IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY

RIVER ENTERPRISES, LLC, A Maryland limited liability company, Plaintiff, v. TAMARI PROPERTIES, LLC, a Delaware limited liability company, and MIDWAY HIGHWAY LLC, a Delaware limited liability company, Defendants.	)	C.A. No. 655-S

MEMORANDUM OPINION AND ORDER

Submitted: January 14, 2005
Decided: February 15, 2005

Ronald J. Drescher, Esquire, DRESCHER & ASSOCIATES, P.A., Wilmington, Delaware, *Attorney for the Plaintiff.*

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LAMB, Vice Chancellor.

I.

Defendant Tamari Properties, LLC ("Tamari") has moved for a cancellation of a *lis pendens* recorded on behalf of the plaintiff, River Enterprises, LLC ("River"). A cancellation of *lis pendens* is governed by 25 *Del. C.* § 1608, which permits the court to direct the Recorder of Deeds "to cancel a notice of pendency if the court determines that there is not a probability that final judgment will be entered in favor of the party recording the notice of pendency. The party recording the notice of pendency shall bear the burden of establishing such probability."[1]

On September 11, 2003, River contracted to purchase a 300-acre parcel of land ("the Lot") from Tamari. River was to pay the purchase price in installments: $125,000 deposit in an escrow account with James P. Quillen, Esquire, upon River's receipt of an executed copy of the contract, a second $125,000 deposit in the escrow account within 120 days of the agreement date, and the remaining balance at a closing no later than November 15, 2004.[2] Further, the parties agreed

[1] *See also Pierce v. Laws*, 2003 WL 23021937, at *1 (Del. Ch. Dec. 5, 2003).

[2] The contract provision pertaining to the deposit provides:

> 1.1. Deposit. Upon Buyer's receipt of an executed copy of this Agreement, Buyer shall deposit with James P. Quillen, Esquire ("Escrow Agent"), having an address of 110 Old Padonia Road, Cockeysville, Maryland 21030, the sum of One Hundred Twenty Five Thousand Dollars ($125,000.00) ("Deposit"). At the conclusion of One Hundred Twenty (120) days from the date of this agreement, provided Buyer has given affirmative notice of Buyer's intention to proceed (as described herein), Buyer shall deposit with Escrow Agent an additional One Hundred Twenty Five Thousand Dollars ($125,000.00), and together the total deposit will be non-refundable. At the conclusion of the 120 days from the date of this Agreement, Escrow Agent will release Two Hundred Fifty Thousand Dollars ($250,000.00) to Seller provided appropriate security can be addressed by the participating parties' attorneys.

that the $250,000 held in escrow would be released to Tamari 120 days after the date of the agreement (September 11, 2003), provided that the parties agreed on appropriate security.

Tamari received letters from Quillen on October 1, 2003 and January 24, 2004 confirming that each deposit had been made by River. However, River refused to release the deposit money because the parties were never able to agree on appropriate security. Tamari informed River on February 13, 2004 that it viewed the contract as void based on River's refusal to release the deposit money and negotiate the security in good faith. River, viewing the contract as valid, filed an action for specific performance on August 18, 2004, and a notice of *lis pendens* on August 20, 2004.

To succeed on its claim for specific performance, River must demonstrate the existence of a valid contract to purchase real property and show that it was and is ready, willing and able to perform its obligations under the contract.[3] Tamari suggests that no valid contract ever existed because the contract left the security for the deposit open to negotiation. In the alternative, Tamari claims that River breached the contract for failing to provide evidence that the deposits were actually made and to negotiate the issue of appropriate security in good faith.

[3] *Silver Props., L.L.C. v. Ernest Megee, L. P.*, 2000 WL 567870, at *2 (Del. Ch. Apr. 27, 2000).

II.

A contract must contain all material terms to be enforceable.[4] However, "a court will not upset an agreement where [an] indefinite provision is not an essential term."[5]

Tamari relies upon *Hindes* to argue that the clause in the contract "agreeing to agree" on security for the deposits renders the contract unenforceable. Tamari's reliance is misplaced. In *Hindes*, the court refused to grant specific performance for a contract between an author and a publisher because the contract left the consideration (royalty payments) open for negotiation. Further, the court made a clear distinction between leaving the "terms of payment" open, and leaving the "basic consideration" open for agreement, only finding the latter to be a material term.

Here, the contract reflects the parties' agreement on all essential terms: price, date of settlement, and the property to be sold. Merely leaving the collateral for the deposits open for later negotiation is not so essential that the court would have to set aside the agreement. The contract does not require the parties to ever agree on the collateral, nor does it provide for any consequences if the parties fail to agree. Hence, a failure to agree on the open issue of collateral would not be fatal. The deposits could remain in escrow until settlement, which occurs in many

[4] *Hazen v. Miller*, 1991 WL 244240, at *5 (Del. Ch. Nov. 18, 1991), *citing Vale v. Atlantic Coast & Inland Corp.*, 99 A.2d 396, 399 (Del. Ch. 1953).
[5] *Hindes v. Wilmington Poetry Society*, 138 A.2d 501, 503 (Del. Ch. 1958).

real estate transactions. Moreover, River has shown a probability that it acted in good faith in negotiating the collateral for the deposits. During negotiations, River learned that Tamari was not the record owner of the Lot, and Tamari was only able to offer an assignment of contract rights as collateral. River's unwillingness to accept a mere assignment of rights as collateral for the return of its $250,000 is not evidence of a failure to engage in good faith negotiation.

Tamari's argument that the release of the deposits was essential because the money was needed to obtain government approvals is also unpersuasive. The contract makes no mention of Tamari's use of the deposits. If the need for the deposit money was so important, Tamari should have made the deal contingent upon the release of the deposits, thereby making the collateral for the deposits an essential term.

Tamari has also suggested that River is in breach of the contract for having failed to make the deposits. River responds by pointing to Quillen's letters giving notice that the deposits were made, arguing that even these letters were more than is required by the terms of the contract. This response is somewhat wide of the mark. River, as the party seeking specific performance, must show the existence of a valid contract and must also show that it did not breach the contract in this respect by failing to make the required deposits.

Quillen's letters to Tamari stating that the deposits were made are, of course, some evidence that the deposits were made. In the absence of any evidence to the contrary, those letters suffice for purposes of this motion to establish a probability of success on the merits. However, because River has not supplied more direct evidence of the deposits–such as cancelled checks or copies of a bank statement–Tamari is naturally skeptical as to whether the deposits were actually made.[6] The court notes that Tamari has noticed discovery into the details of the deposits. In the event that discovery shows that the deposits were not made in accordance with the terms of the contract, Tamari can renew its motion to discharge the *lis pendens*. In the meantime, that motion will be denied without prejudice.

III.

For the foregoing reasons, and as discussed at the hearing, the motion for cancellation of the *lis pendens* is denied without prejudice. IT IS SO ORDERED. Counsel is directed to confer and propose a case scheduling order with the goal of reaching trial in this matter by April of 2005.

[6] River, perhaps intentionally, has carefully worded its brief and the supporting affidavits when discussing the deposits. For example, Quillen, in his affidavit, never directly avers that the deposits were made. He merely says, "In my experience, the transmission of a letter from an attorney has generally been sufficient evidence of the existence of a deposit for the purchase of real property." Similarly, Frank Derose, marketing and sales agent of River, never states in his affidavit that he made the deposits.