

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

PATRICIA W. GRIFFIN
MASTER IN CHANCERY

CHANCERY COURTHOUSE
34 The Circle
GEORGETOWN, DELAWARE 19947

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Scott G. Wilcox, Esquire
Moore & Rutt, P.A.
1007 North Orange Street, Suite 446
Wilmington, DE 19899

David C. Hutt, Esquire
Michelle G. Bounds, Esquire
Morris James LLP
107 West Market Street
Georgetown, DE 19947

Re: *Hastings Funeral Home, Inc. v. Charles W. Hastings*
C.A. No. 2021-0373-PWG

Dear Counsel:

Pending before me is a motion to dismiss, under Court of Chancery Rule 12(b)(6), a complaint in which the new owner of a funeral home business seeks specific performance of a lease purchase agreement with the former owner for real properties used in the operation of the business, and damages. The new owner sought to exercise the option to purchase the properties and began the process specified in the agreement for establishing the properties' sale price. Disputes arose between the parties concerning the process and the sale price. In his motion to dismiss, the former owner claims the new owner is not entitled to specific

performance or damages because of its failure to comply with the terms and conditions of the agreement. The new owner responds that the former owner, not it, failed to comply with the agreement. I recommend that the Court deny the motion to dismiss because it has not been shown that the new owner could not recover under any reasonably conceivable set of circumstances that could be proven. This is a final report.

I. Background

On May 4, 2014, William Bryan Bishop, Jr. purchased all the shares and assets of Plaintiff Hastings Funeral Home, Inc. (“HFH”) from Defendant Charles W. Hastings (“Hastings”).¹ On July 1, 2014, the parties entered into a separate lease purchase agreement (“Agreement”) for real property owned by Hastings and located at 19 South Main Street and 24 South Main Street, Selbyville, Delaware (“Properties”) out of which HFH operates the business.² The Agreement’s initial five-year term ended on June 30, 2019, and HFH had the option to renew for two additional five-year terms.³ At the end of each term, if HFH did not exercise the option to renew under the Agreement, it was obligated to purchase the Properties.⁴

¹ Docket Item (“D.I.”) 1, ¶¶ 4-5.

² *Id.*, ¶ 6; *id.*, Ex. A.

³ *Id.*, Ex. A, Art. 2; *id.*, Art. 20.

⁴ *Id.*, Art. 21. At any time during the renewal terms, HFH had the option to purchase the Properties from Hastings. *Id.*, Art. 21(b).

The Agreement stated that Plaintiff will purchase the Properties at their “then fair market value” to be agreed upon by HFH and Hastings.⁵ If the parties could not agree on the fair market value price, the Agreement provided a mechanism for determining fair market value (“Appraisal Mechanism”):

[T]he fair market value shall be determined by calculating the average fair market value based upon two appraisals commissioned independently by [HFH] and [Hastings] and prepared by MAI, Delaware Licensed Appraisers, provided that any difference between the value does not exceed ten (10%) percent. If such difference is greater than ten (10%), then [HFH] and [Hastings] shall instruct those MAI, Delaware Licensed Appraisers to appoint a third MAI, Delaware Licensed Appraiser to prepare a third appraisal, the cost of which shall be born equally by [Hastings] and [HFH]. If the three MAI, Delaware Licensed Appraisers cannot agree on the fair market value of the [Properties], then [Hastings] and [HFH] shall be bound by the appraisal of the mutually chosen third MAI, Delaware Licensed Appraiser. In the event that [HFH] exercises the option, [HFH] and [Hastings] shall have thirty (30) days after the giving of notice by [HFH] of its intention to exercise the option to obtain the appraisals at their own expense of their own MAI, Delaware Licensed Appraiser. The third appraisal, if necessary, shall be obtained within thirty (30) days thereafter.⁶

If HFH purchased the Properties at the end of any term, the date of purchase would be the last day of the term, unless the parties mutually agreed to an alternative date.⁷ If HFH purchased the Properties during one of the renewal terms, the

⁵ *Id.*, Ex. A, Art. 21(d).

⁶ *Id.*

⁷ *Id.*, Ex. A, Art. 21(a), (c).

purchase must conclude within 90 days after the exercise of the option, unless the parties mutually agreed to an alternative date.⁸

Prior to the end of the Agreement's initial term, HFH exercised its option to purchase the Properties.⁹ When the parties were unable to agree upon a fair market value price for the Properties, they each hired appraisers to determine the fair market value, with HFH hiring Harold L. Carmean ("Carmean") and Hastings hiring William McCain ("McCain").¹⁰ Carmean's appraisal valued the Properties at \$637,500.00 and was delivered to Hastings on August 14, 2019, after the initial lease term had ended.¹¹ HFH claims Hastings delayed in providing it with McCain's appraisal, which was dated October 10, 2019 and valued the Properties at \$925,000.00.¹² Because the difference in their values exceeded 10 percent, Carmean and McCain appointed a third appraiser, Georgia Nichols ("Nichols"), who valued the Properties at \$850,000.00 in a June 16, 2020 appraisal.¹³

In a July 9, 2020 letter to HFH's attorney, Hastings first raised concerns that HFH had not complied with the Agreement's terms because Carmean was not

⁸ *Id.*, Art. 21(b). The Agreement also contains a time is of the essence clause. *Id.*, Art. 26(d).

⁹ D.I. 1, ¶ 9.

¹⁰ *Id.*, ¶¶ 9-10. Carmean was a Delaware certified appraiser but not a MIA-certified appraiser. *Id.*, ¶ 10; D.I. 5, at 5.

¹¹ D.I. 1, ¶ 10.

¹² *Id.*, ¶ 11; *see also* D.I. 9, at 6.

MAI-certified.¹⁴ His letter stated that, since Carmean was not a qualified appraiser under the Agreement, HFH would “have to start all over and hire an MAI Delaware appraiser to apprise the property.”¹⁵ HFH then hired a new MAI-certified appraiser, John Crognale (“Crognale”), who valued the properties at \$615,000.00 in an appraisal dated November 2, 2020.¹⁶

HFH’s counsel sent Crognale’s appraisal to Hastings on November 9, 2020 and asked, since the value difference still exceeded 10 percent, whether Hastings would agree to using the Nichols’ appraisal or for Crognale and McCain to select a new third appraiser.¹⁷ On January 25, 2021, Hastings responded to the November 9th letter, claiming that HFH had breached a material term or condition in the Agreement because Carmean lacked MAI certification and the Agreement does not provide for additional appraisals.¹⁸

¹³ D.I. 1, ¶¶ 11,12.

¹⁴ *Id.*, ¶ 13. Hastings asserts that it only came to his attention that Carmean was not a MAI-certified appraiser after the parties obtained Nichols’ appraisal on June 16, 2020. D.I. 10, at 13.

¹⁵ D.I. 1, Ex. B. Hastings offered to sell the Properties at \$887,500.00, which represented the average value of the appraisals prepared by McCain and Nichols, the two MAI-certified appraisers. *Id.*

¹⁶ D.I. 1, ¶¶ 13-14.

¹⁷ *Id.*, Ex. C.

¹⁸ *Id.*, Ex. D. He offered a sale price of \$878,000.00 or \$850,000.00 if HFH assumed all sale costs. *Id.*

When the parties were unable to reach an agreement about the Properties' sale price, HFH filed a complaint ("Complaint") on April 29, 2021 claiming Hastings breached the Agreement and seeking specific performance of the Agreement and damages representing rent paid by HFH.¹⁹

Hastings filed a motion to dismiss ("Motion") on June 4, 2021, arguing that Plaintiff is not entitled to specific performance.²⁰ HFH responded on July 17, 2021, asserting that it had met its pleading burden on specific performance.²¹ Hastings filed his reply on August 6, 2021.²²

II. Standard of Review

"A motion to dismiss under Rule 12(b)(6) for failure to state a claim should be denied unless it can be determined with reasonable certainty that the plaintiff could not prevail on any set of facts reasonably inferable from the pleadings."²³ The facts for purposes of a motion to dismiss under Rule 12(b)(6) are drawn from the complaint and all well-pled allegations in the complaint are assumed to be true,

¹⁹ D.I. 1. HFH continues to pay rent under the Agreement. *Id.*, ¶¶ 19, 20.

²⁰ D.I. 5.

²¹ D.I. 9.

²² D.I. 10.

²³ *N.K.S. Distributors, Inc.*, 2010 WL 2178520, at *4 (Del. Ch. May 28, 2010) (internal quotation marks and citations omitted); *see also VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 611 (Del. 2003).

with the plaintiff receiving the benefit of all reasonable inferences.²⁴ Even though “it may, as a factual matter, ultimately prove impossible for the plaintiff to prove his claims at a later stage of a proceeding, ... that is not the test to survive a motion to dismiss.”²⁵ A broad brush is used in determining sufficiency of claims – if the petitioner pleads any reasonably conceivable set of circumstances that could be proven and would entitle her to relief, then the motion to dismiss fails.

III. Analysis

Hastings argues that HFH’s action should be dismissed because it is not entitled to specific performance or the return of paid rent.²⁶ HFH responds that the motion to dismiss should be denied.²⁷ A party seeking specific performance must establish, by clear and convincing evidence, that (1) an enforceable contractual obligation exists; (2) it has performed (or is ready, willing, and able to perform) its own obligations; and (3) that the balance of the equities tips in its favor.²⁸ In other words, under the standard applicable to a motion to dismiss, I consider whether it

²⁴ See *In re Gen. Motors (Hughes) S’holder Litig.*, 897 A.2d 162, 168 (Del. 2006); *VLIW Tech., LLC*, 840 A.2d at 611; *Malpiede v. Townson*, 780 A.2d 1075, 1082-83 (Del. 2001); *Orman v. Cullman*, 794 A.2d 5, 15 (Del. Ch. Mar. 1, 2002).

²⁵ *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 27 A.3d 531, 536 (Del. 2011).

²⁶ D.I. 5.

²⁷ D.I. 9.

²⁸ See *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1158 (Del. 2010).

is reasonably conceivable that HFH can establish a right to specific performance of the Agreement by clear and convincing evidence.

In the Motion, Hastings makes a number of claims why HFH is not entitled to specific performance. I address each claim below.

A. The Agreement Contains Sufficiently Definite Terms

Hastings argues that specific performance cannot be granted because the Agreement lacks a definite price due to HFH's failure to properly follow the Agreement's process for determining the sale price.²⁹ HFH responds that the Agreement is definite since it provides a means for determining the Properties' sale price.³⁰ "[S]pecific performance will only be granted when an agreement is clear and definite and a court does not need to supply essential contract terms."³¹ "A contract is sufficiently definite and certain to be enforceable if the court can ... ascertain what the parties have agreed to do."³² The essential terms of a real estate contract are the names of the buyer and seller, description of the property to be

²⁹ D.I. 5, at 11-13; *see also* D.I. 10, at 8.

³⁰ D.I. 9, at 12-14.

³¹ *Osborn*, 991 A.2d at 1158.

³² *Eagle Force Hldgs., LLC v. EF Invs., LLC*, 187 A.3d 1209, 1232 (Del. 2018).

sold, sales price or the means of determining the price, the terms and conditions of the sale, and the signature of the party to be charged.³³

The Agreement does not lack a sufficiently definite price term for the Properties. The Agreement provides a means of determining the price – it states that HFH will pay fair market value for the Properties, and establishes the Appraisal Mechanism for determining the fair market value.³⁴ This Court has held that substantially similar agreements, providing for an appraisal-based method for determining the fair market value of real estate, can support specific performance.³⁵ HFH’s failure to comply with all aspects of the Appraisal Mechanism in the Agreement does not affect the parties’ intentions in making the Agreement or whether the Agreement’s terms are definite. Therefore, it is reasonably conceivable that the Agreement is an enforceable contract with sufficiently definite terms to support specific performance.

B. The Appraisal Mechanism is Not a Condition Precedent

Next, Hastings asserts HFH is not entitled to specific performance because it has not met conditions precedent to the purchase of the Properties in the

³³ See *Pulieri v. Boardwalk Properties, LLC*, 2015 WL 691449, at *5 (Del. Ch. Feb. 18, 2015) (citation omitted).

³⁴ D.I. 1, Ex. A, Art. 21.

³⁵ See *Walsh v. White House Post Productions, LLC*, 2020 WL 1492543, at *9 (Del. Ch. Mar. 25, 2020); Cf. *Hexamer v. Hexamer*, 1976 WL 8256, at *2 (Del. Ch. Feb. 18, 1976)

Agreement, including the use of a MAI-certified appraiser and the time requirements in the Agreement.³⁶ HFH contends that the Appraisal Mechanism is not a condition precedent to the sale of the Properties and Defendant has waived any protections under the Agreement by his delays and through directing HFH, in his July 9, 2020 letter to obtain another appraisal.³⁷

I consider whether conditions precedent have not occurred since the parties have not agreed on the fair market value of the Properties or strictly complied with the Appraisal Mechanism. Hastings claims HFH has failed to meet the condition precedent “of establishing the [Properties’ sale] price.”³⁸ HFH argues that the obligation to sell the Properties was not conditioned on completion of the appraisals under the Appraisal Mechanism.³⁹

(finding no right to specific performance because the agreement only provided that the plaintiff “may” purchase the property at fair market value).

³⁶ D.I. 5, at 13-16. The Agreement’s time requirements include 30 days for the parties to obtain appraisals after HFH notified Hastings that it wanted to purchase the Properties, and another 30 days after that to obtain a third appraisal. D.I. 1, Ex. A, ¶ 21(d). The Agreement provides that the purchase of the Properties will occur 90 days after HFH exercised its option to purchase, “unless the parties mutually agree[d] to an alternate date.” *Id.*, ¶ 21(b).

³⁷ D.I. 9, at 14-18.

³⁸ D.I. 10, at 8; *see also* D.I. 5, at 13-16.

³⁹ D.I. 9, at 18.

“A condition precedent is ‘an act or event, other than a lapse of time, that must exist or occur *before* a duty to perform something promised arises.”⁴⁰ “[W]hether a condition is one precedent to performance by the other party is divined from the intent of the parties.”⁴¹ “Typically, conditions precedent are easily ascertainable objective facts, generally that a party performed some particular act or that some independent event has occurred.”⁴² “Although no particular words are necessary for the existence of a condition, such terms as ‘if,’ ‘provided that,’ ‘on condition that,’ or some other phrase that conditions performance usually connote an intent for a condition.”⁴³

The Agreement obligates Plaintiff to purchase the Properties at fair market value either at the end of one of the terms, or during a renewal term upon notice.⁴⁴ The Agreement does not contain language that conditions the obligation to

⁴⁰ *Aveanna Healthcare, LLC v. Epic/Freedom, LLC*, 2021 WL 3235739, at *25 (Del. Super. July 29, 2021) (citation omitted) (emphasis in original).

⁴¹ *SJM Soft.com, Inc. v. Cross Country Bank*, 2003 WL 1769770, at *12 (Del. Super. Apr. 2, 2003).

⁴² *Hexion Specialty Chems., Inc. v. Huntsman Corp.*, 965 A.2d 715, 739 (Del. Ch. 2008).

⁴³ *SLMSoft.Com, Inc.*, 2003 WL 1769770, at *12 (citation omitted); *see, e.g., ITG Brands, LLC v. Reynolds Am., Inc.*, 2017 WL 5903355, at *8 (Del. Ch. Nov. 30, 2017); *Sage Software, Inc. v. CA, Inc.*, 2010 WL 5121961, at *8 (Del. Ch. Dec. 14, 2010) (“The words “provided that” normally create a condition.”), *aff’d*, 27 A.3d 552 (Del. 2011); *Kansas City Southern v. Grupo TMM, S.A.*, 2003 WL 22659332, at *3 (Del. Ch. Nov. 4, 2003) (finding no condition because the “words ‘on condition that’ or ‘provided that’ or even the two-letter word ‘if,’ phrases typically used by parties to create conditions, are not present”).

⁴⁴ D.I. 1, Ex. A, Art. 21.

purchase the Properties upon an independent event or particular act. Viewed objectively, this obligation is unconditional. Once the option to purchase is exercised, the Appraisal Mechanism provides the means to determine the fair market value of the Properties, if disputed by the parties. The Appraisal Mechanism's process is not an event that must occur before the duty to purchase or sell the Properties arises but provides a method to accomplish that obligation. Therefore, HRH's failure to fully comply with the Appraisal Mechanism's terms is not a violation of a condition precedent preventing purchase of the Properties under the Agreement.

C. HFH Has Sufficiently Pleaded Waiver by Hastings

HFH argues that Hastings' actions caused the delays in the Appraisal Mechanism process, and he waived any claim of breach when he did not challenge the appraisal process for nearly a year and then indicated that, to comply with the Appraisal Mechanism, HFH "would have to start all over and hire [a] MAI Delaware appraiser to appraise the property."⁴⁵ Hastings replies that both parties caused delays, the Agreement contains a non-waiver provision that would prevent HFH's waiver arguments, and his attempts to come to an agreement on price do not waive his ability to enforce the Agreement.⁴⁶

⁴⁵ D.I. 9, at 14-17 (citing D.I. 1, Ex. B).

⁴⁶ D.I. 10, at 12-17.

“Any one may forego a right intended for his own benefit in the absence of some rule of public policy.”⁴⁷ “A party asserting waiver must demonstrate that (1) there is a requirement or condition to be waived; (2) the waiving party knew of the requirement or condition; and (3) the waiving party intended to waive that requirement or condition.”⁴⁸

Here, the Appraisal Mechanism required that the appraisers be MAI-certified and imposed certain time requirements – that appraisals be obtained by HFH and Hastings within 30 days, and the third appraisal within 60 days, after the purchase option was exercised by HFH.⁴⁹ And, if the lease was not renewed (and there is no evidence that it was in this instance), HFH’s purchase of the Properties was to take place on the last day of the lease term, or in 90 days if during a lease term.⁵⁰ Both parties knew of these requirements since they executed the Agreement.⁵¹ With regard to the MAI certification requirement, Hastings argues HFH’s initial appraisal was invalid because Carmean was not MAI-certified and that its attempt to cure the breach by later obtaining an appraisal from an MAI-

⁴⁷ *In re Coinmint, LLC*, 2021 WL 3560831, at *14 (Del. Ch. Aug. 12, 2021) (internal quotation marks and citations omitted).

⁴⁸ *Id.*, at *15.

⁴⁹ D.I. 1, Ex. A, Art. 21(d).

⁵⁰ *Id.*, Art. 21(a), (b).

⁵¹ *See id.*, at 14.

certified appraiser was still in violation of the Agreement.⁵² The pleaded facts show that HFH provided the appraisal of a non-MAI certified appraiser to Hastings on August 14, 2019.⁵³ The pleaded facts also show that Hastings did not raise the issue of MAI certification until eleven months after the Carmean appraisal was obtained and after the Appraisal Mechanism process continued in reliance upon the Carmean appraisal.⁵⁴ While the evidence to prove waiver must ultimately “be unequivocal,”⁵⁵ the pleaded facts at this stage of the litigation make it reasonably conceivable that HFH can show Hastings intentionally waived the MAI certification requirement because of this reliance.⁵⁶

In addition, Hastings claims that HFH failed to comply with the time requirements in the Agreement when its Carmean appraisal was dated August 14, 2019 and the lease term ended on June 30, 2019, in excess of the 30-day limit in the Agreement for obtaining an appraisal.⁵⁷ He also argues that the almost one-

⁵² See D.I. 5, at 12-13.

⁵³ D.I. 1, ¶ 10.

⁵⁴ *Id.*, ¶¶ 10-13.

⁵⁵ *In re Coinmint, LLC*, 2021 WL 3560831, at *15 (Del. Ch. Aug. 12, 2021) (citations omitted).

⁵⁶ In the Motion, Hastings claims that he immediately notified HFH of the certification issue upon learning that Carmean was not MAI-certified. See D.I. 5, at 12-13. Because this assertion is not part of the Complaint, the Court may not properly consider it in this Motion.

⁵⁷ See *id.*, at 15. In the Motion, Hastings disputes whether HFH properly exercised its right to purchase the Properties, alleging that the option to purchase occurred “at a later

year delay in obtaining the third appraisal, or ten months after the Agreement's 60 days deadline for the third appraisal had elapsed, violates the Agreement.⁵⁸ HFH contends that Hastings' actions caused continual delays, including taking from June 30, 2019 until October 10, 2019 to provide the McCain appraisal, "drag[ging] his feet for several months before agreeing to hire [the third appraiser]," and demanding that HFH obtain a second appraisal from a MAI-certified appraiser.⁵⁹ Hastings admits that "[b]oth parties contributed to delays and deviations from the agreed-upon process for determining the purchase price."⁶⁰ Accordingly, drawing inferences in HFH's favor and relying on the factual allegations about Hastings' conduct, I find it is reasonably conceivable that Hastings intended to waive the time requirements related to obtaining the appraisers.

Hastings further argues that he has not waived his ability to enforce the terms of the Agreement because the Agreement contains a non-waiver provision.⁶¹

date," and separately, in the reply brief, that HFH has offered no date or written proof that it provided notice to Hasting. *Id.*, at 4; D.I. 10, at 13.

⁵⁸ D.I. 5, at 15-16.

⁵⁹ D.I. 9, at 14-15.

⁶⁰ D.I. 10, at 12-13.

⁶¹ *Id.*, at 15-16.

Delaware law recognizes the role and importance of non-waiver provisions in contracts.⁶² The Agreement contains the following provision:

No waiver of any covenant or condition or the breach of any covenant or condition of this [Agreement] shall be taken to constitute a waiver of any subsequent breach nor shall such waiver justify or authorize [HFH] to violate any other term, condition or covenant hereof at any subsequent date.⁶³

The plain language of this provision does not purport to prohibit all waivers but provides that a waiver of a present breach is not deemed a waiver of any future breach and does not provide justification to violate another Agreement term. By its terms, this provision does not preclude waiver of an Agreement term.

In conclusion, HFH has sufficiently pleaded factual allegations to show that it is reasonably conceivable it is ready, willing, and able to perform under the Agreement.

D. It is Reasonably Conceivable that the Balance of the Equities Tip in HFH's Favor

Hastings asserts that, at the motion to dismiss stage, the balance of equities tip in his favor since HFH breached the terms of the Agreement.⁶⁴ HRH responds that the equities weigh in its favor because of Hastings' bad faith conduct in

⁶² See *Viking Pump, Inc., v. Liberty Mut. Ins. Co.*, 2007 WL 1207107, at *27 (Del. Ch. Apr. 13, 2007).

⁶³ D.I. 1, Ex. A, Art. 13.

⁶⁴ D.I. 5, at 16-17.

attempting to thwart HFH from exercising its option to purchase the Properties under the Agreement.⁶⁵

Generally, the balancing of the equities test requires the Court to address whether “the harm that would result if an injunction does not issue outweighs the harm that would befall the opposing party if the injunction is issued.”⁶⁶ In the context of specific performance, the Court must consider whether “specific enforcement of a validly formed contract would cause even greater harm than it would prevent.”⁶⁷

The Complaint alleges that Hastings delayed fulfilment of the purchase obligation in the Agreement, and then sought to renegotiate certain terms of the Agreement.⁶⁸ Hastings asks the Court to find that the equities do not favor specific performance because HFH has not complied with the Appraisal Mechanism process. Assuming the factual allegations in the Complaint are true and making all inferences in the favor of HRH, it is reasonably conceivable that HRH could prove that the balance of the equities tips in its favor. Therefore, HRH has met its pleading stage obligation to show that the balance of the equities would tip in its

⁶⁵ D.I. 9, at 20-22.

⁶⁶ *Kuhns v. Bruce A. Hiler Del. QPRT*, 2014 WL 1292860, at *23 (Del. Ch. Mar. 31, 2014) (quoting *Penn Mart Supermarkets, Inc. v. New Castle Shopping LLC*, 2005 WL 3502054, at *15 (Del. Ch. Dec. 15, 2005)).

⁶⁷ *Walton v. Beale*, 2006 WL 265489, at *7 (Del. Ch. Jan. 30, 2006).

⁶⁸ D.I. 1, ¶¶ 13, 15-18.

favor, and that it is reasonably conceivable that HFH can establish a right to specific performance of the Agreement by clear and convincing evidence.

E. HFH has Stated a Reasonably Conceivable Claim for Damages

Hastings also argues that both HFH's specific performance claim and its claim for reimbursement of its rental payments fail for the same reasons.⁶⁹ HFH responds that it has sufficiently alleged a breach of the Agreement through Hastings' delay, change in positions and refusal to sell the Properties for the price established through the Appraisal Mechanism process.⁷⁰

"Under Delaware law, the elements of a breach of contract claim are: (1) a contractual obligation; (2) a breach of that obligation; and (3) resulting damages."⁷¹ As discussed above, HFH had a binding obligation under the Agreement to purchase the Properties at "fair market value" at some point during the Agreement's term(s), and the Appraisal Mechanism provides a method by which the parties may determine the Properties' fair market value.⁷² And, HFH has pleaded a reasonably conceivable set of circumstances that, if proven, shows that HFH's defaults under the Agreement have been waived by Hastings, who failed to

⁶⁹ D.I. 5, at 18-19. Hastings states that rent is due under the Agreement until HFH's purchase of the Properties is complete. *Id.*, at 19.

⁷⁰ D.I. 9, at 22.

⁷¹ *Interim Healthcare, Inc. v. Spherion Corp.*, 884 A.2d 513, 548 (Del. Super. 2005).

⁷² D.I. 1, Ex. A, Art. 21.

convey the Properties to HFH once the fair market value had been determined through the Appraisal Mechanism process. HFH alleges that, as a result of Hastings' refusal to convey the Properties, it has continued to pay rent on the Properties at the rates in the Agreement.⁷³ Considering all inferences in HFH's favor, I find there is a reasonably conceivable claim for damages resulting from Hastings' breach, if proven. A plaintiff in a contract action may recover "damages for breach and those consequential damages that were reasonably foreseeable."⁷⁴ Under the Agreement, rent is due until the Properties are conveyed to HFH. Thus, the alleged breach, or failure to complete the sale of the Properties to HFH under the Agreement, would result in HFH continuing to pay rent. Therefore, at the pleading stage, I find it is reasonably conceivable that damages could be ordered in the form of rent paid after the Properties should have been transferred.

IV. Conclusion

For the reasons stated above, I recommend that Defendant Charles W. Hastings' Motion to Dismiss be denied. This is a Final Master's Report, and exceptions may be taken under Court of Chancery Rule 144.

/s/ Patricia W. Griffin
Master Patricia W. Griffin

⁷³ *Id.*, ¶ 19; D.I. 9, at 22.

⁷⁴ *Pierce v. Int'l Ins. Co. of Ill.*, 671 A.2d 1361, 1367 (Del. 1996).