IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

THE ESTATE OF LUCILLE OSBORN, by and through its Co-Executor/Executrix, Lawrence Osborn and Sharon Gillespie,	)	
Plaintiff,	)	
v.	)	Civil Action No. 3171-VCP
MICHAEL J. KEMP,	)	
Defendant.	)	

MEMORANDUM OPINION

Submitted: May 15, 2009
Decided: August 20, 2009

Dean A. Campbell, Esquire, Mark H. Hudson, Esquire, LAW OFFICE OF DEAN A. CAMPBELL, LLC, Georgetown, Delaware; *Attorneys for Plaintiff*

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PARSONS, Vice Chancellor.

This is an action by the estate of the original owner of a beach house against a tenant who is also the putative purchaser of the property. From November 1984 to July 2005, the tenant made monthly payments of $275 to the owner for, at least, rent. In July 2005, the tenant stopped paying any rent, utilities, or anything else to the owner. In January 2007, when the niece of the owner sent the tenant a "Five Day Notice" letter demanding payment of past due rent and utilities, the tenant answered by presenting a photocopy of a one-sentence, handwritten note he alleged to be an installment or rent-to-own contract that he and the owner had entered into and signed in April 1985. The tenant alleges he is now the equitable owner of the property.

The niece of the owner brought this suit on behalf of the estate seeking a declaratory judgment that the tenant does not own the property, a permanent injunction, and restitution against the tenant. The tenant filed a counterclaim for specific performance on August 8, 2008. The Court conducted a trial of this action on October 29, 2008, and the parties later briefed and argued the issues presented. For the reasons discussed below, I find that the tenant is entitled to specific performance.

I. BACKGROUND

A. Parties

The original Plaintiff, Lucille Osborn f/k/a Lucille G. Menicucci ("Osborn"), was the owner of a property and house located in Slaughter Beach, Sussex County, Delaware (the "Property").[1] Osborn was born in 1923, had an associate degree in business, and was

[1] Pl.'s Trial Exhibit ("PX") 18.

a tax preparer for about twenty-five years.[2] During the earlier stages of this litigation, she suffered from progressive dementia and resided in a nursing home.[3] Beginning in or around May 2006, Osborn could no longer handle her affairs, and her niece, Sharon Gillespie, acted as the attorney-in-fact for Osborn.[4] Osborn died on December 15, 2008.[5] She had no children,[6] and her will named Gillespie as a co-executrix of her estate and a fifty percent beneficiary of it.[7] By Order dated January 30, 2009, Osborn's estate, by and through its Co-Executor/Executrix Lawrence Osborn and Gillespie, was substituted for Osborn as Plaintiff in this action.

Defendant, Michael Kemp, was a tenant of Osborn's and claims to have purchased the Property from her. Kemp was an electrician by trade without a high school diploma and was unemployed at the time of trial.[8]

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2 Trial Transcript ("T. Tr.") at 53, 63-64.

3 *Id.* at 51.

4 *See id.* at 50.

5 Mot. to Substitute Parties & Suggestion of Death, filed Jan. 29, 2009 ("Mot. to Substitute"), Ex. A.

6 T. Tr. at 56.

7 *Id*. at 103; Mot. to Substitute Ex. B.

8 T. Tr. at 122-23, 179.

B. Facts

In 1968, Osborn and her first husband, Charles Menicucci, purchased the Property as a vacation home.[9] Menicucci died on February 1, 1985,[10] leaving Osborn two houses, including the Property.[11] As a result, Osborn was responsible for both her home in Wilmington and the Property.

On November 9, 1984, Kemp began leasing the upstairs apartment in the Property from Osborn for $275 per month.[12] Thereafter, Osborn lived in Wilmington[13] and generally only used the Property in the summertime for a few weeks.[14] When she stayed at the Property, Osborn used the downstairs quarters.[15] Although there was no written lease agreement, Kemp gave Osborn a $275 security deposit when he began leasing the Property,[16] as evidenced by a photocopy of handwritten receipt Osborn gave to Kemp at

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9 PX 18.

10 PX 21.

11 *See* PX 18; T. Tr. at 50.

12 T. Tr. at 45, 127.

13 *Id*. at 50.

14 *Id.* at 153.

15 *Id*. at 187.

16 *Id.* at 46.

that time.[17] The receipt indicates she received $275 for rent from "11-9 to 12-9/84" and a $275 security deposit.[18]

On April 16, 1985, Kemp alleges that he and Osborn signed a contract by which he would purchase the Property (the "Contract").[19] The Contract is handwritten and reads in its entirety: "I Michael Kemp Agree to Pay Lucille Menicucci $275.00 Per Month Plus Utilities for twenty years for the Purchase of Property at 292 S. Delaware and Bay Ave. Slaughter Beach for $50,000."[20] The Contract appears to have been signed by both Osborn and Kemp and bears the signature and embossing seal of a notary public on it.[21] Kemp only has a photocopy of the Contract. He testified that, consistent with her usual practice, Osborn took the original back with her to Wilmington and sent him a copy.[22] Kemp also alleges that Osborn kept the originals of the utilities bills.[23] Osborn's niece, Gillespie testified that she found the original rent receipt from November 1984 among Osborn's property, but did not find the Contract.

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17 *Id.*

18 PX 2.

19 T. Tr. at 91.

20 PX 2.

21 *Id.*

22 T. Tr. at 142-43.

23 *Id.* at 143.

In 1986, Osborn executed an Antenuptial Agreement with her second husband.[24] In that Agreement, Osborn stated that she was the "owner in fee simple" of the Property.[25]

Kemp made rent and utilities payments to Osborn for each month through July 2005.[26] Sometimes, Kemp wrote the checks from his own account,[27] while on other occasions, his cohabitant, Roxanne Danburg, who began living with him in late 1984, wrote the checks.[28] On occasion, they would pay their rent and utilities bills late.[29] As indicated on many of those checks, both Kemp and Danburg referred to the $275 per month payment as "rent."[30] Similarly, in Osborn's 2004 Tax Return, she treated the payments made by Kemp as rent payments.[31]

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24 PX 6.

25 *Id.*

26 T. Tr. at 79.

27 PX 8.

28 *Id.*; T. Tr. at 131.

29 PX 8. As indicated from the photocopies of the payment checks, from April 1985 to July 2005, the largest single payment Kemp and Danburg made was a late payment covering a four-month period.

30 *Id.*

31 PX 7.

Over the more than twenty years he lived at the Property, Kemp alleges he made a number of improvements to the house[32] and estimates the total expenses for those improvements at around $11,000.[33] Kemp claimed not to have most of the receipts but explained that Osborn generally took the receipts for tax purposes.[34] Gillespie testified that Osborn reimbursed Kemp for the cost of these alleged improvements.[35] As evidence, she proffered copies of certain checks made out by Osborn for house improvements. It is not clear from those checks, however, whether the improvements were made to her Wilmington home or the beach house.[36] Gillespie also disputes the existence of some of the improvements Kemp claims he made.[37]

Based on the twenty-year term of the Contract, the last rental payment would have been due in April 2005. Because Kemp made rent and utilities payments until July 2005, he arguably "overpaid" three months rent after fulfilling his obligations under the Contract. Kemp claims he did not realize until July 2005 that the twenty years referred to

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32 T. Tr. at 157-69.

33 *Id.* at 198-200.

34 *Id.* at 200-01.

35 *Id.* at 223.

36 Pl.'s Supplemental Aff., filed Nov. 7, 2008 ("Pl.'s Supp. Aff."), Exs. A-D. At the conclusion of the trial, I granted the parties leave to file post-trial affidavits addressing repairs and improvements made by Kemp to the Property while he lived there.

37 Pl.'s Supp. Aff. at 4, Ex. D.

in the Contract had passed.[38] He further stated that he talked to Osborn about the overpayment after August 2005, and suggested that Osborn just deduct later utility bills from the amount Kemp overpaid.[39] Kemp also surmised that was why Osborn did not send him any utilities bills between July 2005 and May 2006, even though she was competent during that period.[40] In August 2005, four months after the twenty-year term expired, Kemp alleges he talked with Osborn about delivering the deed, and she promised to come down to the Property and take care of it.[41] Kemp said he did not push Osborn to get a deed because he "never forced any issue with this lady."[42]

In May 2006, Osborn was found on the floor of her house in Wilmington and later diagnosed with progressive dementia and placed in a nursing home.[43] In August 2006, Gillespie went to the Property to meet Kemp.[44] Kemp did not know Osborn had fallen until Gillespie told him when they met.[45] At that time, Gillespie asked Kemp to pay back

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38 *See* T. Tr. at 171-72.

39 *Id.* at 172-73.

40 *Id.* at 72-74, 172-73.

41 *Id.* at 211-12.

42 *Id.* at 212.

43 *Id.* at 51, 70.

44 *Id.* at 69.

45 *Id.* at 174.

the money he owed to Osborn.[46] At that meeting, he did not deny that he owed Osborn money or claim that he was the owner of the Property.[47] According to Kemp, he did not mention the Contract to Gillespie because he preferred to keep his affairs with Osborn between the two of them.[48]

In any event, Kemp made no payments after the meeting with Gillespie.[49] In January 2007, Osborn's attorney sent Kemp a "Five Day Notice" letter demanding payment of rent and utilities that were owed.[50] Kemp answered by presenting the Contract.[51]

The notary public, Joyce Macklin, confirmed her signature and seal on the photocopy of the Contract.[52] She also confirmed the handwritten date "April 16, 1985" was in her handwriting.[53] Macklin generally did not read documents she notarized, but remembered the Contract because it was so strange.[54] She noted that very few people

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46 *Id.* at 175.

47 *See id.* at 174-77.

48 *Id.* at 177.

49 *Id.* at 89.

50 PX 3. The letter provided five days notice of a default to Kemp, as the tenant, under § 5502 of the Landlord-Tenant Code. 25 *Del. C.* § 5502.

51 T. Tr. at 91.

52 DX 1 at 3.

53 *Id.*

54 *See id.* at 3, 5.

bought property using a handwritten document.[55] Macklin did not remember, however, either Kemp or Osborn coming to her store, or whether one or two people signed the document.[56] Rather, she testified that her general practice was to check the photo IDs of the persons whose signatures she notarized and to notarize the bottom signature.[57] Yet, Macklin also said that she did not necessarily always put her seal below the bottom signature.[58] Instead, she would put her seal anywhere she could get it.[59] In this case, Macklin's signature on the Contract is to the left with her seal over it, and Kemp's and Osborn's signatures are to the right.[60] Kemp's signature is above Macklin's, which, in turn, is above Osborn's.[61]

Regarding the authenticity of the Contract, Gillespie called a handwriting expert. The expert questioned the authenticity of Osborn's signature, but admitted his opinion was inconclusive because the Contract was only a photocopy.[62] The handwriting expert also said that an embossing seal generally will not show up on photocopied versions and

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55 *See id.*

56 *Id.* at 4.

57 *Id.* at 3-4.

58 *Id.* at 4.

59 *Id.*

60 PX 2.

61 *Id.*

62 T. Tr. at 33.

that there seemed to be a fake line on the seal in this case.[63] Despite the fact that Osborn was an extremely organized person who kept everything,[64] Gillespie never found any original or photocopied version of the Contract after a thorough search of Osborn's house.[65] Gillespie also admitted, however, that she threw some things out when she went through Osborn's filing cabinet, including the original rental receipt.[66]

C. Procedural History

On August 17, 2007, Osborn, by and through her attorney-in-fact, Gillespie, filed suit against Kemp seeking a permanent injunction, a declaratory judgment, and restitution arising out of the parties' dispute over the ownership of the Property. Kemp answered and denied all liability, and later, on August 8, 2008, added a counterclaim for specific performance.

Trial was held on October 29, 2008. At the conclusion of the trial, I granted the parties leave to file post-trial affidavits addressing the alleged repairs and improvements Kemp made to the Property while he lived there. Gillespie filed her post-trial affidavit on November 7, 2008, and Kemp filed his on November 14, 2008. Thereafter, the parties filed their respective post-trial briefs and presented oral argument.

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63 *Id.* at 37.

64 *Id.* at 56.

65 *Id.* at 61-62.

66 *Id.* at 102-03.

D. Parties' Contentions

Gillespie argues that the Contract is not authentic, and that it would have been "absurd" for Osborn to have agreed to the alleged deal. Gillespie also argues that even if the Contract is genuine, Kemp is not entitled to specific performance because: (1) the Contract is ambiguous; (2) Kemp is not ready, willing, and able to perform the Contract; (3) the Contract is not equitable; and (4) laches bars the specific performance of the Contract. Kemp counters that the Contract is authentic and unambiguous, and should be interpreted as an installment sales contract or rent-to-own contract as to which the full purchase price has been paid. Kemp also argues that if, contrary to his position, the Court interprets the Contract as an option contract requiring him to pay an additional $50,000, he is ready, willing, and able to exercise that option. Finally, Kemp denies he is guilty of laches.

II. ANALYSIS

Typically, in a post-trial opinion, the court evaluates the parties' claims using a preponderance of the evidence standard. Under that standard, for example, a claimant asserting a breach of contract must prove the elements of its claim by a preponderance of the evidence.[67] In this case, that standard would apply to Osborn's claims for injunctive and declaratory relief and for damages under a quasi-contract or restitution theory. The issues raised by those claims, however, are largely subsumed under those presented by

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[67] *United Rentals, Inc. v. RAM Holdings, Inc.*, 937 A.2d 810, 834 n.112 (Del. Ch. 2007).

Kemp's counterclaim for specific performance. The burden of persuasion on a claim for specific performance is higher than the preponderance of the evidence: entitlement to specific performance must be proved by clear and convincing evidence.[68] Because the focus of the parties' briefing and argument has been on Kemp's counterclaim for specific performance, which involves a higher burden of proof, I direct my analysis primarily to the counterclaim. The issues raised by Osborn's related claims are addressed in the context of that analysis.

A. Has Kemp Met the Requirements for Obtaining Specific Performance of the Alleged Contract?

1. The standard for obtaining specific performance

To obtain an order of specific performance, a claimant must present proof (1) that a valid contract to purchase real property exists; (2) that the party seeking specific performance was ready, willing, and able to perform his or her contractual obligations; and (3) that the "balance of equities" tips in favor of specific performance.[69] The burden of persuasion with respect to those elements is by clear and convincing evidence.[70]

2. Was there a valid and enforceable contract to purchase real estate?

Gillespie challenges the validity and enforceability of the alleged contract on several grounds. First, she contends Kemp failed to prove that the photocopy of the one sentence agreement is authentic or that Osborn, in fact, signed the document. Second,

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68 *Id.*

69 *Morabito v. Harris*, 2002 WL 550117, at *2 (Del. Ch. Mar. 26, 2002).

70 *United Rentals*, 937 A.2d at 834 n.112.

Gillespie questions whether the document is sufficiently definite to constitute a valid and enforceable agreement. In the same vein, Gillespie also argues that the Contract is ambiguous in terms of the purchase price and whether it represents an installment or rent-to-own agreement or, instead, an option agreement under which Kemp could buy the Property at the end of the twenty-year period for an additional $50,000. According to Gillespie, these uncertainties make the alleged contract ineligible for the equitable remedy of specific performance. I turn, then, to these arguments.

a. Is the photocopy of the purported contract admissible?

Gillespie challenges the admissibility of the photocopy of the Contract because Kemp only has a photocopy of it and "a genuine question is raised as to the authenticity of the original."[71] Kemp defends the admissibility of the photocopy, arguing there is no genuine issue as to the authenticity of the original. The Best Evidence Rule, codified in D.R.E. 1002, states: "To prove the content of a writing, recording or photograph, the original writing, recording or photograph is required, except as otherwise provided in [the Rules of Evidence] or by statute."[72] The Best Evidence Rule, however, is not without exception. Delaware Rule of Evidence 1003 states: "[a] duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original, or (2) in the circumstances, it would be unfair to admit the duplicate instead of the original." Here, only the first exception is relevant; no one seriously argued the

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71 D.R.E. 1003.

72 D.R.E. 1002.

second exception applies. Further, Rule 1004(1) states: "[t]he original is not required, and other evidence of the contents of a writing, recording or photograph is admissible if . . . [a]ll originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith."

Here, the original of the purported Contract has been lost or destroyed. Based on the evidence, I find that Osborn probably kept the original and sent a photocopy to Kemp, consistent with her normal practice. There is no persuasive evidence suggesting that Kemp, the proponent of the photocopy, lost or destroyed the original Contract document, let alone that he did so in bad faith. In contrast, it is conceivable that Gillespie lost or destroyed the original, because she admitted discarding some of Osborn's papers. There is no basis, however, to believe that Gillespie would have done so intentionally or in bad faith. Rather, the purported Contract is very informal, and could have been discarded by mistake just like the original rent receipt was.

The relevant evidentiary rule, therefore, is D.R.E. 1003, under which the photocopy of the Contract would be admissible unless "a genuine question is raised as to the authenticity of the original . . . ." A piece of evidence may be authenticated by a person with sufficient knowledge of the matter in question, without requiring absolute verification that the record is accurate.[73] For a genuine question of authenticity to exist, a party would need to present facts or testimony sufficient to bring the issue into

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[73] *Graves v. State*, 2006 WL 496140, at *2 (Del. Super. Feb. 2, 2006).

contention.[74] In this case, I find the photocopy of the Contract admissible and authentic because: (1) as discussed in Part II.A.2.b *infra*, the notary public acknowledged the existence of the Contract; (2) the evidence shows that Osborn probably took the original with her and sent Kemp the photocopy; (3) Kemp testified credibly about the document; and (4) the actions of the parties during the relevant time period after April 1985 strongly support an inference that an agreement along the lines of the Contract did exist. Regarding the latter point, I note, for example, that there is no evidence Osborn ever tried to change the rent during the more than twenty years Kemp lived at the Property. Indeed, there is no indication Osborn ever even discussed that topic with Kemp. If Osborn entered into the purported Contract, that is not surprising. If there were no such Contract, I would have expected to see evidence of at least some communications between the parties on the amount of the rent.

b. Is Osborn's signature on the contract authentic?

Kemp argues that the notary public's signature on the Contract gives rise to a presumption of its genuineness.[75] Gillespie argues that no presumption of genuineness

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74 *Id.*

75 Def. Michael J. Kemp's Post-T. Opening Br. ("DOB") at 13. The parties each filed two rounds of simultaneous post-trial briefs. Plaintiff's opening and reply briefs are cited, respectively, as "POB" and "PRB." Similarly, Defendant's briefs are referred to as "DOB" and "DRB."

arises because the Contract document does not contain a "Certificate of notarial act" conforming to the requirement of 29 *Del. C.* §§ 4327-4328.[76]

This Court has held that an acknowledgment of a signature by a notary gives rise to a presumption of the genuineness of that signature,[77] and the party challenging the authenticity of the document has the burden of proving otherwise.[78] To create a presumption of genuineness, the notarial act must satisfy the requirements of Section 4327(a)-(b), which provides that:

> (a) A notarial act **must be** evidenced by a certificate physically or electronically signed and dated by a notarial officer. The certificate **must** include *identification of the jurisdiction* in which the notarial act is performed and *the title of the office that the notarial officer holds* and may include the official stamp or seal of office, or the electronic notary's electronic seal. If the officer is a notary public, the certificate must also indicate the date of expiration, if any, of the commission of office, but omission of that information may subsequently be corrected. . . .
>
> (b) A certificate of a notarial act is sufficient if it meets the requirements of subsection (a) of this section and it:
>
> (1) Is in the short form set forth in § 4328 of this title . . . .[79]

Under 29 *Del. C.* § 4328(1), the following short form certificate of an acknowledgment of a signature in an individual capacity would be sufficient:

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[76] POB at 24.

[77] *City Inv. Co. Liquidating Trust v. Continental Cas. Co.*, 1992 WL 65411, at *6 (Del. Ch. Mar. 30, 1992).

[78] *See id.* at *7.

[79] 29 *Del. C.* § 4328(a)-(b) (emphasis added).

State of _____
County of _____

This instrument was acknowledged before me on (date) by (name(s) of person(s)).

_____
(signature of notarial officer)

(Seal, if any)

_____
(title and rank)
(my commission expires:_____)

As to Kemp's purported Contract, the notary public did not satisfy the statute because the Contract document neither includes "identification of the jurisdiction" nor "the title of the office that the notarial officer holds." In addition, the Contract does not contain the prescribed language in § 4328(1). The mere signature and seal of a notary public on a document does not give rise to a presumption of genuineness. Therefore, no such presumption applies to the photocopy of the Contract.

The notary public's involvement, however, is relevant in determining the authenticity of the Contract. Gillespie argues that the notary's testimony is more beneficial to Plaintiff, because "it is certainly possible that Mr. Kemp took the document to [the notary public] to notarize his signature so that he could send it to Osborn as an offer."[80] Gillespie cites two reasons for this. First, the notary public did not remember who, or how many persons, signed the Contract. Second, the notary asserted that when she notarized something, she generally notarized the bottom signature, which in this case

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[80] POB at 24.

is Osborn's signature. In contrast, Kemp contends the notary's testimony supports the authenticity of the Contact because: (1) she remembered the Contract; (2) she knew the Contract related to "someone buying property"; and (3) her general practice was to check the IDs of the persons whose signatures needed to be notarized.

I have no reason to doubt the notary public testified truthfully to the best of her knowledge. She remembered the Contract, although she was not sure of the number or the identity of the person(s) who signed the document. Her additional testimony as to the document concerning "someone buying property" and her practice of requiring IDs from those seeking her notarial services weakly supports an inference that the Contract is authentic, but is not conclusive. Consequently, I must evaluate the other evidence on this issue.

The additional fact that Kemp and Osborn acted consistently with the Contract throughout the twenty-year period from 1985 to 2005 convinces me that Osborn's signature on the document probably is authentic. Although Gillespie argues that Osborn never would have entered into the Contract,[81] the evidence convinces me that she may have. In addition, I found Kemp's testimony to be credible. Kemp made improvements to the house several times, which he alleges he would not have done if he did not expect to own the house.[82] Further, although Gillespie alleges that Osborn reimbursed Kemp for

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81 *See* PRB at 4.

82 These improvements include: (i) replacing lead piping under the house; (ii) building a new brick hearth; (iii) repairing the oil furnace; (iv) coating the roof with a sealant; (v) installing a ground sprinkler; (vi) performing various

the improvements he made and produced the checks written by Osborn as evidence, those checks do not specify which house (Wilmington or Slaughter Beach) was fixed. Kemp also explained his lack of receipts, as stemming from Osborn taking most of them for tax purposes.[83]

Gillespie contends that Kemp has failed to prove the authenticity of Osborn's signature by clear and convincing evidence. To support her position, Gillespie presented a handwriting expert, David Wilkerson, who examined the photocopy of the Contract. Wilkerson testified the signature might not be Osborn's, but acknowledged his opinion was inconclusive because he only had a photocopy. As previously discussed, nothing in the record suggests Kemp is responsible for the absence of the original. Wilkerson also half-heartedly questioned the authenticity of the notarial seal on the Contract. The notary public allayed that concern, however, when she recognized the document and identified the signature and seal as hers. I, therefore, find Gillespie's handwriting expert's testimony too uncertain to be helpful.

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landscaping jobs; (vii) remodeling the upstairs bathroom, including installing new drywall and flooring; (viii) gutting the downstairs bathroom, and then installing new plumbing, new wiring, and new walls; and (ix) replacing old windows with new vinyl models. *See* DOB at 8-9, citing T. Tr. at 158-171.

[83] Evidently, the receipts generally did not include either Kemp's or Osborn's name on them.

In summary, considering the evidence on the authenticity of the Contract as a whole, I find that Kemp has met his burden of showing by clear and convincing evidence that the Contract document is what it purports to be.[84]

c. Apart from the dispute over the purchase price, is the contract sufficiently definite to be valid and enforceable?

Three elements are necessary to prove the existence of an enforceable contract: (1) the intent of the parties to be bound by it, (2) sufficiently definite terms, and (3) consideration.[85] Based on the discussion below of consideration and the benefits to Osborn stemming from the Contract and of Kemp's performance of its terms, I find that both parties intended to be bound by the Contract. I turn next, therefore, to whether the terms of the Contract were sufficiently definite.

Courts have found the essential terms of a real estate contract to be the price, date of settlement, and a description of the property to be sold.[86] An agreement may be enforceable even where some of its terms are left to future determination.[87] Here, the parties clearly understood that the Contract related to Osborn's Slaughter Beach Property

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84 In this regard, I consider the dispute over the substance of the conversation between Gillespie and Kemp in August 2006 to be immaterial. Kemp evidently did not make any mention of the Contract during that meeting, but his explanation that he considered it a private matter between him and Osborn is reasonable in that this was the first time he ever met Gillespie. Whether Gillespie actually used the word "rent" in that conversation would not affect my conclusion on the authenticity of the Contract one way or the other.

85 *Carlson*, 925 A.2d at 524.

86 *Walton v. Beale*, 2006 WL 265489, at *5 (Del. Ch. Jan. 30, 2006).

87 *Id.*

and that settlement would occur sometime after April 15, 2005, assuming Kemp performed his obligations in the interim. In addition, the Contract specified the price. Although the parties now dispute whether that price was $275 per month plus utilities for twenty years or that amount plus an additional $50,000, it plainly is one or the other. Thus, the terms of the Contract are sufficiently definite to support its enforcement.

As to the final requirement, the record indicates there was ample consideration flowing to Osborn to support the validity of the Contract. "Delaware courts define consideration as a benefit to a promisor or a detriment to a promisee pursuant to the promisor's request."[88] For purposes of contractual enforceability, the inquiry focuses on the existence of consideration, not whether it is fair or adequate. Mere inadequacy of consideration, in the absence of any unfairness or overreaching, does not justify a denial of the right of specific performance where in other respects the contract conforms with the rules and principles of equity.[89]

When the Contract was signed on April 16, 1985, Osborn's husband had just died, and her busiest season as a tax return preparer had just ended. Kemp appeared to be a good and handy tenant. Osborn held the beach house only as a vacation or second home. By entering into the Contract, she assured herself of (1) receiving steady income of $275 per month for twenty years (and, perhaps, an additional $50,000 at the end of that period,

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88 *Continental Ins. Co. v. Rutledge & Co.*, 750 A.2d 1219, 1232 (Del. Ch. 2000) (citation omitted).

89 *Glenn v. Tide Water Assoc. Oil Co.*, 101 A.2d 339, 344 (Del. Ch. 1953).

if Kemp completed the purchase of the Property); (2) having a good tenant who could help maintain the house; and (3) the ability to use the downstairs of the house whenever she wanted. During the twenty-year period, Osborn would remain the fee simple owner of the house. Twenty years later she would be 82 years old. In these circumstances, I hold there was ample consideration to support finding the Contract valid and binding on Osborn.

d. Is the purported agreement an installment contract that was performed fully after twenty years of agreed payments or an option contract to purchase the Property after twenty years for an additional $50,000?

Gillespie argues that the Contract is unclear as to whether the $275 per month payment is to be credited toward a total purchase price of $50,000, excluding interest, or whether after twenty years of faithful payment of $275 per month plus utilities, Kemp then could purchase the Property from Osborn for an additional payment of $50,000.[90] Kemp contends the Contract unambiguously means that the $275 per month payment is to be credited toward the $50,000 payment, and the extra $16,000[91] to be paid implicitly would be for interest, insurances, and taxes.[92]

I find the Contract requires Kemp to pay an additional $50,000 to purchase the Property for two primary reasons. First, contracts are to be interpreted in a way that does

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90 POB at 17.

91 ($275*12*20)-$50,000=$16,000

92 DOB at 15.

not render any provision illusory or meaningless.[93] The handwritten Contract provides in its entirety: "I Michael Kemp Agree to Pay Lucille Menicucci $275.00 Per Month Plus Utilities for twenty years for the Purchase of Property at 292 S. Delaware and Bay Ave. Slaughter Beach for $50,000."[94] If the $275 per month is to be credited toward the purchase price of the Property, there arguably is no need for the additional language "for the [p]urchase of Property . . . for $50,000." Kemp simply would get the Property after twenty years of making monthly payments of $275 plus utilities, no matter what the parties claimed the purchase price was. Therefore, construing the phrase regarding the purchase of the Property for $50,000 as Kemp suggests would render that contractual language illusory or meaningless.

I do not find persuasive the contrary position advanced by Kemp that the total of the payments of $275 per month plus utilities over twenty years, or $66,000, effectively equates to $50,000, after netting out a reasonable amount for interest, insurance, and taxes. Osborn presented credible evidence that the interest rate for mortgages in early 1985 was in the range of ten percent or more.[95] Discounting the $275 monthly payments

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93 *O'Brien*, 785 A.2d at 287.

94 PX 2.

95 Specifically, Osborn asks the Court to take judicial notice of a report from the U.S. Housing and Urban Development Agency, which indicates a mortgage interest rate of 10.625%. POB at 19. Under Delaware Rule of Evidence 201(b), a court may take judicial notice of an adjudicative fact if the judicially noticed fact is "not subject to reasonable dispute" and is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." D.R.E. 201(b). A party is entitled upon timely request to an opportunity to be heard as to

made by Kemp during the twenty year period from 1985 to 2005 at a discount rate of ten percent would yield an effective purchase price far less than $50,000. Moreover, the fact that Kemp presented no evidence that the lower purchase price reflected in his interpretation of the Contract bears any relation to a reasonable price for the Property further weakens his argument that the Contract should not be construed to require the payment of an additional $50,000.

Second, Delaware courts apply the general principle of *contra proferentum*, which holds that ambiguous terms should be construed against their drafter.[96] Because there is no dispute Kemp drafted the Contract, I will construe the ambiguous price term in the Contract against him.[97] For both of these reasons, therefore, I find the Contract requires Kemp to pay an additional $50,000 to purchase the Property.

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the propriety of taking judicial notice and the tenor of the matter noticed. *Id.* Because this historical interest rate information was provided by the federal government, I find the information not subject to reasonable dispute and capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. In addition, Kemp did not object to this evidence. Therefore, I grant Osborn's request and will take judicial notice of this information.

96 *Stockman*, 2009 WL 2096213, at *5.

97 I consider the Contract ambiguous as to price, because I find both the competing interpretations advanced by the parties to be reasonable in the circumstances of this case. Those circumstances include the facts that neither party was represented by counsel and Kemp had less than a high school education. In such a situation, it is not surprising that a contract for the sale of land may require consideration of extrinsic evidence to aid in its interpretation. Having now reviewed and heard all the evidence, I have resolved the perceived ambiguity and determined that the parties intended to require the payment of an additional $50,000 after Kemp paid

3. Has Kemp shown he is ready, willing, and able to perform his obligations under the contract?

To obtain the remedy of specific performance, the party seeking it must be ready, willing, and able to perform his contractual obligations.[98] Gillespie asserts that if the Court determines that $50,000 still must be paid beyond the twenty years of monthly payments, Kemp is not ready, willing, and able to settle on the Contract because he neither has the money nor the financing in place to obtain it.[99] Therefore, Gillespie contends Kemp has not shown an entitlement to specific performance. Kemp avers that he already has fulfilled his contractual obligations by paying rents and utilities for twenty years,[100] and that, if the Court concludes the Contract requires payment of an additional $50,000 at settlement, he is ready, willing, and able to pay that amount.[101] At trial, Kemp testified that he would attempt to get financing to "save [his] home," if he needed to pay an additional $50,000 to purchase the Property.[102] I take judicial notice of the fact that, even in today's relatively bearish real estate market, Kemp probably could obtain financing for the remainder of the purchase price for the Property, using the Property as

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what he and his cohabitant regularly termed "rent" for the specified twenty-year period.

98 *Morabito v. Harris*, 2002 WL 550117, at *2 (Del. Ch. Mar. 26, 2002).

99 POB at 20.

100 DOB at 17.

101 DRB at 9.

102 T. Tr. at 221.

collateral. Therefore, I conclude that Kemp has demonstrated he is ready, willing, and able to perform the Contract in the sense that he should be given a reasonable period to obtain the necessary financing and effect settlement on the purchase of the Property. I further conclude that a reasonable period for the closing in this case is ninety (90) days from the date of this opinion.[103]

4. The balance of the equities

The final requirement for obtaining an order of specific performance is a showing that the "balance of the equities" tips in favor of specific performance.[104] Gillespie argues that the equities tip in favor of Osborn because: (1) Osborn gained nothing by entering into the Contract because she was already being paid $275 per month plus utilities for the upstairs apartment; (2) Osborn could have earned approximately ten percent interest per year had she sold the Property to Kemp for $50,000 in 1984; and (3) the "unfair and unconscionable contract was negotiated in the months immediately following [Osborn's] husband's death."[105] Predictably, Kemp contends the equities tip in his favor because the Property is unique, he lacks any other adequate remedy, and he has made many significant repairs to the Property.[106]

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[103] If Kemp fails to obtain the necessary financing within the specified period, he will have exhausted his specific performance remedy. In that event, the Contract would be deemed to have expired, which presumably would remove any cloud over the Osborn estate's title to the Property.

[104] *Morabito v. Harris*, 2002 WL 550117, at *2.

[105] POB at 19-20.

[106] DOB at 18.

For the reasons discussed in Part II.A.2.c *supra* on the issue of consideration, I find Osborn did receive material benefits from the Contract and that the record does not support Gillespie's arguments to the contrary. Whether the transaction represented a "good deal" from an objective perspective is certainly debatable. Nothing in the twenty-year history of Kemp's performance under the Contract, however, suggests Osborn was dissatisfied with the monthly income stream she received from her arrangement with Kemp. Further, my construction of the Contract as requiring the payment of an additional $50,000 to complete the purchase of the Property ameliorates to some extent the interest-related concerns expressed by Gillespie. And, on the timing of the transaction relative to Osborn's husband's death, Gillespie failed to present any evidence that Osborn was not competent at the time or that she somehow fell victim to undue influence on the part of Kemp.

In contrast, the record shows Kemp made a number of improvements to the Property. Although the total amount Kemp spent on those improvements is not clear, it appears it was more than just a nominal amount. Finally, I consider it important that the Property has been Kemp's home for more than twenty years, and that he lived there for almost ninety percent of that time without any objection from Osborn or her representative. In these circumstances, I conclude the equities as to whether specific performance is an appropriate remedy tip decidedly in favor of Kemp.

B. Is Kemp's Claim for Specific Performance Barred by Laches?

Finally, Gillespie argues that laches bars specific performance of the Contract because Kemp unreasonably failed to bring the Contract to Osborn's attention between

April 2005 and May 2006, while she was still competent to defend her interests and refute Kemp's claim, to the severe prejudice of Osborn and her estate.[107] Kemp denies that laches bars his claim, asserting that Osborn and, later, Gillespie unreasonably delayed from July 2005 until August 2006 in filing suit to evict him from the Property for failure to pay the rent allegedly due. As a result, Kemp contends he was prevented from confirming the Contract with Osborn when she was competent or at least able to provide some meaningful input.[108]

"Laches is an unreasonable delay by a party, without any specific reference to duration, in the enforcement of a right."[109] "[T]he laches inquiry is principally whether it is inequitable to permit a claim to be enforced, the touchstone of which is inexcusable delay leading to an adverse change in the condition or relations of the property or the parties."[110] The doctrine "is rooted in the maxim that equity aids the vigilant, not those who slumber on their rights."[111] In the absence of unusual conditions or exceptional circumstances, the analogous statute of limitations creates a presumptively reasonable time period for action, after which a claim likely will be barred as stale or untimely.[112]

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107 POB at 26.

108 DRB at 12.

109 *AQSR India Private, Ltd. v. Bureau Veritas Holdings, Inc.*, 2009 WL 1707910, at *6 (Del. Ch. June 16, 2009).

110 *Id.*

111 *Adams v. Jankouskas*, 452 A.2d 148, 157 (Del. 1982).

112 *Reid v. Spazio*, 2009 WL 962683, at *4 (Del. Apr. 9, 2009).

Plaintiff's effort to avoid specific performance on the ground of laches lacks merit for several reasons. First, Gillespie has not shown that Kemp unreasonably delayed bringing his claimed right to purchase the Property to Osborn's attention. Under the construction of the Contract I have adopted, Kemp's right to purchase the Property arose on or about April 16, 2005. If Kemp's alternative interpretation of the Contract had been correct, he would have owed nothing more on the Property as of that date other than the cost of the same utilities he had been paying for over twenty years. Nevertheless, Kemp's cohabitant, Danburg, wrote Osborn a check on or about July 21, 2005 for the rent for May, June, and July 2005 and the utilities for April, May, and June 2005. Thereafter, Kemp ceased making any payments to Osborn, because by the end of July 2005, he and Danburg realized that they already had paid what they believed was the purchase price for the Property.[113] By taking that action based on his understanding of the Contract, Kemp provided at least some notice of his position to Osborn as early as the latter half of 2005, when she failed to receive his periodic payments for rent and utilities. The "delay" in providing that indirect notice certainly was not unreasonable.

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[113] T. Tr. at 171. Kemp never attempted to recoup the July 2005 payment from Osborn. He explained that inaction by stating he believed Osborn would use the amount he paid beyond what he owed to help defray future utilities costs. T. Tr. at 173. Consistent with that position, Kemp does not dispute in his post-trial briefing that, if he succeeds in obtaining specific performance of the Contract, he still will need to reimburse Osborn's estate for the cost of the utilities he normally paid for to the extent any such costs for the period after July 2005 remain unpaid as of the date of settlement net of any setoff based on Kemp's July 2005 payment. Rather, Kemp noted that he had already paid all utilities for which he had received utility bills. DOB at 17.

In terms of what happened next, I find each side equally to blame for any delay in exposing the exact nature of the dispute between the parties. There is no dispute that Osborn continued to be competent to handle her affairs until at least May 2006, when she fell and had to be placed in a nursing home. Even allowing for the fact that Kemp sometimes was late making his monthly payments, Osborn had ample time to realize that Kemp was in arrears and to question him about it. Yet, she never did so. One possible explanation, although definitely not the only one, is that Osborn knew about the Contract and recognized Kemp's right to purchase the Property may have matured. Similarly, I find no reason to fault Kemp any more than Gillespie for the fact that it took from their first meeting in August 2006 until approximately January 2007 for the Contract issue to surface. Kemp had never met Gillespie before their interaction in August 2006, and it is not clear he knew Osborn was incompetent at the August 2006 meeting.

For these reasons and based on my review of all the evidence presented, I find that Plaintiff has not shown that Kemp's claim for specific performance should be barred by the equitable doctrine of laches.

C. The Terms of the Specific Performance Remedy

Having determined that Kemp is entitled to specific performance of the Contract as I have construed it, I turn next to the precise form of specific performance remedy appropriate in this case. Kemp had a contractual right to purchase the Property for an additional $50,000 on April 16, 2005. As Plaintiff correctly notes, however, Kemp has had the use of the Property from that time until the present without paying any rent or utilities, other than the payment Danburg made on or about July 21, 2005. All parties

agree that, during this interim period, Kemp is responsible for the same utilities for which he previously had been paying. Accordingly, Kemp will be required to pay that amount as a condition to closing on any purchase of the Property.

Plaintiff argues that Kemp also should have to pay Osborn for the use of the Property since April or July 2005. If Plaintiff had prevailed on her claims that the Contract is invalid or specific performance is not justified, she might have a point. Because Plaintiff did not prevail on those claims, however, she has no right to a payment for use of the Property. Still, the theory of the specific performance remedy is that Kemp had the right to acquire the Property for $50,000 on April 16, 2005, which means Osborn would have had those funds as of that time. Therefore, I hold that Kemp also must pay to Osborn's estate interest on the outstanding purchase price of $50,000 at the legal rate as of April 16, 2005, compounded quarterly, from that date until the date of settlement under the Contract. Further, the payment Danburg made in July 2005 should be offset against any amounts due for utilities first and, if not exhausted, then for interest.

As to the closing costs associated with the anticipated transfer of the Property, Kemp has agreed to pay the deed preparation and recording costs.[114] Regarding the transfer taxes, the Contract is silent on that issue. Therefore, under 30 *Del. C.* § 5412, Plaintiff will be responsible for those taxes. Any other costs associated with the closing should be allocated between the parties in accordance with the customs and normal practice in Kent County.

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[114] POB at 17.

Lastly, in terms of timing, absent some other agreement of the parties in connection with the form of the final judgment, the closing on the purchase of the Property must occur within ninety (90) days of the date of this opinion.

III. CONCLUSION

For the reasons stated in this opinion, I will grant a judgment of specific performance in favor of Kemp on his counterclaim and dismiss with prejudice all the claims for relief in Plaintiff's Complaint. Kemp's counsel shall file, on notice, a proposed form of final judgment within ten (10) days of the date of this opinion. Except for costs allowed under Court of Chancery Rule 54(d) to Kemp as the prevailing party, each party to this litigation shall bear its own attorneys' fees and expenses.