IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

STEPHEN G. DRAPER, individually and as Trustee under the Revocable Trust Agreement of Stephen G. Draper dated January 29, 1997 and as Trustee under the Revocable Trust Agreement of Clara Emily Draper dated January 29, 1997, and CLARA EMILY DRAPER,	)	
Plaintiffs,	)	
v.	)	C.A. No. 4428-MG
WESTWOOD DEVELOPMENT PARTNERS, LLC, a Delaware Limited Liability Company,	)	
Defendant.	)	

MASTER'S REPORT

Date Submitted: April 19, 2010
Final Report: June 3, 2010
Revised: June 16, 2010

Kathi A. Karsnitz, Esquire, Georgetown, Delaware; Attorney for Plaintiffs.

Thomas P. Preston, Esquire, of Blank Rome LLP, Wilmington, Delaware; Attorney for Defendant.

GLASSCOCK, Master

This matter involves an agreement of purchase and sale for real property in Kent County. The Purchaser under that contract is defendant Westwood Development Partners, LLC ("Westwood"). The Sellers are the plaintiffs Stephen G. Draper, Emily Draper and the Clara Emily Draper Trust (collectively, the "Draper Family"). Under the agreement, Westwood agreed to purchase from the Draper Family several parcels of unimproved real property for a price of $6,000,000, of which $1,000,000 was paid as an earnest money deposit. The Agreement was entered and the deposit paid on October 17, 2005. In October, 2008, Westwood filed suit in Superior Court seeking return of the deposit. The Draper Family filed a counterclaim seeking, among other remedies, specific performance of the agreement (the "Agreement"), and the matter was transferred to this Court. Westwood moved for a judgment on the pleadings under Rule 12 (c), contending that it is entitled to return of the deposit and that the Draper Family specific performance action should be dismissed. The matter was briefed and scheduled for oral argument.

At argument, Westwood's contention was that it had properly determined that it was entitled to terminate the Agreement for cause and demand return of its deposit under the terms of the Agreement. Since I noted that the Agreement gave either party the right to terminate the Agreement at will, I raised, sua sponte, the issue of whether the Agreement by its terms was incapable of specific performance, the sole equitable remedy sought. *See* Court of Chancery Rules, Rule (12)(b)(3). At the conclusion of the argument, I issued an oral draft report, finding that the motion for judgment on the pleadings should be granted with respect to the action for specific performance. Since that part of the action

was the sole equitable portion of the proceedings, I found it appropriate that the matter be returned to Superior Court for further litigation. The Draper Family took exception to my oral draft report and the exceptions have been briefed. This is my final report; my oral draft report is withdrawn and this final report shall constitute my entire report in this matter.[1]

I. The legal standard.

In considering a motion for judgment on the pleadings, I must grant the motion only where, upon review of the pleadings, no material issues of fact appear and the moving party is entitled to judgment as a matter of law. Chancery Court Rules, Rule 12 (c). This Court's jurisdiction is limited to those cases where a complete remedy is not afforded at law. 10 *Del. C.* § 342. Because I find that the unambiguous language of the contract provides that, in the current circumstances, the Draper Family is not entitled to the equitable remedy of specific performance, all the relief to which the Draper Family is entitled is available at law, and the matter should be returned to Superior Court under 10 *Del. C.* § 1902 for a determination of the parties' rights at law.

[1] Although the issue of equitable jurisdiction was raised sua sponte, the parties have had a full opportunity to brief the issue on exception to my draft report.

II. Background.

On October 17, 2005, the parties entered an Agreement of contract and sale under which Westwood was to purchase from the Draper Family a number of parcels of property (collectively, the "property") near Milford in Kent County. The purchase price was $6,000,000, of which $1,000,000 was paid at the time of contracting as an earnest money deposit. The contract specifically provides that

> [e]xcept as expressly provided otherwise in this Agreement, that deposit shall be NON-REFUNDABLE and pending final settlement that deposit shall be held by Seller for its own use and benefit. At final settlement that deposit shall be applied as part payment of the purchase price; and at final settlement the balance of the purchase price shall then be paid by Purchaser to Seller in the amount of FIVE MILLION ($5,000,000) DOLLARS.

Agreement, at ¶2 (emphasis in original).

The Agreement provides for a number of explicit exceptions to the directive that the deposit is non-refundable. Pertinent here is a provision, in paragraph 9, that "Seller shall supply to Purchaser satisfactory Phase I and Phase II environmental audit reports prior to final settlement; and if Seller shall fail to do so, Purchaser may accept the property in its condition as reported or it may elect to terminate this Agreement, in which case the said deposit shall be refunded promptly to Purchaser."

The contract provides for numerous contingencies and preconditions to the consummation of the sale, some of which require the return of the deposit and others

which do not.[2] Under the Agreement, the Seller "authorizes Purchaser as equitable owner and as Seller's agent to sign all applications, permits and related forms for the purpose of achieving annexation into the City of Milford and/or major subdivision approval by either the City of Milford or Kent County;" however, should settlement not be achieved within three years—that is by October 17, 2008—the Agreement is subject to termination by either party at will. "Final settlement hereunder shall take place within fifteen (15) days following major subdivision approval for the property and recordation of the subdivision Plot Plan in the Office of the Recorder of Deeds.... *The foregoing notwithstanding, this Agreement shall terminate at the written election of either party at any time after three (3) years from the date of this Agreement.*" Agreement at ¶12 (emphasis added). Thus, under paragraph 12, both parties had a bargained-for right to terminate the Agreement, if not consummated, after October 17, 2008.

On September 23, 2008 shortly before the third anniversary of the date on which the Agreement was entered, Westwood notified the Draper Family that the Draper Family had failed to provide environmental audit reports that were "satisfactory" to Westwood, under paragraph 9 of the Agreement, and that subdivision approval for the property was not obtainable as provided in paragraph 11. Accordingly, Westwood terminated the

[2] As examples, in addition to the required environmental audit reports referred to above, the Agreement in paragraph 3 requires the Seller to provide marketable fee simple title, and the purchase is conditioned upon the receipt by the Purchaser of major subdivision approval for a housing subdivision (Agreement, at ¶11). The Agreement is conditioned upon the Seller not introducing any hazzards or toxic substances onto the property (Agreement, at ¶16) and the Agreement may be terminated if the property is taken by eminent domain prior to settlement (Agreement, at ¶24).

Agreement, and demanded the return of its deposit.[3] Westwood repeated its demand for return of the deposit, citing paragraph 9, on October 20, 2008, a few days *after* the third anniversary of the date of entry of the contract. In that letter, Westwood again stated that the contract was terminated[4].

At issue before the Superior Court in Westwood's initial complaint (and at issue here via Westwood's counterclaim) was whether the environmental audit reports provided by the Draper Family were "satisfactory" under the terms of paragraph 9. If they were not, Westwood was entitled to return of the deposit; otherwise, the Draper Family was entitled to retain the deposit. In its complaint in this Court, the Draper Family seeks an order requiring Westwood to consummate the sale of the property by paying the Draper Family the $5,000,000 contract balance, in return for the Draper Family providing title to the property, and other relief.

III. Discussion.

The issue before me is whether the language of the Agreement permits the Draper Family to seek a court order directing Westwood to pay to the Draper Family the balance of the contract price, and requiring the Draper Family to transfer the property to Westwood. While the pleadings are silent as to the reason for the Draper Family seeking a

[3] Failure of the conditions set forth in both paragraph 9 (satisfactory environmental audits) and paragraph 11 (subdivision approval) allowed Westwood to terminate the contract; but only a failure under paragraph 9 entitled Westwood to return of its deposit.

[4] The letters, and the Agreement, are attached to the pleadings.

specific performance remedy, it is clear from the posture of this matter that both Westwood and the Draper Family regard the diminution in value of this property, as it reflects the much-weakened real estate market that has arisen since the contract was entered in 2005, to be such that it exceeds the very robust $1,000,000 deposit. That is, Westwood (assuming it is unsuccessful in its argument that it is entitled to return of its deposit under paragraph 9) would rather forfeit the deposit than consummate the sale of the property for another $5,000,000; and the Draper Family would rather sell the property to Westwood and receive an additional $5,000,000 than retain the $1,000,000 deposit *and* title to the property. Contract actions are typically actions at law seeking money damages that represent the benefit of its bargain to the non-breaching party. This Court, however, in appropriate circumstances has jurisdiction to entertain specific performance of a contract to buy and sell real property, under the theory that land is unique and that money damages, while available, would not be sufficient to make one party whole upon the other's breach. *E.g.* Abdol Bahmanyar Corp. v. Ciancio, Del. Ch., No. 5062, Brown, V.C. (May 3, 1977)(Mem. Op.) at 1. At this stage in the proceedings I assume, unless the Agreement provides otherwise, that specific performance is an equitable remedy available to the Draper Family. On the other hand, if the Agreement precludes specific performance under its terms, no equitable action is available, and the Draper Family is limited to a recovery at law.

In case of a breach by Westwood, the contract provides for liquidated damages. "In the event of a default by Purchaser, Seller may terminate this Agreement and the deposit

shall be forfeited to Seller as liquidated damages, which the parties agree are reasonable although the actual damages would be difficult to calculate." Agreement, at ¶6. Unless a contract provides that liquidated damages are to be the exclusive remedy for a breach, a liquidated damages provision does not preclude other relief to the non-breaching party, if the actual damages are caused by an event not contemplated by the parties in the liquidated damages clause. Delaware Limousine Service, Inc. v. Royal Limousine Service, Inc., Del. Super, C.A. No. 87C-FE-104, Goldstein, J. (April 5, 1991)(Mem. Op.) at 2, *citing* Am. Jur. 2d. Damages, §§ 726, 728. Here, in addition to the liquidated damages clause, the Agreement provides specifically that the earnest money deposit is non-refundable *whether or not* the Purchaser has breached the Agreement, with narrow exceptions. Thus, paragraph 6 arguably constitutes mere surplusage, unless it is interpreted to restrict the seller to $1,000,000 in liquidated damages in the event of a breach. I need not resolve the meaning of paragraph 6 to determine whether the parties intended a specific performance remedy to exist in the current circumstances, however, because under the clear and unambiguous terms of the Agreement, after October 17, 2008 either party had the right to terminate the contract at will. Under the terms of paragraph 2 (providing that the deposit is non-refundable) and paragraph 12 (providing that, after three years, the contract is terminable at will) the contract operates, after three years, akin to an option: Either Westwood or the Draper Family is entitled to walk away at will, in which case the Draper Family retains the $1,000,000 deposit.

The pertinent facts in the pleadings are uncontested. Both before and after the running of the three-year anniversary of the formation of the contract, Westwood sent letters to the Draper Family, declaring the contract terminated. The same letters demanded that the Draper Family return the earnest money deposit, citing unsatisfactory environmental audit reports. The Draper Family denies that they failed to provide satisfactory environmental audit reports and vigorously contests the return of the deposit under the terms of paragraph 9 of the Agreement. If Westwood is correct, it is entitled to the return of its deposit and the termination of the contract. If the Draper Family is correct, it is entitled to retain the deposit. It cannot, however, demand specific performance in the nature of consummation of the sale at equity, because under the specific terms of the contract Westwood is entitled to terminate the contract at will. In other words, the termination of the contract at will by Westwood, with the Draper Family retaining the $1,000,000 and title to the property, *is* performance of the Agreement, as contemplated in paragraph 12.[5] Where no unqualified obligation exists on a party to complete a contract, the contract may not be specifically enforced against that party. Giacoma v. Robinson, Del. Ch., (No. unpublished), Jacobs, V.C. (February 26, 1988)(Mem. Op.) at 1.

[5] The Draper Family argues that Westwood has breached the Agreement in various ways, for which monetary damages at law should flow. Since I have found that specific performance, the sole equitable remedy sought, is unavailable here, and that the matter must be litigated before the Superior Court, I make no determination in this Report of the availability of money damages, any statement to the contrary in my withdrawn draft report notwithstanding.

The Draper Family argues that, in seeking return of the deposit under paragraph 9, Westwood has forfeited its right to terminate the contract should a court find that the demand for return of the deposit was unfounded. The Draper Family argues that factual development may demonstrate that the demand for return of the deposit, and the litigation seeking to enforce that demand, have not been conducted in good faith. The Draper family, in its exceptions to my draft report, poses the issue thus: Assume for purposes of this motion that Westwood cited paragraph 9 of the Agreement, and not paragraph 12, in its written termination of the Agreement, in bad faith, in an attempt to leverage an unsupported right to a refund into a new sales agreement on more favorable terms. Under this hypothetical, Westwood's demand (made by letter and, ultimately, lawsuit) under paragraph 9 was made despite Westwood's knowledge that the required environmental audits were satisfactory. In that case, argues the Draper family, Westwood's termination of the contract was in fact a repudiation or breach. The result, according to the Draper Family, should be that described by this Court in West Willow-Bay Court LLC v. Robino-Bay Court Plaza, LLC, Del Ch., No. 2742, Noble, V.C. (February 23, 2009)(Mem. Op.) at 5: "A party confronted by repudiation may respond by (i) electing to treat the contract as terminated by breach, (ii) by lobbying the repudiating party to perform, or (iii) by ignoring the repudiation…." and treating the mutual obligations as still in force. West Willow-Bay, (Mem. Op.) at 5. The Draper Family "chose option number 3."[6] Such reasoning,

[6] Draper Family Reply Brief, at 5-6.

however, is of no avail to the Draper Family. If the plaintiffs elect to ignore Westwood's theoretical breach and treat the rights and obligations of the contract as still in force, one such right is Westwood's right to terminate the contract at will, subject to the Draper Family's right to retain the deposit. "A suit seeking specific performance is…in effect an assertion not that the promisee elects to finalize the breach claimed and calculate his damages now, but rather that the promisee treats the mutual obligations as being still in force." Id. What the Draper Family seeks here is specific performance of the Agreement with the walk-away provision written out. There is simply no basis, however, for replacing the unambiguous contract that the Draper Family entered with another contract that–given current market conditions–it finds preferable. Nothing in the Agreement provides that a demand for return of the deposit, whether or not well-founded, forfeits the right of either party to terminate the contract at will after the third anniversary of its formation.[7]

In sum, the Draper Family entered a contract with Westwood according to which it was entitled to a very substantial non-refundable deposit. If the contract was not consummated within three years, either party could terminate the contract at will, leaving

[7] I find that Westwood's October 20, 2008 letter was a termination of the Agreement under paragraph 12. The Draper Family points out that the letter mentions paragraphs 9 and 11 but not 12, and argues that a factual question remains whether the letter was sufficient to terminate the Agreement under paragraph 12. Even if the Draper Family is correct, however, Westwood still retains the right, in light of the Draper Family's election to ignore any breach and seek specific performance, to invoke its right to terminate under paragraph 12 going forward. The effect of the termination in the October 20 letter, therefore, is moot with respect to the plaintiffs right to compel the sale of the property.

the Draper Family with both title to the property and the $1,000,000 deposit, which represents almost 17% of the purchase price. The right of Westwood to terminate the Agreement at will is an explicit part of the bargain struck between the parties. Since the terms of the contract unambiguously permit Westwood to terminate the contract at will, Westwood's obligation to purchase is not absolute, and specific performance is thus not available to the Draper Family. *See* Giacoma, at 1.[8]

IV. Conclusion.

Under the Agreement, Westwood had the right to unilaterally terminate the Agreement after October 17, 2008. It did so on October 20, 2008. Westwood alleges that it also has a right to a return of its deposit, under the terms of paragraph 9 of the Agreement. The Draper Family contends that Westwood breached the Agreement, for which it is entitled to money damages. Those issues remain for a court of law. Since the Agreement has been terminated, however, no equitable right to specific performance exists.

[8] In support of the proposition that equity may specifically enforce a contract against a party not absolutely bound to perform, the Draper Family cites Elliot v. Jones, Del. Ch., 101 A. 874 (1917). That reliance is misplaced. Elliot involved an agreement by two men to buy a racehorse as tenants in common, and to form a partnership to maintain and employ the horse. One party bought the horse individually, and refused to transfer a half-interest to the other. The Court found an unqualified right under the contract for the plaintiff to purchase his half-share, and specifically enforced that right. The Court noted that it could not enforce the partnership portion of the agreement in equity, and thus the rights of the parties going forward would be as co-tenants, not partners.

For the foregoing reasons, Westwood's motion on the pleadings is granted in part. Pursuant to 10 *Del. C.* § 1902, either party may elect to transfer this matter back to an appropriate court for determination of the remaining issues at law, within 60 days.

/s/ *Sam Glasscock, III*
Master in Chancery