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Re: Stroud v. Forest Gate Development Corporation, Inc.
C.A. No. 20063-NC
Diamond v. Forest Gate Development Company
C.A. No. 20464-NC
Date Submitted: April 6, 2004

Dear Counsel:

The Plaintiffs in these two cases, which were consolidated for trial, seek specific performance of their contracts with the Defendant for the purchase of townhouse units in the Forest Gate Development, a subdivision in northern New Castle County, Delaware. Construction of these units was postponed in part because of problems with a stormwater management pond, and the Defendant now maintains that a *force majeure* clause relieves

it of any duty to convey the units to the Plaintiffs. This letter opinion sets forth the Court's findings of fact and conclusions of law.

I. BACKGROUND

In 1995, Defendant Forest Gate Development Company ("FGDC") initiated the process to develop a 3.52-acre parcel for a 24-unit townhouse community known as Forest Gate. By March 1999, building permits had been issued for twenty of the units. New Castle County ("County") would not issue building permits for the remaining units until the open space serving Forest Gate, including the stormwater management system, had been completed and inspected and approved by the County.[1] The delays which would provide the basis for FGDC's *force majeure* claim occurred primarily within the context of the County's inspection of the stormwater management system.

On March 10, 2000, Plaintiffs S. Scott Stroud and Anna Phalangas Stroud ("the Strouds") entered into an agreement with FGDC for the purchase of Forest Gate Unit 11.[2] That agreement called for closing in March 2001.

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[1] In accordance with an agreement, dated June 8, 1998, between FGDC and the County, the open space facilities had to be completed and approved before the last 25% of the building permits for the development would be issued. FGDC, *inter alia*, was also required to design open space or common facilities "in accordance with [County] design specifications." JX 2.

[2] JX 18.

On January 29, 2002, Plaintiffs Nicholas Diamond and Sherry Diamond ("the Diamonds") entered into an agreement with FGDC for the purchase of Forest Gate Unit 14.[3] That agreement called for closing on July 31, 2002. The relevant terms of both agreements are the same.[4]

* * *

The Record Major Subdivision Plan for Forest Gate was approved in July 1997. Townhouses were to be constructed in two groups of six units and three groups of four units. Karins and Associates ("Karins"), an engineering firm retained by FGDC, designed a detention basin that was to operate as a sediment basin during construction and, afterwards, as a dry detention pond for stormwater management. The design was approved by the County in May 1998 and the pond was constructed by FGDC's site construction contractor in June 1998.

As part of its efforts to design the detention basin, Karins performed soil borings, which established the groundwater elevation where the detention basin was to be constructed. A review of the Karins design and the soil boring data demonstrates that the

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[3] JX 72.

[4] For convenience, the Strouds and the Diamonds will be referred to collectively as the "Plaintiffs," and both of their agreements with FGDC will be referred to collectively as the "Agreement".

bottom of the detention basin was approximately six inches above the seasonal groundwater level.[5]

In late August 1998, Forest Gate sought and obtained building permits for twelve townhouse units. These townhouses were constructed and certificates of occupancy were issued for all of them by August 18, 2000. On November 15, 1998, FGDC sought building permits for the balance of the townhouses. Initially, the County issued only four permits because the open space improvements had not been completed. In March 1999, the County did issue another four permits, thus leaving only four of the proposed twenty-four townhouse units without building permits. Among these four units are the two units which the Plaintiffs now seek to acquire. Also, the County provided FGDC with a list of conditions which FGDC would be required to satisfy before the open space would be approved by the County and transferred to the homeowners' association. These conditions dealt primarily with debris removal, final grading, re-vegetation and landscaping.

In early May 2000, Karins sought the County's approval to convert the temporary sediment basin to the permanent detention basin.[6] FGDC, as part of this process, would be required to perform the final grading and stabilize the site except for the limited area

[5] JX 61 at 97-99.
[6] JX 35.

remaining under active construction. Within the next week FGDC directed its site contractor to perform the necessary work. On July 11, 2000, FGDC provided additional instructions to its site contractor directing it, *inter alia*, to convert the detention pond to final grade and to complete all open space improvements.[7]

On July 17, 2000, Karins performed an internal certified construction review and concluded that there were problems with the detention basin[8] but that otherwise the open space improvements had been successfully implemented. Karins' observations regarding the detention basin included the following: the basin outlet structure was too low, the "low flow structure" specified in the plans was no longer available (but an "approved equal" was suggested), and limited areas needed to be regraded and stabilized. Karins recommended changes necessary to cure the shortcomings and expressed optimism that the County would approve its proposed modifications.

The site contractor was directed to perform additional work in October 2000 with respect to the stormwater pond punch list and the stabilization of the open space in general.[9] Certain improvements were made to the stormwater management system. In June 2001, a new site contractor was retained by FGDC to clear silt from the pond, to install a new outlet structure, and to stabilize disturbed areas. On June 15, 2001, FGDC

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[7] JX 39.
[8] JX 40.
[9] JX 43.

informed the County that the open space requirements had been satisfied and the as-built drawings for the stormwater management were being provided to it.

Karins, on June 22, 2001, conducted another internal review of the stormwater management facility and concluded that the pond had minor deficiencies which rendered it unsatisfactory.[10] The defects included the need for riprap around the pond inlet to prevent erosion, the removal of sediment, and a depression that required filling. One of the problems that FGDC encountered at this time was a dry spell that impeded its ability to establish an adequate growth of grass and caused the death of a number of trees required for landscaping.[11] By late summer, Karins had performed the as-built survey of the stormwater management area and completed the as-built plans which were submitted to the County along with the construction review report.

FGDC requested the County, by letter of September 26, 2001, to conduct its open space inspection.[12] The inspection, performed by the County on October 4, 2001, was generally favorable. One significant problem was identified: the stormwater management

[10] JX 53.
[11] FGDC has not persuasively quantified any delay resulting from the shortage of rainfall.
[12] JX 64. This request came more than fourteen months after Karins' internal review in early summer 2000.

system failed because, due to the pond's design, a "small" quantity of water would remain in the pond after a heavy rain.[13]

Because the pond could not function as it was intended, *i.e.*, as a dry pond, FGDC was required to re-design it in order that it would function as a wet pond. This, of course, required both additional design work and additional review by the County. On October 23, 2001, Karins provided the County with its design for a modified low channel approach. In early November 2001, the new site contractor installed some perforated pipe and stone drain. On January 24, 2002, Karins submitted the low flow channel and under drain design for County consideration.[14] This design was approved by the County in early March 2002. FGDC retained yet a third site contractor to perform the work necessary to convert the dry pond to a wet pond. This work involved removing the previously installed concrete overflow box, fabricating and installing a new trash rack, regrading the pond, and taking steps to assure a good growth of grass. It was performed over a two-month period beginning in the middle of April and ending on June 12, 2002. On July 18, 2002, FGDC requested the County to perform another open space

[13] *See* JX 65, citing a failure to comply with approved construction plans and problems with sediment and debris.
[14] JX 71.

inspection.[15] That inspection occurred on July 26, 2002. On July 30, 2002, Karins submitted revised as-builts to the County.

On July 31, 2002, the County approved the stormwater management pond.[16] At that time the County identified a problem with a utility pole in the open space and FGDC removed it on August 23, 2002. The County approved the open space on August 28, 2002 and confirmed that decision with a letter to FGDC on September 10, 2002.[17] The County Law Department had not by then completed its review of the documents for transfer of the open space to the homeowners' maintenance corporation;[18] on September 25, 2002, it required a certificate of good standing for the maintenance corporation and a modification to the deed which FGDC had proposed. The deed was revised and executed on October 9, 2002 and recorded on October 23, 2002.[19] By that deed, FGDC transferred the private open space to the maintenance corporation. On November 22, 2002, the County released the remaining lots in Forest Gate; on December 12, 2002, FGDC applied for building permits, which were issued on December 17, 2002.

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[15] JX 85.
[16] JX 86.
[17] JX 91.
[18] Control of the maintenance corporation had been transferred to the homeowners in November 2000.
[19] JX 95.

During construction of the final set of townhouses, FGDC encountered difficulties with water intruding into the basements which interfered with the construction of the foundations. The foundations were finally completed and approved in early July 2003.

* * *

On November 6, 2002, FGDC sent the Strouds a letter reciting that it considered the agreement for Unit 11 null and void pursuant to the *force majeure* clause.[20] A similar letter regarding Unit 14 was sent to the Diamonds on May 8, 2003.[21]

* * *

Both units are now nearing completion. The Diamonds have paid FGDC for the "options" or purchaser selected items to enhance Unit 14 to their liking. FGDC has agreed to use its "best efforts," if specific performance is not granted, to obtain reimbursement for the Diamonds from any ultimate purchaser of the unit. The Strouds, however, were unwilling to rely upon the "best efforts" of FGDC. As part of any order of specific performance, they seek to require FGDC to reimburse them the costs which they will incur in having their selections installed after the unit has been completed. It would have been cheaper if the purchaser selected items had been installed during construction.

[20] JX 97.
[21] JX 107.

* * *

The Agreement provides, at Paragraph 3:

> 3. . . . Title to said property to be good, marketable, fee simple, free and clear of all liens and encumbrances of record, but subject to all existing easement and restrictions of record. If for any reason Seller's title is not good and marketable and Seller shall be unable to perfect such title, or if for any reason Seller is unable to construct or complete said premises or make title as herein provided, Seller shall return to Buyer the sum or sums paid on account of the purchase price without interest, and this agreement shall thereupon become cancelled, null and void, and Seller shall have no further liability whatsoever to Buyer.

The Agreement provides, at Paragraph 5:

> 5. Final settlement to be held on or before [March 2001 as to the Strouds and July 31, 2002 as to the Diamonds], provided however, and it is hereby mutually agreed that the Seller shall not be held responsible for, and is hereby relieved and discharged from all liability by reason of any delay in completion of premises or settlement caused by changes ordered by Buyer, Buyer's failure to make and furnish to Seller all material and color selections within ten (10) days of notice, fire, strikes, acts of God, or any other reason whatsoever beyond the control of the Seller. In the event of any such delay in completion of premises or settlement, Sellers shall give Buyers ten (10) days notice prior to the above date of their intent to extend settlement. Such date shall not exceed six (6) months from the above settlement date. However, Seller reserves the right to delay the start of construction until the mortgage commitment is received and all contingencies removed. If at the time of final settlement, all work on the unit has not been completed, Seller shall diligently proceed to complete such items in a workmanlike manner. No portion of the purchase price shall be withheld from Seller at settlement nor held in escrow pending completion of those items.

II. CONTENTIONS

The Plaintiffs contend that they are entitled to specific performance of the Agreement. FGDC argues that its duty to perform is excused by delay resulting from a series of *force majeure* events. The Plaintiffs, in turn, assert that FGDC, even if its performance would otherwise be excused through application of the *force majeure* provision, waived any right to terminate the Agreement. In addition, the Strouds maintain that, if specific performance is ordered, they are entitled to reimbursement from FGDC of the additional costs resulting from installation of "options" after construction, instead of during construction. Finally, the Plaintiffs claim that FGDC's bad faith entitles them to an award of their attorneys' fees.

III. ANALYSIS

A. *Specific Performance*

The Plaintiffs seek specific performance of the contracts for the acquisition of two townhouses. "The remedy of specific performance is usually granted to enforce valid contracts for the sale of land. . . . The granting of specific performance is within the Court's discretion."[22] Unless FGDC can demonstrate that its performance is excused by

[22] *Messick v Moore*, 1994 WL 643188, at *4 (Del. Ch. Oct. 26, 1994).

the *force majeure* provision of the Agreement,[23] specific performance will be the appropriate remedy for effecting the Plaintiffs' rights under the Agreement which all parties otherwise agree is valid.[24]

B. *Force majeure*

Force majeure clauses are, as a general matter, drafted to protect a contracting party from the consequences of adverse events beyond that party's control.[25] Application

[23] FGDC acknowledges that it has the burden of showing a right to relief under the *force majeure* provision. *See*, *e.g.*, *United States v. Panhandle Eastern Corp.*, 693 F. Supp. 88, 95 (D. Del. 1988).

[24] To the extent that the decision to grant specific performances is a matter of the Court's discretion, I note that the Plaintiffs have acted in good faith, have a binding agreement, are ready, willing and able to perform, and otherwise have presented a case which, but for consideration of FGDC's arguments as to *force majeure*, would be compelling. FGDC questions whether the Plaintiffs, or the Strouds in particular, are ready, willing and able to complete settlement and whether they are able to satisfy the mortgage contingency. The record is clear that the Strouds were absolved by an FGDC representative from any obligation to have a mortgage in place as of the time set in their agreement because settlement was, even then, scheduled so far in the future. With the passage of time, it is not reasonable to expect the Strouds to have gone to the trouble and expense of maintaining an on-going mortgage commitment.

[25] Although the parties have properly focused upon the *force majeure* aspects of the Agreement, the Court is, nonetheless, guided by the familiar principle that, at the outset, "a court must determine the intent of the parties from the language of the contract." *Twin City Fire Ins. Co. v. Del. Racing Ass'n*, 840 A.2d 624, 628 (Del. 2003). If the contract is ambiguous, then the Court may consider objective extrinsic evidence. *In re: Explorer Pipeline Co.*, 781 A.2d 705, 713-14 (Del. Ch. 2001).

of a *force majeure* provision, as with any other contractual provision, starts with the words chosen by the drafters:[26]

> FGDC shall not be held responsible for, and is hereby relieved and discharged from all liability by reason of any delay in completion of premises or settlement caused by changes ordered by buyer, [buyers' delay in making material or color selections], fire, strikes, acts of God, or any other reason whatsoever beyond the control of [FGDC].

None of the listed events is present. This dispute does not involve, for instance, strikes, fires, or acts of God. Instead, it depends upon the intent of the parties as to the phrase: "or any other reason whatsoever beyond the control of [FGDC]." A "catch-all" phrase, such as this, must be construed within the context established by the preceding listed causes. On the other hand, the use of "whatsoever" suggests that an especially narrow reading of the phrase was not intended. Too broad of a reading, however, would reduce the Agreement to little more than option because delays, in the absence of a diligent effort to avoid them, are almost inevitable in the real estate development setting. Ultimately, the most likely expectation of the parties to the Agreement is that the *force majeure* clause encompasses two concepts: first, that the delay-causing event was beyond the reasonable control of FGDC and, second, that the event was not reasonably

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[26] The Agreement was drafted by and for the benefit of FGDC. There is no evidence to suggest that the Plaintiffs negotiated the language at issue. Thus, any ambiguity in the Agreement would be construed against FGDC. *Wilmington Firefighters Ass'n v. City of Wilmington*, 2002 WL 418032, at *10 (Del. Ch. Mar. 12, 2002); *Joseph T. Dashiell Builders v. Andrews*, 2002 WL 31819895, at *3 (Del. Super. Dec. 10, 2002).

foreseeable in the ordinary course of real estate development. It is within this framework that I will address FGDC's claim that delay should excuse any duty to convey the townhouses under the Agreement to the Plaintiffs.[27]

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[27] The parties have not argued, and thus I have not addressed, the meaning to be ascribed to the phrase "relieved and discharged from all liability by reason of any delay in completion of premises." "Liability" could refer to nothing more than damages resulting from the delay and not to the continuing obligation to deliver the townhouse. Paragraph 9 of the Agreement identifies conditions, all attributable to the Buyer, under which the "contract will become canceled, null and void, and the Seller shall have no further liability whatsoever to Buyer." Thus, the inter-relationship of Paragraph 5, which contains the *force majeure* clause, and Paragraph 9 will not be explored.

Paragraph 3 provides that "if for any reason Seller is unable to construct or complete said premises," then the agreement is terminated and the buyer's only remedy is a refund of his deposit. One, thus, could, without much effort, read the "agreement" as a put option held by FGDC. If, as this interpretation goes, FGDC "gets around" to building the townhouse, the buyers are contractually obligated to buy it. If FGDC does not bother itself to build (or complete) the townhouse, then the buyers are to be satisfied with the mere return of their deposit. I decline to read the Agreement so cynically. First, it would render the Agreement largely illusory. Second, in order to read the Agreement as a whole, *see*, *e.g.*, *Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 395 (Del. 1996), the better resolution of the tension between Paragraph 3 and Paragraph 5 is that only unforeseeable delay not the responsibility of FGDC was intended to excuse performance. Finally, the primary purpose of the words quoted from Paragraph 3 of the Agreement may well have been to protect FGDC from claims for damages resulting from delay caused either by title problems or construction problems. In that latter context, it may be that FGDC sought to escape liability for delay damages even if FGDC were at fault. That analytical puzzle I leave for others to resolve.

This excursion may have suggested that the Agreement manifests a fundamental unfairness, especially when measured by the distance between what the typical homebuyer expects and FGDC's construction of the Agreement. It is not, however, the function of the Court to rewrite an agreement to achieve some sort of cosmic fairness. *See*, *e.g.*, *Cincinnati SMSA, L.P. v. Cincinnati Bell Cellular Sys. Co.*, 708 A.2d 989, 992 (Del. 1998). The Plaintiffs do not claim to have been coerced into signing the Agreement or not to have had ample opportunity to review it. Thus, they are left with the contract

C. *Delay Attributable to the Dry Pond*

The delay in completion of Forest Gate traces back to the failure of the "dry" stormwater detention pond. In May 2000, FGDC requested permission to convert the sediment basin to a permanent stormwater management pond. Various site work tasks were a necessary part of the process, an effort that was hampered somewhat by unusually dry weather that impeded the growth of grass and other vegetation. In any event, it was not until September 26, 2001, roughly 16 months later, that FGDC requested the County to conduct its inspection.[28]

The stormwater pond was designed by FGDC's engineers. They chose a design which placed the bottom of the pond within six inches of the seasonal high groundwater contour.[29] This design was approved by the County. The parties, especially after trial, have debated the appropriate design standard that should have been employed. The Plaintiffs point to the New Castle County Drainage Code (last revised July 9, 1996),[30]

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that they signed, subject, of course, to the general interpretative guidance that ambiguous language in a contract is construed against the drafting party.

[28] While several tasks were undertaken in the interim (*see, e.g.*, JX 45, 51 & 56), the pace of the work can most charitably be described as languid. Of course, some problems were encountered, but FGDC evidenced, little, if any, sensitivity to the passage of time – an approach that it consistently followed as it went about constructing the last units in Forest Gate.

[29] JX 61 at 97-99. The elevation shown in the soil borings clearly demonstrates that FGDC engineers were aware (or should have been aware) of the proximity of the seasonal groundwater level to the bottom of the pond.

[30] Pls.' Joint Post-Trial Reply Mem., Ex. A.

which provides at Section 12-86(d)(6) as follows: "The bottom of a dry pond must be at least three (3) feet above the groundwater table and have positive drainage to the outfall."

FGDC, however, notes[31] that its application for preliminary plan review was filed on May 22, 1995, and that the County, on June 5, 1995, as reconfirmed on numerous occasions, determined that:

> The stormwater management design must be in accordance with the Delaware Sediment and Stormwater Regulations, the SCS Small Pond Code 378, the New Castle County Drainage Code and the Department [of Public Works'] "Interim Guidelines" dated 6/14/1993.[32]

Although the Department's Interim Guidelines were not produced at trial, the Plaintiffs eventually submitted a copy,[33] the authenticity of which FGDC has not disputed. The Interim Guidelines, at Paragraph 4 under the heading of Storm Water Quality Control, provide:

> 4. The bottom of a dry pond must be a least three (3) feet above the ground water table and have positive drainage to the outfall. The pond must drain completely after a rainfall event.[34]

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[31] Letter from Jeffrey M. Weiner, Esq., dated March 22, 2004.
[32] *Id*. (attachment). Thus, I conclude that the County Drainage Code (last revised July 9, 1996) did not govern the design of Forest Gate's detention pond.
[33] Letter of David L. Finger, Esq., dated April 6, 2004 (attachment).
[34] The introduction to the Interim Guidelines instructs design professionals (and others) that "the Department [of Public Work] . . . will be using the [criteria set forth in the Interim Guidelines] to review all design/plans submitted for compliance with the State Regulations and the County Drainage Code." The Department went on to express its "[hope] that this information will assist designers to prepare plans to the standards required by the Department. . . ."

I am also guided by the testimony of Gregory Swift, now a project review engineer for the County, who, in the mid-1990's, was employed by Karins[35] in the design and review of stormwater management projects.[36] Therefore, he was familiar with the prevailing practices in the County at the time with respect to the design of stormwater management facilities. According to him, the "rule of thumb" for separation between the bottom of a dry pond and the groundwater level was approximately two feet. Thus, although the design of the dry pond was approved by the County and, perhaps, did not conflict with any formally adopted regulatory requirement, it deviated from prevailing practice.

The County rejected the dry pond, following its inspection, because it retained standing water after a rain event. That water retention may be, at least in substantial part, attributed to the narrow separation between the bottom of the pond and the groundwater. The County did not, at that time, have a firm practice of requiring that dry ponds hold no water following significant rainfall. Thus, FGDC argues that the County changed its position and that it was harmed by that change in position. FGDC, however, has neither demonstrated nor argued that the County's decision to reject the dry pond as constructed was arbitrary, capricious, or even unreasonable. Moreover, it has not demonstrated that,

[35] Mr. Swift left Karins in 2003 after sixteen years with that firm.
[36] Mr. Swift did not design the FGDC's stormwater management system, but he was responsible for its construction review.

as of that time period, it was unforeseeable that retention problems would be recognized by the County and either rejection or additional work would follow.

In sum, the dry pond failed to receive County approval because the design chosen by FGDC's engineers did not allow sufficient clearance between the bottom of the pond and the groundwater. Although the design may not have violated any specific regulatory design parameters imposed by the County and, indeed, it was approved by the County, the design was inconsistent with the prevailing practice in the County at that time and with the Interim Guidelines issued for the benefit of stormwater management system designers. Thus, the County's not unreasonable rejection of the dry pond cannot be fairly be characterized as a "reason whatsoever beyond the control of [FGDC]."[37]

D. *Conversion to "Wet Pond"*

As a result of the County's inspection and rejection of the dry pond, FGDC understood, as of October 4, 2001, that conversion to a "wet pond" would be necessary. The wet pond, as constructed, was approved on July 31, 2002. In the interim, FGDC submitted and obtained approval for a new design, performed the construction work,[38] and prepared new "as-built drawings." Again, the pace was unhurried.

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[37] FGDC is, in this context, responsible for the actions of its agents and contractors.
[38] The bulk of the construction work was accomplished on four days spanning more than two months.

E. *Other Causes of Delay*

FGDC has also identified other causes of delay. For example, obtaining the final approval of the County Law Department for the open space transfer documents, including the delivery of a certificate of good standing for the homeowners' maintenance corporation, took approximately two months. Yet, FGDC has not demonstrated that the County's action were either unreasonable or unforeseeable. Indeed, cooperating with the County Law Department to accomplish the transfer is just another one of the tasks which a developer must accomplish and the time required to accomplish that task, unless it is out of the ordinary, cannot be considered a reason for delay. In short, every event that, in some sense, "delays" progress is not the meat of a *force majeure* clause.[39]

F. *The Plaintiffs and Timing*

Because the Strouds and the Diamonds do not share the same timelines, an evaluation of their individual circumstances becomes necessary.

1. <u>The Strouds</u>

The Strouds contract was signed in March 2000 and FGDC sought to terminate it on November 6, 2002.[40] FGDC simply has failed to prove that it was delayed, by any

[39] Other potential sources of delay, such as the dry spell addressed above, have not satisfied the *force majeure* standard either.

[40] Thus, FGDC may only rely upon delay before November 6, 2002. The precise question is whether the termination of the Strouds' agreement, as of that time, was justified.

reason within the scope of the *force majeure* clause, that would allow it to escape its duty to close under the Strouds' agreement. It took its time until late September or early October 2001 when it finally learned that the dry pond would not satisfy the County. No cognizable delay occurred before that time and any delay resulting from the rejection of the pond was the result of FGDC's conduct or the conduct of its contractors. Indeed, the emptiness of FGDC's argument is demonstrated by the time FGDC took in reaching the stage where the County could conduct its inspection of the dry pond. That inspection was more than 18 months after the Strouds executed their agreement and, thus, FGDC already had passed through the date for closing established by the contract. In short, FGDC has not met its burden of proving that it had been delayed by matters beyond its control as of the time it sought to terminate the Strouds' agreement, and its *force majeure* defense as to the Strouds fails.

2. <u>The Diamonds</u>

By the time the Diamonds had signed their agreement in January 2002, the design work for the wet pond was well underway. The construction work was not completed on the wet pond until June 2002, but no delay within the scope of the *force majeure* clause has been identified. FGDC and its contractors, again "took their time" in performing the necessary work, but they were not delayed within the meaning of the *force majeure* clause. The period required for final inspection and approval by the County is not a

"reason" for delay. The final items to obtain County approval, such as moving a utility pole, may not have been foreseen in a specific sense, but items of that nature are not atypical. By May 2003, when FGDC sought to terminate the Diamonds' agreement, it had encountered problems with groundwater which interfered with construction of the foundation; that, is not what caused FGDC to miss its contractual performance date; it missed that date because it had not previously moved diligently. In summary, FGDC has not proved that any delay associated with the water intrusion into the foundation caused its inability to complete its work within the time allowed by the contract. Accordingly, FGDC has not demonstrated that its performance is excused by delay resulting from matters beyond its control.

Accordingly, the delays upon which FGDC relies, both as to the Strouds and as to the Diamonds, were the product of its actions (including those of its contractors) or its lack of diligence. In order to prevail under the Agreement, FGDC must show that, but for the excused delays, it would have completed the tasks in accordance with the Agreement. It has failed to meet that burden, and, thus, the Plaintiffs are entitled to specific performance.[41]

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[41] Thus, I need not address whether FGDC, with its delay in providing notice of termination to the Plaintiffs, waived any right to termination. The Strouds claim of waiver is persuasive in light of the passage of approximately thirteen months between expiration of the latest settlement date under the agreement and the date of the giving of

G. *The Strouds' Claims Regarding Options*

In October 2003, while construction of Unit 11 was underway, FGDC informed the Strouds of the opportunity to select "options." Under the Agreement, payment for the options would be Strouds' responsibility, but they were understandably concerned that, if they were not successful in this litigation, they would not be able to recoup those expenditures. Recognizing this concern, FGDC expressed a willingness to use its "best efforts" to recover those sums from any subsequent purchaser. This approach was not comforting to the Strouds. Because construction has gone forward without the inclusion of the options selected by the Strouds, the Strouds seek a declaration that FGDC must reimburse them for the differential costs incurred if the options are installed after the completion of construction.[42]

As set forth above, FGDC, without cause, terminated the Strouds' agreement. Had FGDC met its obligations, the reasonable inferences are that the Strouds would have selected the options and made the necessary payments to appropriate sub-contractor or made them to FGDC and that the options would have been installed. The Strouds are entitled to the townhouse contemplated in the Agreement. That unit would have (or should have) included those options which they otherwise would have selected. The task

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notice. The argument with respect to the Diamonds is somewhat less persuasive because FGDC waited only a little more than three months.

[42] The Strouds do not, at this time, seek a determination of that amount.

is at hand is to place the Strouds in the position where they would have been if FGDC had not improperly terminated the Agreement. By imposing the differential cost of the installation of the options on FGDC that goal can be achieved. Accordingly, the Strouds have demonstrated that they are entitled to a declaratory judgement establishing their right to reimbursement in an amount to be determined subsequently for the differential cost of the installation of options.

H. *Attorneys' Fees*

The Plaintiffs seek awards of their attorneys' fees. In general, each party bears its own legal fees. Successful litigants, however, may recover their attorneys' fees if, for example, such an award is authorized by statute, a common fund is established, or the adverse party has pursued a bad faith course of conduct.[43] Here, the Plaintiffs challenge FGDC's good faith. They assert that FGDC has taken its litigation posture merely to be able to sell the townhouses for a higher price.[44]

Although FGDC has not prevailed in these proceedings, I do not find that its conduct was in bad faith. When it entered into the Agreement, it did not anticipate that

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[43] *See*, *e.g.*, *Johnston v. Arbitrium (Cayman Islands) Handels AG*, 720 A.2d 542, 545 (Del. 1998).

[44] They also point to FGDC's return of the Diamond's deposit through a wire transfer while knowing that the Diamonds did not want the deposit returned. Although FGDC's strategy may not have been the best, this event was inconsequential; no real harm occurred; no material burden resulted; and, more importantly, given FGDC's position, return of the deposit was necessary.

construction would not be completed until 2004. No one doubts its costs have increased. The *force majeure* claim was not frivolous. Thus, the Plaintiffs have not persuaded me that an award of attorneys' fees is either necessary or appropriate.

IV. CONCLUSION

For the reasons set forth above, the Plaintiffs are entitled to specific performance of their contracts to purchase townhouses in Forest Gate. In addition, the Strouds are entitled to a declaratory judgment establishing their right to recover the differential costs incurred for installation of contract options. Plaintiffs' application for an award of their attorneys' fees is denied.

Counsel are requested to confer and submit, within five days, forms of order to implement this letter opinion.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-NC