FOR THIS AGREEMENT AT A MONTHLY RENT OF $790 (SEVEN HUNDRED NINTY [SIC] DOLLARS). ALLIED ASSOCIATES, LTD. HAS AGREED TO A RENT REBATE OF $395 (THREE HUNDRED NINTY-FIVE [SIC] DOLLARS) FOR A PERIOD OF NOT MORE THAT [SIC] 24 (TWENTY-FOUR) MONTHS, IF PURCHASE PROCEEDS UNDER THE TERMS SET FORTH. NO REBATE IS TO BE GIVEN, NOR EXPECTED IF PURCHASE IS NOT MADE. ALLIED ASSOCIATES, LTD. WILL THEN COLLECT THE FULL RENT OF $790 PER MONTH. I UNDERSTAND THAT THIS REBATE IS TO BE USED EXCLUSIVELY FOR THE PRICE REDUCTION OF THIS PROPERTY AND IS NOT CONSIDERED A DOWNPAYMENT. ALLIED ASSOCIATES, LTD. FURTHER AGREES TO PAY $2,000 (TWO THOUSAND DOLLARS) TOWARDS ATTORNEY AND DOCUMENT FEES AT SETTLEMENT. IT IS UNDERSTOOD THAT THERE IS NO INTEREST ON THESE MONIES.[3]

[2] Trial Transcript at 8.
[3] Joint Exhibit No. 1.

On the same date, the parties signed a separate document entitled "LEASE AGREEMENT" ("Lease") that the defendant had prepared.[4] The Lease provided for a rental rate of $790 per month and a 12-month term starting April 1, 2003, with an option to renew on the date of termination or to continue occupancy on a month to month basis. On the day that the parties signed these documents, the plaintiff paid the defendant $2,790.[5]

The plaintiff moved into the property several weeks later. During the following two years, the plaintiff paid the defendant $790 at the start of each month, except July 2004, when he was in the hospital and unable to send a money order. Instead, plaintiff's mother wrote a check for his rent in the amount of $750, which she sent to the defendant.[6] A few days later when the plaintiff left the hospital, he sent defendant a money order for $40, the balance he owed for July's rent [7] During the two-year period, the plaintiff made substantial improvements to the property. He installed electric garage doors and new gutters, re-landscaped the property, replaced the roof and windows, and painted both the interior and exterior of the house. The plaintiff made these improvements because he intended to purchase the

[4] Joint Exhibit No. 9.
[5] Trial Transcript at 9.
[6] Joint Exhibit No. 12.
[7] Trial Transcript at 20, 47.

property, and he paid approximately $45,000 for these improvements, not including the cost of his own labor.

As the end of the two-year period approached, plaintiff sent the defendant some notes with his monthly checks to indicate that he still intended to purchase the property. The notes reflect that plaintiff's intention was for settlement to occur in May 2005.[8] The plaintiff, however, had miscounted the number of months he had paid rent. He had already made 25 payments to the defendant. Since the plaintiff was only entitled to a rent rebate for 24 months, his April 2005 payment of $790 was wholly attributable to rent, and the 90-day period during which he could exercise the option had begun to run on April 1, 2005. The plaintiff, therefore, decided to settle on the property in April rather than May.

The plaintiff attempted to contact the defendant about a settlement date, but without success. His attorney, William B. Wilgus, Esquire,[9] then sent both parties a letter dated April 18, 2005, scheduling settlement to take place on Friday, April 22, 2005, and enclosing a copy of the proposed

[8] Joint Exhibit No. 10: "Just a short note to recommend [sic] a May settlement. I'll be paying you off – settlement by mail. My Attorney William Wilgus 302 934-7777[.]" Joint Exhibit No. 11: "Please find enclosed my last payment, and will close on May 1, 2005."

[9] Wilgus represented the plaintiff at trial, and the parties submitted joint exhibits which included several letters written by Wilgus. However, defendant did not object to Wilgus's representation until after trial, when the defendant moved to strike the plaintiff's post-trial Reply Memorandum, claiming that Wilgus was "testifying" from his own recollection. I denied the motion, but stated that I would not consider any statement or argument in the Reply Memorandum to the extent that it did not accurately reflect the evidence presented at trial or was not a logical and reasonable inference drawn therefrom.

Settlement Statement for their review.[10] On April 21, 2005, the defendant called Wilgus and informed him that he had not received any paperwork and would not be able to settle the following day. The plaintiff appeared at his attorney's office on April 22, 2005, having borrowed funds in order to purchase the property.[11] The defendant did not appear for the scheduled settlement, and Wilgus sent the defendant another letter, dated April 22, 2005, enclosing additional copies of the settlement documents.[12] In his letter, Wilgus asked the defendant to take the documents to his attorney for review and stated that, upon receipt of the signed documents, Wilgus would forward an escrow check in the amount of $78,899.48 to the defendant. Wilgus sent two more letters to the defendant, the first one dated April 30, 2005, and the second one dated May 13, 2005, reminding the defendant to execute, acknowledge, and return the settlement documents.[13]

On May 25, 2005, the defendant telephoned the plaintiff's attorney. The substance of their conversation is in dispute. As described in the attorney's letter dated May 25, 2005,[14] during their conversation the defendant complained that he had been given insufficient notice of the closing, and requested that: (1) the settlement statement be pro-rated as of

[10] Joint Exhibit No. 2.
[11] According to the Settlement Statement, plaintiff's mother was his lender. Joint Exhibit No. 8.
[12] Joint Exhibit No. 3.
[13] Joint Exhibit Nos. 4 & 5.
[14] Joint Exhibit No. 6.

May 31, 2005; (2) plaintiff pay rent through May 31st at the rate of $790 per month; and (3) a new check be issued to replace the July 2004 check sent by plaintiff's mother, which the defendant had never cashed and now considered stale. The plaintiff, according to the letter, offered to replace the check but declined to make any adjustments to the settlement sheet because he, not the defendant, had the right to choose the settlement date, and a later date would give the defendant a windfall, i.e., approximately $1000 in additional rents. At trial, however, the defendant testified that the settlement sheet confused him; he knew there should have been more money.[15] During their conversation on May 25th, the defendant testified, he told Wilgus to correct the settlement sheet, and then he would sign it.

Defendant never signed the settlement sheet, prompting plaintiff to seek specific performance of the Agreement. Since May 1, 2005, plaintiff has been in possession of the property without paying rent, prompting defendant to counterclaim for possession of the property and a money judgment for unpaid rents and late fees. Each party also requests the costs of this action to be assessed against the other party.

Analysis of the Exceptions

A. Whether the Agreement is Ambiguous with respect to an Essential Term

[15] Trial Transcript at 67-70

Using the standard of an objectively reasonable third-party observer, I found the language of the Agreement not unmistakably clear as to the parties' intentions regarding the initial non-refundable $2,000 payment. *See Dittrick*, mem. op. at *4, s*upra*. Although the document recites that the $2,000 payment is for the purchase option, I found confusing the subsequent sentence supposedly clarifying that this payment is not a "rent deposit." Why did the document clarify that the payment is not a "rent deposit" and not further clarify that the payment is also not a down payment? The drafter used that very term in the next paragraph of the document where, in reference to the rent rebate of $395 per month, the Agreement explicitly states, "I [plaintiff] understand that this rebate is to be used exclusively for the price reduction of this property and is not considered a downpayment." In my draft report, I found that the Agreement's failure to clarify that the $2,000 payment was neither a "rent deposit" nor a "downpayment" rendered the Agreement ambiguous. In his exception, the defendant argues that my finding constitutes a finding of ambiguity with respect to the actual purchase price for the property to be paid by the plaintiff. Since price is an essential term in a contract for the sale of real property, the defendant argues that specific performance is unavailable where the Court has to supply an ambiguous but essential contract term.

My draft report, however, did not supply the purchase price. I did not have to supply that term because the parties had agreed on a purchase price for the property, that is, $92,500, as explicitly stated in the Agreement. What I had to determine was whether the plaintiff had been ready, willing and able to perform the contract on April 22, 2005, the date the plaintiff had scheduled the settlement. To do this, I had to determine whether the plaintiff had tendered sufficient funds to purchase the property at that time. Because I found the purpose of the initial non-refundable $2,000 payment to be ambiguous, I turned to extrinsic evidence to determine the parties' reasonable intentions at the time of the contract. *See id.* I concluded that the parties' reasonable expectations upon signing the Agreement were that the initial non-refundable $2,000 payment would function as a down payment to be applied toward the full sales price when the plaintiff exercised his option to purchase the property. My reasons for reaching this conclusion were: (1) the plaintiff neither requested nor needed the purchase option, but had to accept the lease purchase arrangement in order to purchase the property; (2) the plaintiff derived no benefit or advantage from this arrangement, while the defendant was presumably placed in a more favorable tax position; and (3) it was the plaintiff who bore the risk of losing $2,000 plus any rents he would have paid if he failed to exercise the purchase option. I also applied

the general rule of construction that favors the grantee or leasee in cases of deeds or leases whose granting language is ambiguous. *See Old Time Petroleum Co. v. Turcol*, 156 A. 501, 505 (Del. Ch. 1931).

In his Reply Memorandum of Law, the defendant now argues that the purchase price is not, in fact, $92,500. According to the defendant, because the plaintiff is seeking specific performance of the entire contract, the actual contract consideration is: $2,000 for the purchase option PLUS $92,500 for the property price PLUS 24X ($790 monthly rent LESS $395 monthly rent credit) LESS $2,000 credit for attorney and document fees.[16] Defendant's Reply Memorandum at *1. Thus, the defendant argues, the Court had to supply an ambiguous but essential term of the contract.

I supplied no term of the contract, essential or non-essential. It was the defendant who drafted the Agreement that states: "LEASE PURCHASE AGREEMENT FOR 331 NORTH BRADFORD STREET, DELAWARE. FULL SALES PRICE OF $92,500 (NINTY-TWO [SIC] THOURSAND FIVE HUNDRED DOLLARS)."[17] My decision recommending specific performance in this case was premised on the principle that the defendant, having drafted the written Agreement, must bear the consequences of ambiguous language employed therein. Accordingly, this exception is denied.

[16] If my calculations are correct, this equation yields $101,980.
[17] Joint Exhibit No. 1.

B. Use of Judicial Discretion to Determine What is "Reasonable"

The defendant takes exception to my use of extrinsic evidence to determine what he describes as the parties' "reasonable" intentions with respect to the contract price. In that vein, the defendant further argues that common sense dictates that he would not have taken a $2,000 purchase option from the plaintiff and, in exchange, given plaintiff both a $2,000 credit for attorney and document fees **and** a $2,000 credit against the purchase price; nor would plaintiff have reasonably expected the defendant to do so.

At the risk of repeating myself, it was not the contract price that I found to be ambiguous, since that essential term had already been agreed upon by the parties. Instead, it was the provision in the Agreement calling for an initial non-refundable $2,000 payment that I found fairly susceptible to different meanings because immediately thereafter was language clarifying that this payment was not a rent deposit. Elsewhere in the Agreement was language clarifying that the rent rebate was not a down payment, so if the drafter of the Agreement was capable of using the term "down payment" in one part of the Agreement, the drafter should have used the same term to clarify whether or not the initial non-refundable $2,000 payment would serve as a down payment.

The defendant cites *Mehiel v. Solo Cup, Co*., 2005 WL 1252348 (Del. Ch. May 13, 2005), in support of his argument that the Court should not turn to extrinsic evidence to determine the parties' "reasonable" intentions. Unlike the plaintiff in *Mehiel*, who unsuccessfully sought specific performance of an obligation to execute a "reasonable engagement letter," mem. op. at *8, *supra*, the plaintiff here is seeking specific performance of a written contract to purchase real property. And, unlike the Court in *Mehiel*, I am not being asked to "divine" the meaning of "reasonable" since that term is nowhere to be found in the pertinent portions of the Agreement. *Id.* Once I found the Agreement to be ambiguous as to the purpose of the initial non-refundable $2,000 payment, it was appropriate for me to consider the extrinsic evidence presented at trial.

The trial testimony on the issue was conflicting. The plaintiff testified that he understood that the $2,000 payment was not refundable and if he did not buy the house, he would not get it back, but he signed the contract with the understanding that the money would be deducted from the purchase price when it came time to settle.[18] The defendant, on the other hand, testified that the payment was the price of the purchase option, and that he had never given plaintiff any indication that the payment could be applied toward the

[18] Trial Transcript at 9-10, 36-38.

purchase price.[19] In my draft report I did not resolve the conflicting testimony; instead, I attempted to discern the intention of the parties "by presumptions arising in light of the facts and circumstances and by the use of common sense." *Lee Builders, Inc. v. Wells*, 92 A.2d 710, 714 (Del. Ch. 1952), *rev'd on other grounds*, 99 A.2d 620 (Del. 1953). The evidence shows that it was the plaintiff who: (1) had no choice but to acquiesce to the lease purchase arrangement if he wanted to purchase the property; (2) derived no benefit or advantage from this arrangement; and (3) risked losing $2,000 and any rents he would have paid if he failed to timely exercise the purchase option. In my draft report, therefore, I found that common sense dictates that the plaintiff would not have intended to pay valuable consideration for a purchase option he neither requested nor needed, nor would the defendant have reasonably expected a willing buyer like the plaintiff to pay more than the full sales price to accommodate the defendant's own financial stratagem. The defendant now argues that my conclusion is unreasonable because common sense dictates that he would not have taken a $2,000 purchase option from plaintiff and, in exchange, given him both a $2,000 credit for attorney and document fees and a $2,000 credit against the purchase price.

[19] Trial Transcript at 63-65.

The evidence shows that it was the defendant who: (1) insisted upon the two-year lease purchase arrangement; (2) bore no discernible financial risk if the purchase option was not exercised in a timely fashion because he would retain the property in addition to the non-refundable $2000 and rents paid by the plaintiff; and (3) would receive (presumably) favorable tax treatment if the option was timely exercised. If the parties' lease purchase arrangement had been less one-sided, the defendant's "common sense" argument might have carried more weight. Since it was not, this exception is must be denied.

C. The Agreement is Unambiguous

The defendant takes issue with my finding of ambiguity, arguing that a reasonable third party reading the document would understand that the initial non-refundable $2,000 payment was intended to provide the plaintiff with $2,000 in seller's help for attorney and document fees at settlement. According to the defendant, "[n]o reasonable person would expect that a $2,000 purchase option payment would create more than a $2,000 benefit – and so the failure of the Agreement to expressly negate a $4,000 benefit ($2,000 for seller's assistance plus $2,000 to apply to the purchase price) did not make the Agreement ambiguous." Defendant's Opening Memorandum of Law at *3. The defendant argues that a reasonable third party would

conclude that it was no coincidence that the option payment and the seller's assistance toward buyer's costs were both $2,000. The defendant further argues that if the identical dollar amounts were not conclusive, then the "plain meaning" of the last sentence of the second paragraph of the Agreement ("It is understood that there is no interest on these monies.") is that the option payment made two years earlier did not draw interest to be applied for the buyer's attorney and document fees at settlement. *Id.*

This argument, however, renders the Agreement even more ambiguous than before when the defendant claimed that the payment was consideration for the purchase option. If the initial non-refundable $2,000 payment was consideration for the purchase option, why was the payment to be refunded to the purchaser at settlement? If, as the defendant now argues, no interest was to accrue on this payment, was the initial non-refundable $2,000 payment intended to function as a two-year loan (without interest) to the defendant? Rather than persuading me to reconsider my finding, this argument further highlights the ambiguity of this provision.

The defendant also contends that language in the Agreement stating that the initial non-refundable $2,000 payment was not a "rent deposit" did not cloud the meaning of the document. According to the defendant, because the companion lease did not call for a security deposit, a reasonable

third party would understand the quoted language as meaning that the purchaser could not apply any portion of the $2,000 payment toward rental arrears accrued during the lease period if, for example, the attorney and document fees came to only $1,000. This argument, however, fails to persuade me that my finding was incorrect. I found the Agreement ambiguous because inconsistencies in the language used to clarify different portions of the document rendered the function of the initial non-refundable $2,000 payment anything but unmistakably clear. This exception must be denied.

D. The extrinsic evidence was erroneously analyzed

The defendant contends that I erroneously analyzed the extrinsic evidence when I found no evidence that the plaintiff had derived any benefit or advantage from the two-year option arrangement, leading me to conclude that the plaintiff would not have paid an additional $2,000 for such an option. The defendant argues that I disregarded the contract itself, which provided the plaintiff with a "substantial benefit" consisting of a $2,000 payment by the defendant toward the plaintiff's attorney and document fees. Defendant's Opening Memorandum of Law at *4. It was the plaintiff who has overreached, according to the defendant, by attempting to apply the $2,000 payment to the purchase price while keeping the $2,000 contribution

for attorney and document fees. I disagree, however, with the defendant's characterization of the $2,000 contribution for attorney and document fees at settlement as a "substantial benefit" to the plaintiff. In order to receive this so-called benefit, the plaintiff first had to make a non-refundable $2,000 payment to the defendant. From a reasonable person's point of view, this transaction would have been, at best, a "wash."

The record reveals that the Agreement came into existence only because the defendant insisted upon the lease purchase arrangement for his own tax purposes.[20] The plaintiff was forced to accept this arrangement because he wanted to purchase the property.[21] Yet it was the plaintiff who bore the entire financial risk inherent in the Agreement if he failed to go to settlement within the prescribed time period. Had unforeseen circumstances prevented the plaintiff from purchasing the property, the plaintiff would have had nothing to show for his money while the defendant would have received the entire rents ($790 per month) plus $2,000 for the temporary use of his property by plaintiff.

The evidence also reveals that the parties had had no prior dealings together before they signed the Agreement. The plaintiff, a retired disabled

[20] Trial Transcript at 8.
[21] Trial Transcript at 7-8.

veteran,[22] first met the defendant, who is in the real estate business,[23] when the plaintiff responded to the defendant's advertisement concerning the property.[24] It was the defendant who drafted the Agreement.[25] And it is the defendant who now seeks to regain possession of the property because the plaintiff viewed the initial non-refundable $2,000 payment as a down payment and, accordingly, deducted that amount from the full sales price in the Settlement Statement prepared for the April 22, 2005 closing.

In my draft report, I characterized the defendant as seeking a forfeiture based on the very language the defendant had drafted. *See Old Time Petroleum Co,*, 156 A. at 505. I applied to the Agreement the rule of construction announced in *Old Time Petroleum Co.* for cases of forfeiture, and found that the defendant had failed to make it unmistakably clear that the initial non-refundable $2,000 was not to be applied toward the full sales price at settlement. Therefore, I concluded that the defendant's refusal to sign, execute and return the settlement documents constituted a breach of the Agreement. The undisputed factual circumstances in which this Agreement arose confirm that the principle of *contra proferentem* should apply here. *See SI Management L.P. v. Wininger*, 707 A.2d 37, 42-43 (Del. Supr. 1998).

[22] Trial Transcript at 4.
[23] Trial Transcript at 8, 72.
[24] Trial Transcript at 5-6.
[25] Trial Transcript at 7-8.

Clearly the parties were on unequal footing with each other and, as the dominant party who drafted the Agreement, the defendant was responsible for making its terms clear. *See id.* It is the defendant, therefore, as the party who had control over the drafting of the contract terms, who must bear full responsibility for the consequence of those terms. *See id.*at 44. This exception is also denied.

E. Failure to Provide the Defendant with Payments to Which He is Entitled

The defendant complains that the draft report does not require the plaintiff to pay legal interest on the purchase price or rents, or provide for the balance of rents to be paid to the defendant, including those for July 2004. Nor does the draft report allow the defendant to be reimbursed for the property taxes he paid during the past several years. After considering the defendant's arguments, and the plaintiff's response thereto,[26] I have decided to modify my draft report.

In my draft report, I found that the plaintiff was ready, willing and able to perform his contractual obligations under the Agreement on April 22, 2005. Since I also found that the balance of equities favored the plaintiff, I

[26] Although I determined that -- under the principle of *contra proferentem* -- the defendant must bear the consequences of having drafted an ambiguous provision in the Agreement, I never found that the defendant had unclean hands, contrary to the plaintiff's assertion. While I found the lease purchase arrangement was entered into for the defendant's benefit, nothing in the record suggests "some sort of fraud or sharp practice" on the part of the defendant or that he purposely tried to deceive the plaintiff. *See Dittrick*, mem. op. at *5, fn. 18, *supra* (refusing to apply doctrine of unclean hands where the required element of unscrupulous practices and overreaching is not satisfied).

recommended specific performance of the contract. Despite having made such a recommendation, I failed to examine whether "equitable adjustments [we]re needed to restore the parties to the positions they would have occupied had the contract been lawfully performed to begin with." *Vaughan v. Creekside Homes, Inc.*, 1994 WL 586833 (Del. Ch. Oct. 7, 1994). My failure to do so was an oversight and, therefore, I will examine the issue now.

Although the plaintiff has enjoyed possession of the property since April 22, 2005, the plaintiff also would have been the record owner of the property, entitled to all its rents and profits, if the contract had been fully performed on that date. Therefore, the defendant is not entitled to any additional rents or late fees after April 22, 2005. On the other hand, if the contract had been fully performed on that date, the defendant would have received the net proceeds from the sale, and thereafter would have enjoyed the use of those proceeds. The net sale proceeds apparently have remained in the escrow account of the plaintiff's attorney since April 22, 2005.[27] In order to place both parties in the positions they would have occupied if the

[27] At trial, the plaintiff, the plaintiff testified that after April 22, 2005, he was paying for the mortgage and insurance on the property. Trial Transcript at 22. According to a letter from plaintiff's attorney, the proceeds were still held in the escrow account as of May 25, 2005. *See* Joint Exhibit No. 6. There is nothing in the record to suggest that the funds subsequently have been returned to the plaintiff.

contract had been fully performed on April 22, 2005, the defendant should receive the interest that has accrued on those funds in the escrow account.

Similarly, the defendant should be reimbursed for the real estate taxes he has paid on the property since April 22, 2005 because the property taxes would have been the responsibility of the plaintiff if the contract had been fully performed on that date. In addition, the defendant is entitled to receive $750, which corresponds to an uncashed check in that amount issued by the plaintiff's mother in partial payment for plaintiff's July 2004 rent.[28] The defendant, however, is not entitled to any interest on this money because, due to his own oversight, the defendant failed to deposit the July 2004 check in a timely fashion and thereafter assumed it was stale.[29]

Accordingly, when this report becomes final, the parties shall confer and present a form of order that will provide for: (1) the defendant signing, acknowledging, and returning the prepared settlement documents to plaintiff's attorney, including a good and sufficient deed conveying the property in fee simple to plaintiff, in return for a check in an amount comprising $78,894.48 plus accrued interest; (2) plaintiff's payment of $750 to the defendant in return for the original July 2004 rent check issued

[28] *See* Joint Exhibit 12. The plaintiff previously offered to issue a new check to the defendant if the July 2004 check was returned to him or to his attorney. *See* Joint Exhibit 6.
[29] Trial Transcript at 65-67 ("Well, when it came in at 750 and not the correct amount, it was put aside and not put in the monthly deposits. … Well, it wasn't in with that particular monthly deposit, and it just got lost in the shuffle."); Joint Exhibit No. 12.

by the plaintiff's mother: and (3) plaintiff's reimbursement to defendant of real estate taxes paid by the defendant on the property since April 22, 2005. Each party shall bear his own costs for this proceeding.