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February 23, 2011

*Via LexisNexis File & Serve
and First Class Mail*

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Ms. Roberta Tueros
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Re: Montgomery v. Tueros
C.A. No. 6152-VCN
Date Submitted: February 22, 2011

Dear Mr. and Ms. Tueros and Counsel:

Petitioners Vincent Montgomery and Anita Montgomery (the "Petitioners") and Intervenor Mathew D. Marker (the "Intervenor") both entered into agreements to purchase a dwelling with an address of 23 Mica Street, Townsend, Delaware (the "Property") from Respondents Alejandro Tueros and Roberta Tueros (the

“Respondents”). Exactly how this came to pass is not clear. What matters is that the expectations of both Petitioners and Intervenor cannot be satisfied.

The Petitioners filed an action for specific performance seeking to compel the Respondents to sell the Property to them. They also filed a notice of *lis pendens* among the land records of New Castle County; that *lis pendens* filing impedes Intervenor’s ability to close under his contract for the purchase of the Property. Otherwise, the Intervenor is ready, willing, and able to close on his purchase this week.

The Court, thus, as a practical matter, is called upon to determine who will be the purchaser; if the Court is able to resolve this matter now, settlement should be held promptly. If the normal litigation process is necessary, then settlement will be delayed by an extended period of time, and all parties will be subject to lingering uncertainty.

* * *

The Respondents own the Property. They are behind on their mortgage, and, unfortunately, they cannot maintain their home. For obvious reasons, they want to move on with their lives, and to do that, the Property must be sold.

On August 30, 2010, the Intervenor and the Respondents entered into an agreement of sale for the Property.¹ A short sale addendum accompanied the agreement of sale.² The short sale addendum was essential because the purchase price would not allow for satisfaction of the lien (or liens) on the Property. In order for the Intervenor to acquire title free of liens, the mortgage holder had to be willing to accept less than full payment on the sums due it. Thus, the transaction contemplated by the agreement of sale is contingent upon lender approval. Whether to approve a short sale presents a decision for the lender, a decision over which the Respondents evidently have no control.

On December 10, 2010, the Petitioners and Respondents entered into an agreement of sale for the Property.³ They also executed a short sale addendum.⁴

¹ Intervenor's Mot. to Dismiss Ex. 1.

² *Id.* Ex. 2.

³ Amended Pet. Ex. A. The database available to the realtors assisting Petitioners evidently describe the status of the Property as "sale pending" for several months. Why the Petitioners were not told about the Intervenor's contract and why a second contract was submitted under these circumstances are interesting questions but, ultimately, of no moment for this proceeding.

⁴ *Id.* Ex. B.

A few days later, on December 15, 2010, the Intervenor agreed to increase the price that he would pay for the Property. The lender preliminarily approved the Intervenor's transaction the next day.⁵

On January 28, 2011, the lender rejected the Petitioners' agreement.⁶ It offered two reasons: first, the net that it would receive was less under the Petitioners' contract than under the Intervenor's contract and, second, the Petitioners' offer was received after the Intervenor's offer.⁷

Also on January 28, 2011, the Petitioners filed this action against the Respondents seeking specific performance of their agreement of sale for the Property. They also lodged a notice of *lis pendens* among the land records of New Castle County. Their Amended Petition was filed on February 16, 2011.

⁵ Intervenor's Mot. to Dismiss Ex. 6.

⁶ *Id.* Ex. 4.

⁷ The purchase price in the Petitioners' agreement of sale is higher than the purchase price in the Intervenor's agreement of sale, even as revised in December. Credits and closing adjustments were more favorable for the buyer under the Petitioners' agreement; that accounts for the difference in net proceeds to the lender. The lender has not addressed the Petitioners' subsequent effort to increase the net proceeds.

On February 21, 2011, the Intervenor moved to intervene.⁸ With his motion to intervene, the Intervenor also filed a motion to dismiss the Petitioners' Amended Petition or, in the alternative, for summary judgment that would lead to the dismissal of this action.

The Intervenor and the Respondents are prepared to go to closing on the sale of the Property by the end of this week. All conditions in their agreement—including lender approval of the short sale—have been satisfied.

* * *

Summary judgment under Court of Chancery Rule 56 may be granted if there are no material facts in dispute and the moving party is entitled to judgment as a matter of law.⁹ The Petitioners have put forth some facts that are either disputed or, perhaps more accurately, not fully developed on the present record. None of these “facts,” however, is material to the Court’s disposition of the pending motion.

⁸ That motion has been granted.

⁹ *U.S. Bank Nat'l Ass'n v. U.S. Timberlands Klamath Falls, LLC*, 2004 WL 5388052, at *14 (Del. Ch. Dec. 22, 2004). Because the Court considers matters outside the Amended Petition, the motion to dismiss must be taken as one for summary judgment. *See* Ct. Ch. R. 12(b). Although the Petitioners have suggested that discovery would be helpful and, perhaps, necessary, they have not identified any material facts that would be put into question by such discovery. Thus, resolution under Court of Chancery Rule 56 is now appropriate.

The question which the Court must resolve is whether the Petitioners are entitled to an order of specific performance. It is not whether the Intervenor has a enforceable contract to purchase the Property.¹⁰ The Intervenor has a claim under his agreement of sale that is sufficient to have allowed him to intervene in this action. That the Respondents would sell the Property to him this week but for the pendency of this action and the accompanying notice of *lis pendens* also demonstrates that he has a sufficient interest to challenge the entitlement of the Petitioners to specific performance.

A party seeking specific performance must be able to demonstrate that she is “ready, willing, and able” to complete the transaction in accordance with the

¹⁰ The Intervenor and the Petitioners quibble as to the other’s contract rights. Because this matter ultimately turns upon whether the Petitioners are able to complete closing, resolution of those issues is not necessary. As noted, the Intervenor is not seeking the Court’s assistance in closing with the Respondents; instead, he is seeking to avoid the impediments imposed by the Petitioners.

For example, the Petitioners argue that, because of a provision in the short sale addendum, the Intervenor’s agreement of sale was conditioned upon securing lender approval by September 30, 2010—an event which did not occur by that time. The text of the provision relied upon by the Petitioners, however, conferred upon the Intervenor the right to walk away from the contract; it did not, on its own, result in nullification of the underlying agreement of sale. As another example, the Petitioners signed an addendum in early February 2011 to increase their offer. That addendum was not executed by the Respondents. Amended Pet. Ex. D.

contractual terms.¹¹ The Petitioners are not able to settle under their agreement of sale because they not only have not obtained lender approval under the short sale addendum but, indeed, the lender has rejected their contract. Nothing but speculation supports an argument that, perhaps with another attempt, the Petitioners might obtain approval. Thus, although the Petitioners are, from the record before the Court, innocent of any improper or bad faith conduct, they have not been able to satisfy one of the most important conditions upon which the transaction is premised.¹² This is not a matter where the continued failure to satisfy an essential condition has been the fault of the seller or, with reasonable certainty, would be cured in a timely fashion through reasonable efforts that the Petitioners might undertake.¹³ Whether a party to a contract is “ready, willing, and able” to satisfy the terms of the contract is a question of fact. There are no material facts in dispute as to the inability of the Petitioners to complete the contemplated transaction, which is

¹¹ See, e.g., *Lester Realty, Inc. v. Diver*, 2000 WL 33654066, at *4 (Del. CCP Sept. 28, 2000), citing *Delaware Apts., Inc. v. John J. Monaghan Co.*, 69 A.2d 242, 246 (Del. 1949) & *Slaughter v. Stafford*, 141 A.2d 141, 143 (Del. 1958).

¹² See, e.g., *Barnes v. Jackson*, 2005 WL 2130220, at *4 n.27 (Del. Ch. Aug. 29, 2005).

¹³ Cf. *Osborn ex. rel. Osborn v. Kemp*, 991 A.2d 1153, 1161 (Del. 2010).

dependent upon lender approval in accordance with the short sale addendum. Thus, their Amended Petition and the record before the Court collectively demonstrate that, as a matter of law, they are not entitled to an award of specific performance.

Accordingly, the Intervenor is entitled to an entry of summary judgment against the Petitioners and dismissal of this action.¹⁴

* * *

Furthermore, in furtherance of the Court's responsibility to provide complete relief, the Recorder of Deeds, in and for New Castle County, shall cancel the notice of *lis pendens* and mark the indices accordingly when this order of final judgment is no longer appealable.¹⁵

¹⁴ Although the Respondents have not filed a written response to the Amended Petition, they have made clear to the Court their desire to close under the Intervenor's agreement of sale.

In addition, the Petitioners have asked that the Respondents be enjoined from conveying the Property to any third party, including, one assumes, the Intervenor. For the reasons set forth above, there is no basis for an award of injunctive relief, and the dismissal of the Amended Petition carries the Petitioners' claim for injunctive relief with it.

¹⁵ See 25 *Del. C.* § 1606(2).

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The parties shall bear their own costs.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap

cc: Register in Chancery-K