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June 7, 2005

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Re: Alexander v. Petrey
C.A. No. 304-N
Date Submitted: March 28, 2005

Dear Counsel:

On March 4, 2000, Arthur Alexander ("Alexander") entered into an agreement (the "Agreement") with Defendant Adam Petrey ("Petrey") for the purchase of a dwelling known as 4938 Brigantine Court, Wilmington, Delaware (the "Property"). Petrey had 16 months, *i.e.*, until June 30, 2001, to complete the transaction. Until closing, Petrey was obligated to pay the mortgage, to pay the condominium fees, and to pay for utilities. The purchase price at closing would be

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the balance due on the mortgage. Petrey needed to obtain his own mortgage financing.

Petrey did not obtain a written mortgage commitment before June 30, 2001. He has not kept the mortgage current; he attempted to bring his mortgage payments current but his check bounced and that check has not been made good. Also, he has failed for some time to have paid the condominium fees. Petrey, however, continues to reside in the Property.

Alexander died intestate on March 29, 2001. The Plaintiffs are the administrator of his estate and his children, his intestate heirs. They brought this action seeking a declaratory judgment that the Agreement is no longer binding and for ejectment. Petrey counterclaimed for specific performance and also asserted a quantum meruit claim for the improvements that he has made to the Property. The Plaintiffs have now moved for partial summary judgment as to Petrey's right to specific performance and as to their claim for ejectment.

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Summary judgment may be granted if there are no material facts in dispute and the moving party is entitled to judgment as a matter of law.¹ A party seeking specific performance, as a general matter, must be in compliance with the terms of his agreement in order to secure that equitable relief.² Here, it is clear that Petrey has not satisfied his ongoing contractual obligations—whether it be payment of the mortgage or payment of the condominium fees.

Petrey, however, argues that he was prepared to go to closing in the spring of 2001 but was frustrated by the conduct of the Plaintiffs. He had, according to his deposition testimony,³ an oral commitment for mortgage financing in May of 2001 but was unable to obtain the precise payment information necessary to obtain a written commitment because of a lack of cooperation by the Plaintiffs (or their representatives). Whether this was due to the hostility of the Plaintiffs (or some of them) or to confusion surrounding the early administration of Alexander's estate is not clear. There is, however, a dispute of fact, supported by Petrey's deposition testimony, as to whether the failure to close in a timely fashion can fairly be

¹ *City of Wilmington v. Am Fed'n of State, County & Municipal Employees*, 2005 WL 820704, at *3 (Del. Ch. Apr. 4, 2005).

² *Safe Harbor Fishing Club v. Safe Harbor Realty Co.*, 107 A.2d 635, 637 (Del. Ch. 1953).

³ Petrey Dep. at 55.

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attributed to him. If he had closed in a timely fashion, the other circumstances about which the Plaintiffs now complain might never have arisen.

Accordingly, because of the existence of a dispute of material fact, the Plaintiffs' motion for summary judgment is denied.⁴

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-NC

⁴ Petrey's contentions are sufficient to survive summary judgment because he is able to point to a factual basis in the record that could allow him to prevail, if his version of the facts is ultimately accepted. The absence of a written mortgage commitment, his apparent failure to contact the administrator of the estate, his failure to continue to meet his obligations under the Agreement, and other matters all may preclude his obtaining specific performance, when gauged on a complete factual record.