

**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

LEO E. STRINE, JR.
VICE CHANCELLOR

New Castle County Courthouse
Wilmington, Delaware 19801

Date Submitted: March 11, 2010

Date Decided: March 12, 2010

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***RE: Theresa M. Rizzo v. Joseph Rizzo and Sons Construction
Company, Inc. et al., C.A. No. 2551-VCS***

Dear Counsel:

This letter addresses the question of whether the parties' agreement in principle (the "Agreement"), which was read into the record on December 2, 2009,¹ should be entered as a judgment. After the Agreement was recorded, while the parties were negotiating the ancillary documentation necessary to execute the Agreement, plaintiff Theresa M. Rizzo ("Theresa") raised a number of issues that defendants argue were already settled by the Agreement. Defendants have therefore moved to enter the Agreement as a judgment, arguing that the plaintiff should not be allowed to renege on her commitment to settle the case. The key issue in determining whether to grant defendants' motion is whether material

¹ *Theresa M. Rizzo v. Joseph Rizzo and Sons Construction Co., Inc. et al.*, C.A. No. 2551-VCS, at 3-16 (Del. Ch. Dec. 2, 2009) (TRANSCRIPT).

terms of the Agreement remain open after it was recorded on December 2, 2009. For the reasons discussed below, I find that all of the material terms were included in the Agreement, or have since been settled upon by the parties. Therefore, I grant defendants' motion to enter the Agreement as a judgment and thereby dismiss plaintiff's complaint.

I. Factual Background

This case is a dispute between members of the Rizzo family over the management of their family business. Over the years, the Rizzo family business was split up into a number of different entities, including JJ&B, LLC ("JJ&B") and defendants Joseph Rizzo and Sons Construction Co., Inc., Diamond State Masonry Co., Inc., and Ricore, Inc. (the "Operating Entities"). Of these entities, JJ&B alone owns the real estate upon which the family business operates. Theresa holds an interest in JJ&B, which she acquired in 2001 upon the death of her husband Joseph, one of the founders and managers of the family business. In her complaint, which she filed as a derivative action, Theresa alleges that JJ&B is effectively being controlled by the Operating Entities, who are controlled by the families of Joseph's brothers. Theresa holds no interest in the Operating Entities. Theresa alleges that the Operating Entities are using their control over JJ&B to benefit themselves at the expense of JJ&B's other members. In particular, Theresa claims that the Operating Entities are unfairly occupying JJ&B's land without any formal rental agreement and without paying rent to JJ&B.

Since the filing of plaintiff's complaint on November 17, 2006, this dispute has pursued a lengthy, meandering path toward resolution. The first trial in this case, held in December 2008, was cut short after the parties decided to attempt to mediate the matter. Despite several days of mediation, the parties were unable to resolve the dispute. Therefore, a second trial was scheduled, this time to begin on December 2, 2009. At the opening of the trial on December 2, the parties indicated that they had reached an agreement in principle (the aforementioned "Agreement") that would settle the case. That Agreement was read into the record, and both parties represented in open court that the Agreement as read was an accurate portrayal of their intentions to settle the dispute.²

But, while the parties were negotiating the lease agreement between JJ&B and the Operating Entities and other ancillary documentation following the December 2, 2009 hearing, Theresa reopened a number of issues that were covered by the Agreement. In particular, Theresa sent the Operating Entities a proposed lease agreement that would have, among other things, required the Operating Entities to bring the buildings on the property up to code within one year, prevented the Operating Entities from using the property in any way other than its current use, required the Operating Entities to repair a private road, Rizzo Avenue, that extends no more than ten to twenty feet onto the leased property, and increased the amount of casualty insurance from \$1 million to \$2 million.³ In

² *Id.* at 19.

³ Def.'s Op. Br. 3-4.

response, the Operating Entities filed a motion to enter the Agreement as a judgment, arguing that Theresa could not renegotiate the terms of the Agreement to which she assented. Theresa argued that the Agreement was “incomplete in that various documents are still required to be negotiated, drafted and executed by the parties,” and therefore the Agreement was unenforceable because it did not contain all of its material terms.⁴

The parties argued the Operating Entities’ motion at a hearing held on February 25, 2010. At that hearing, the court found that Theresa had improperly reopened negotiation on a number of the Agreement’s terms, and that her argument that the Agreement was incomplete because it did not include the terms of ancillary documents should be rejected.⁵ But, the court declined to enforce the Agreement because it became clear that the parties had overlooked negotiating a material term in the Agreement: just who owned the buildings on the premises to be leased? In the Agreement, the Operating Entities agreed to indemnify Theresa as to a mortgage that the Operating Entities had entered into with Wilmington Trust Company to finance the construction of buildings on the JJ&B property, to the extent that there was any exposure to the JJ&B land.⁶ But, the Agreement did not indicate which party — JJ&B or the Operating Entities — owned the buildings and what would happen to them if the Operating Entities left. Even though this

⁴ Pl.’s Ans. Br. 20.

⁵ *Theresa M. Rizzo v. Joseph Rizzo and Sons Construction Co., Inc. et al.*, C.A. No. 2551-VCS, at 70-72 (Del. Ch. Feb. 25, 2010) (TRANSCRIPT). For this reason, I awarded the defendants attorneys’ fees associated with this motion. *Id.* at 72.

⁶ *Rizzo*, C.A. No. 2551-VCS, at 13 (Del. Ch. Dec. 2, 2009) (TRANSCRIPT).

large oversight was rather frustrating in light of the parties' clear representation on December 2, 2009 that the dispute was settled, the court found that the ownership of the buildings on the JJ&B property was an open material term that precluded entering the Agreement as a judgment.⁷

Therefore, the court suggested that the ownership issue could be solved in either of two ways: either JJ&B would own the buildings and be responsible for the outstanding mortgage should the Operating Entities leave the property, or the Operating Entities would continue to own the buildings and remain responsible for the outstanding mortgage if they left the property.⁸ Despite a lengthy hearing during which a recess was taken to give the parties another chance to resolve this issue, the parties were unable to come to a resolution on this issue in court.

Although the Operating Entities indicated that they would accept either of the two options,⁹ Theresa dithered, eventually refusing to agree to either option.¹⁰

But, in later letters to the court, Theresa indicated a change of heart, and agreed to JJ&B owning the buildings on the property and taking responsibility for the mortgage if the Operating Entities vacate the property upon the expiration of their lease.¹¹

⁷ *Rizzo*, C.A. No. 2551-VCS, at 72 (Del. Ch. Feb. 25, 2010) (TRANSCRIPT).

⁸ *Id.* at 61-63.

⁹ *Id.* at 62.

¹⁰ *Id.* at 58-63.

¹¹ Letter from William J. Rhodunda to the Honorable Leo E. Strine, Jr. (March 3, 2010) (agreeing that "the buildings are owned by JJ&B and JJ&B is responsible for the buildings as a typical owner JJ&B has responsibility for the property as any owner of leased property"); Letter from William J. Rhodunda, Jr. to the Honorable Leo E. Strine, Jr. (March 11, 2010) ("In light of the Defendant's acceptance that JJ&B owns the

II. Legal Analysis

In determining whether a settlement agreement has omitted material terms, this court has stated that:

The enforceability . . . of an agreement which leaves a matter for future negotiation depends on the relative importance and severability of the matter left to the future. It's a question of degree to be determined by whether the matter left open is so essential to the bargain, that to enforce that promise would render enforcement of the rest of the agreement unfair.¹²

Enforcement has been found to be proper “when the only issue left open by an agreement is ‘resolution of the minor terms, such as appropriate documentation.’”¹³

Here, the Agreement should be enforced because all of the material terms of the parties’ settlement have now been agreed upon. Although the Agreement entered on December 2, 2009 still had an open material term — namely, who would own the buildings and pay for the mortgage if the Operating Entities vacated the property — that issue has since been resolved largely in favor of the

buildings, at such time the defendants vacate the property, JJ&B would be responsible for the existing Wilmington Trust Mortgage.”).

¹² *Whittington v. Farm Corp. et al.*, C.A. No. 17380, at 4 (Del. Ch. Oct. 11, 2001) (TRANSCRIPT) (quoting *Asten, Inc. v. Wangner Systems Corp.*, 1999 WL 803965, at *2 (Del. Ch. Sept. 23, 1999)); *Int’l Equity Capital Growth Fund, L.P. v. Clegg*, 1997 WL 208955, at *9 n.3 (Del. Ch. Apr. 22, 1997) (noting that Delaware law “require[s] the parties to have reached agreement on all material terms before an ‘agreement to agree’ will be enforced”); see also 1 CORBIN ON CONTRACTS § 2.8(a), at 131 (Rev. Ed. 1993) (“Indefiniteness may show a lack of finality, a lack of intention to be bound.”); RESTATEMENT (SECOND) OF CONTRACTS § 33 (1981) (“The fact that one or more terms of a proposed bargain are left open or uncertain may show that a manifestation of intention is not intended to be understood as an offer or as an acceptance.”).

¹³ *Whittington*, C.A. No. 17380, at 4 (quoting *VS&A Communications Partners, L.P. v. Palmer Broadcasting L.P.*, 1992 WL 339377, at *8 (Del. Ch. Nov. 16, 1992)).

plaintiff. Both parties have agreed that JJ&B will own the buildings and be responsible for the mortgage if the Operating Entities vacate.¹⁴ Therefore, now that all of the Agreement's material terms are agreed upon, the Agreement is enforceable.¹⁵

Because it is enforceable, I grant the defendants' motion to enter the Agreement as a judgment and, in turn, dismiss plaintiff's complaint. An implementing final order has been entered coincident with this decision.

Very truly yours,

/s/ Leo E. Strine, Jr.

Vice Chancellor

¹⁴ See *supra* notes 9 and 11.

¹⁵ See *Hendry v. Hendry*, 1998 WL 294009 (Del. Ch. June 3, 1998) (finding that, even though a settlement agreement did not set forth the exact boundary line between the disputants' properties, the boundary line was not a material term, and therefore the agreement should be enforced).