SAM GLASSCOCK III
VICE CHANCELLOR

COURT OF CHANCERY
OF THE
STATE OF DELAWARE

COURT OF CHANCERY COURTHOUSE
34 THE CIRCLE
GEORGETOWN, DELAWARE 19947

Date Submitted: September 19, 2016
Date Decided: September 26, 2016

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Re: *Nistazos Holdings, LLC v. Milford Plaza Enterprises, LLC*,
Civil Action No. 11859-VCG

Dear Counsel:

This case involves a lease agreement (the "Lease Agreement") entered on January 8, 2013 under which the Plaintiff was to lease a property to operate a donut shop from the Defendant. The Defendant/lessor, owner of the fee to the property, could not comply with the contractual duty to deliver possession of the premises within a contractually-reasonable time, because it did not have the possessory right to the property, which was subject to a prior lease. Earlier this year, that prior lease terminated, and the Plaintiff sued, seeking specific performance of its rights under the Lease Agreement, and damages. Initially, the parties to the litigation entered a standstill agreement, under which the Defendant refrained from encumbering the property with a lease to any third party. The parties filed cross motions for summary judgment, which I denied after argument. Subsequently, the Defendant sought to

withdraw from the standstill, and the Plaintiff to move forward on its request for preliminary injunctive relief, seeking to prevent encumbrance or alteration of the property until its request for specific performance could be finally resolved. On August 11, 2016 I held a hearing on both motions. By bench ruling of August 31, 2016 (the "Bench Ruling,") I found that the Plaintiff was only entitled to preliminary injunctive relief if it could demonstrate that it was reasonably likely to obtain specific performance of the Lease Agreement, and that it had failed to so demonstrate. I denied Plaintiff's request for preliminary injunctive relief, and released the Defendant from the standstill. The Plaintiff seeks certification of an interlocutory appeal from these rulings; for the reasons that follow that certification must be denied.

As Supreme Court Rule 42 makes clear, interlocutory appeal is an extraordinary remedy, which "should be exceptional, not routine, because [such appeals] disrupt the normal procession of litigation, cause delay, and can threaten to exhaust scarce party and judicial resources."[1] Before certifying an appeal, I must determine that the decision to be appealed has decided a substantial issue of material importance, and that the benefits of an interlocutory appeal "outweigh the probable costs, such that interlocutory review is in the interests of justice."[2] In evaluating that

[1] Supr. Ct. R. 42(b)(ii).
[2] Supr. Ct. R. 42(b)(i), (iii).

balance I must apply the eight factors set out in Supreme Court Rule 42(b)(iii).[3] I find that the decision appealed from decided a substantial issue; in denying the preliminary injunction, I have allowed the Defendant to potentially reconfigure and encumber the property by a lease to a third party tenant, which, if effected, will likely limit the Plaintiff to money damages for breach of the Lease Agreement. I turn, therefore, to the factors I am required to evaluate under Rule 42(b)(iii). The Plaintiff alludes to two of these eight factors in its request for certification, arguing that the matter is "a question of law resolved for the first time in this State,"[4] and that the review of my ruling at this time will serve the "considerations of justice."[5] For the reasons that follow, I disagree.

The Plaintiff frames as a matter of first impression the question of "whether one party's breach of a contract terminates a valid and enforceable contract as a matter of law and, thereby, precludes the non-breaching party from relief in the form

[3] *See* Supr. Ct. R. 42(b)(iii) (listing the eight factors: "(A) The interlocutory order involves a question of law resolved for the first time in this State; (B) The decisions of the trial courts are conflicting upon the question of law; (C) The question of law relates to the constitutionality, construction, or application of a statute of this State, which has not been, but should be, settled by this Court in advance of an appeal from a final order; (D) The interlocutory order has sustained the controverted jurisdiction of the trial court; (E) The interlocutory order has reversed or set aside a prior decision of the trial court, a jury, or an administrative agency from which an appeal was taken to the trial court which had decided a significant issue and a review of the interlocutory order may terminate the litigation, substantially reduce further litigation, or otherwise serve considerations of justice; (F) The interlocutory order has vacated or opened a judgment of the trial court; (G) Review of the interlocutory order may terminate the litigation; or (H) Review of the interlocutory order may serve considerations of justice.").

[4] Supr. Ct. R. 42(b)(iii)(A).

[5] Supr. Ct. R. 42(b)(iii)(H).

of specific performance?" Regarding the "considerations of justice,"[6] the Plaintiff argues that the damages calculation will differ depending on whether my ruling denying specific performance is later affirmed or reversed, which could result in multiple hearings on damages. Thus, according to the Plaintiff, ruling on specific performance now and deferring a hearing on damages until after appellate review would best conserve judicial economy. I turn first to whether the matter presents an issue of first impression.

Contrary to Plaintiff's framing of the issues—which may have arisen from the rather inartful language of the Bench Ruling—the questions I decided here involved settled principles of contract law, and I have not held that specific performance of a lease is never available. According to settled contract law, when a contract is breached, the non-breaching party can seek damages or, in limited circumstances, specific performance. The latter is an equitable remedy, available only where equity so requires.[7] In evaluating a request for preliminary injunctive relief, I must evaluate whether the movant has demonstrated, on the record, a likelihood of ultimate success, post-trial, on legal entitlement to the injunction. The injunction sought here was to preserve the opportunity for specific performance of the Lease Agreement. That, in turn, required the Plaintiff to demonstrate that it was likely to be entitled to

[6] Supr. Ct. R. 42(b)(iii)(H).
[7] *See, e.g.*, *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1161 (Del. 2010) ("[W]e will only order specific performance where the balance of equities tips in favor of specific performance.").

specifically enforce a lease agreement, more than three and one-half years after execution, and approximately three years after Defendant's material breach by non-delivery of possession. In fact, the Defendant was unable to deliver possession within the period implied in the lease,[8] because possession was held by a third party. I found, based on the record, that the Plaintiff had failed to show a reasonable probability that it would be able to demonstrate entitlement to the equitable remedy of specific performance, rather than damages. This finding did not present a "question of law resolved for the first time."

In my Bench Ruling, I found that it was likely that the Plaintiff would be able to demonstrate that, because possession of the property could not be delivered by the Defendant within a reasonable time,[9] the Defendant had breached the Lease Agreement. Here, as I noted in my Bench Ruling, at the time of breach the Plaintiff did not seek specific performance, nor could it successfully have done so, as the Defendant did not possess the premises.[10] Years passed during which the parties

[8] The contract was silent as to time of performance, which I found implied that performance must occur within a reasonable time. *See* n.9, *infra*.

[9] Non-party Rehoboth Donut Shops entered into the Lease Agreement with the Defendant in January, 2013 (Rehoboth Donut Shops thereafter assigned its rights under the agreement to Plaintiff Nistazos Holdings) with all parties presumably expecting the Plaintiff to take possession shortly thereafter. The Defendant, however, lost an action to evict the current tenant, and was required by the Justice of the Peace to permit that third party to remain on the premises until termination of its lease, in early 2016.

[10] The Plaintiff points to this dictum as a question of law "resolved for the first time in this State" arguing that it "is not aware of any Delaware law that would have precluded a court in 2013 from granting injunctive relief requiring the Defendant to deliver possession of the property to the Plaintiff at such time as the property would become vacant," three years later. In any event, this

continued to communicate. As I expressed in my Bench Ruling, the Lease Agreement, which contemplated possession within a reasonable time of January, 2013, and running thereafter for a term of years, is no longer a contract that is reasonably likely to support specific performance; the Plaintiff in effect asks me to create and enforce a new contract, with many of the same terms as the original, but with the lease starting now, rather than in early 2013.

Recognizing, presumably, that the original contract is not specifically enforceable in 2016, the Plaintiff argued at the hearing on preliminary injunctive relief that the discussions between the parties, post-breach, had amended the Lease Agreement, extending the time of performance. I found, however, that the record was insufficient to demonstrate the likelihood that the Plaintiff would be able to demonstrate such an amendment, or that a new lease agreement had been reached by the parties that could support specific performance. Therefore, I found that the Plaintiff could pursue damages, but was unlikely ultimately to be able to obtain an order of specific performance. To my mind, none of these conclusions required the examination of questions of law "resolved for the first time in this State."[11]

As to Plaintiff's argument that "considerations of justice" support interlocutory appeal, if the Plaintiff ultimately proves breach, it will be entitled to

argument is not helpful to the Plaintiff, as it failed to seek to enforce its rights in the years following the breach, until possession returned to the Defendant.

[11] Supr. Ct. R. 42(b)(iii)(A).

full contract damages. As I noted in the Bench Ruling, to the extent the Plaintiff reasonably relied on the ongoing discussions with the Defendant and its agents, post-breach, in forgoing opportunities to find an alternative location for its donut shop, that fact may be relevant to damages, and to negate any argument that the Plaintiff was required to mitigate those damages, post-breach. In any event, the Plaintiff has the opportunity to be made whole, and justice does not support an interlocutory appeal. To the extent the Plaintiff is arguing that an interlocutory appeal will create litigation efficiencies, should it prevail on appeal, such an argument can be made in any action, and cannot justify the extraordinary practice of interlocutory appeal. I cannot find that the benefits of an interlocutory appeal here outweigh the costs of that appeal. An interlocutory appeal is therefore not certifiable under Supreme Court Rule 42. An appropriate form of order follows.

Sincerely,

/s/ Sam Glasscock III

Sam Glasscock III

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

NISTAZOS HOLDINGS, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 11859-VCG
	)	
MILFORD PLAZA ENTERPRISES, LLC,	)	
	)	
Defendant.	)	

ORDER DENYING LEAVE TO APPEAL FROM INTERLOCUTORY ORDER

This 26th day of September, 2016, the Plaintiff having made application under Rule 42 of the Supreme Court for an order certifying an appeal from the interlocutory order of this Court, dated August 31, 2016; and the Court having found that such orders do not satisfy the criteria of Rule 42(b)(iii);

IT IS ORDERED that certification to the Supreme Court of the State of Delaware for disposition in accordance with Rule 42 of that Court is DENIED.

Dated: September 26, 2016

__/s/Sam Glasscock III_____
Sam Glasscock III, Vice Chancellor