IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

MARILYN ALEXANDER BARNES,	:	
	:	
Plaintiff,	:	
	:	
v.	:	**C.A. No. 1061-K**
	:	
JOSEPH L. JACKSON and JUDITH JACKSON,	:	
	:	
	:	
Defendants.	:	

MEMORANDUM OPINION

Date Submitted: May 3, 2005
Date Decided: August 29, 2005

Darryl K. Fountain, Esquire of The Law Offices of Darryl K. Fountain, Wilmington, Delaware, Attorney for Plaintiff.

Joseph L. Jackson and Judith Jackson, Dover, Delaware, Defendants *pro se*.

NOBLE, Vice Chancellor

In this specific performance action, Plaintiff Marilyn Alexander Barnes ("Barnes") seeks to compel Defendants Joseph L. Jackson and Judith Jackson (the "Jacksons") to convey to her a parcel of real property containing a dwelling (the "Property").[1] The parties entered into a lease-purchase agreement. Their relationship quickly deteriorated and, in this post-trial memorandum opinion, the Court concludes that Barnes has not demonstrated that she both sought and was able to complete the purchase of the Property before expiration of the lease. Accordingly, she is not entitled to an order compelling transfer of the Property to her.

In the spring of 2002, the Jacksons decided to relocate, perhaps temporarily, to Texas. They elected to lease the Property to Barnes and to grant her an option to purchase the Property. That effort, undertaken without professional guidance, resulted in a document that demonstrates the dangers of preprinted forms in the hands of individuals who do not fully understand them.

On May 10, 2002, the Jacksons signed a notarized letter, drafted by them, the text of which reads as follows:

> I am giving permission to Ms. Marilyn Barnes to rent my home with the option to buy. Starting on June 1, 2002, she will be making the mortgage payment. We are moving to San Antonio, Texas.

[1] The Property has an address of 1401 South Farmview Drive, Dover, Delaware.

> I am giving Ms. Barnes permission to rent my house as of this date. This is a lease with the option to buy arrangement. Her monthly payments will be applied to the purchase of the house. These terms are effective immediately. Ms. Barnes can purchase the house and/or properties of 1401 South Farmview Drive and surrounding properties. This decision serves indefinitely. The "as is" condition of the property stands on May 10, 2002, and has been agreed upon by all parties.[2]

The Jacksons, after reaching Texas, decided (properly) that something more was required to memorialize their relationship with Barnes. They obtained a preprinted standard form "Lease with Purchase Option" (the "Lease").[3] The Lease, which must be read as superseding any terms of the May 10, 2002 letter, was "for a term of *Two* years to commence on *June 1, 2002*, and to end on *June 1, 2004*, at *Seven* o'clock *a*.m."[4] It required Barnes to pay rent of $794.17 per month; payment was to be made to CitiFinancial's office in Dover, Delaware.[5] Barnes was obligated to pay for utilities. Also, Barnes was precluded from painting and making "alterations . . . to the demised premises . . . without the prior written consent of [the Jacksons]."[6] The last paragraph of the Lease conferred the purchase option:

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[2] PX 2.
[3] PX 1.
[4] PX 1. The terms inserted by hand are in italics.
[5] CitiFinancial held the Jacksons' mortgage.
[6] PX 1, at ¶¶ 7, 11.

> **Purchase Option**. It is agreed that Lessee shall have the option to purchase real estate known as: [the Property] for the purchase price of *Ninety Three Thousand, One Hundred Nineteen Dollars Thirty Five Cents* Dollars ($*93,119.35*) with a down payment of *Ø* Dollars ($*Ø*) payable upon exercise of said purchase option, and with a closing date no later than *Ø* days thereafter. This purchase option must be exercised in writing no later than *Ø* years, but shall not be effective should the Lessee be in default under any terms of this lease or upon any termination of this lease.[7]

Thus, the parties agreed that any exercise of the purchase option had to be in writing and that the option could not be exercised if Barnes was in default or if the Lease had expired. The purchase price of $93,119.35 would become problematic for two reasons. First, the Jacksons set the purchase price by reference to the mortgage payoff. It appears that the sales price would not have been enough to satisfy the mortgage and to meet the Jacksons' closing costs. Thus, the Jacksons, at settlement, would have needed several thousand dollars of their own funds. Second, within a year, an appraisal would indicate that the value of the Property had appreciated to $114,000.[8]

It did not take long for the Jacksons to become dissatisfied with their tenant. Payments to the mortgage company were late; improvements, such as painting and a new carpet, were made without their approval; Barnes was away from the Property (apparently due to work-related absences) for

[7] *Id*., at ¶ 22.
[8] PX 4.

significant periods; and utility bills were not timely paid.[9] The Jacksons had trouble contacting Barnes and when contact was made, the conversations were hostile. On the other hand, the mortgage company never issued a default notice or took other action against the Jacksons because of any delay in payment.[10] Similarly, late notices were sent regarding utility payments, service was never disconnected.

Barnes, because of past credit difficulties, could not qualify for conventional mortgage financing to enable her to purchase the Property. However, by working with Vaughn LeMon ("LeMon"), a mortgage banker, she was "pre-approved" for a nonconforming mortgage in 2003. She never received any mortgage commitment. Sometime in 2003, she contacted the Jacksons to discuss completing the purchase of the Property. For reasons that are not clear from the record, that effort was not pursued. It may be that the Jacksons were not as cooperative as she might have hoped, but the evidence does not prove that the Jacksons manifested an intent to refuse to

[9] The Court need not, and, thus, does not, determine if Barnes's conduct constituted a breach of the Lease. From their testimony, it is fair to conclude (1) that the Jacksons did not fully understand the extent of their agreement with Barnes, and (2) that the Jacksons took a hypertechnical view of what events or conduct would establish a default.

[10] Indeed, the Jacksons had an adjustable rate mortgage which, with a favorable prompt payment history, allowed for a reduction in the interest rate. While Barnes was making payments to the mortgage company, the interest on the Jacksons' mortgage declined, thereby suggesting that her payments were made in a reasonably timely fashion.

meet their obligations under the Lease.[11] No written notice of intent to exercise the option was given.

By late spring of 2004, Barnes was still working with LeMon and she decided to renew her efforts to acquire the Property. LeMon called the Jacksons' attorney to discuss the transaction and to secure authorization to obtain a formal payoff from the mortgage company. LeMon was surprised by both the substance and the tenor of the response. The Jacksons' attorney informed LeMon that there would be no deal, that Barnes had no right to exercise any option to purchase the Property, and that the Jacksons wanted Barnes out of their home. LeMon, however, was uncertain when the conversation occurred. It was, according to him, in either May or June 2004. Barnes recalled the conversation as having been in June or July 2004. Although at the time of the conversation (whenever it was) Barnes may have been able to obtain the necessary mortgage financing, the transaction, because of the Jacksons' view of their duties under the purchase option as expressed by their attorney, did not go forward. Instead, the Jacksons sought to have Barnes evicted from the Property. That effort was eventually

[11] Barnes generally attributes her failure to move the process along to the refusal of the Jacksons to provide her with necessary information regarding the payoff of their mortgage, but her efforts to prove this claim resulted in vague and ambiguous evidence, bereft of specifics as to time, place, and, most importantly, substance.

successful when, in December 2004, through entry of a default judgment, the Justice of the Peace Court awarded possession to the Jacksons and awarded a money judgment to the Jacksons in the amount of $6,625.44.[12]

Barnes now seeks an order of specific performance compelling the Jacksons to convey the Property to her. "To grant specific performance, there must be proof of a valid contract to purchase real property and proof that plaintiff was ready, willing and able to perform his contractual obligations. In addition, the Court must determine whether the 'balance of equities' tips in favor of specific performance."[13] It is Barnes's burden to "demonstrate [her] entitlement to specific performance by clear and convincing evidence."[14]

Barnes's efforts ultimately fail for two reasons. First, she has been unable to demonstrate that she was ready, willing and able to complete the purchase of the Property when the Lease was in effect or that she properly sought to exercise the option during that period. Second, she has not proved

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[12] DX 6.

[13] *Morabito v. Harris*, 2002 WL 550117, at *2 (Del. Ch. Mar. 26, 2002) (citations omitted); *Sargent v. Schneller*, 2005 WL 1863382, at *4 (Del. Ch. Aug. 2, 2005); *DeMarie v. Neff*, 2005 WL 89403, at *4 (Del. Ch. Jan. 12, 2005).

[14] *In re IBP, Inc. S'holders Litig.*, 789 A.2d 14, 52 (Del. Ch. 2001); *accord Kowal v. Clark*, 2000 WL 739250, at *3 (Del. Ch. June 2, 2000) (quoting Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* §12-3, 816 (1998)).

that the Jacksons are estopped by their conduct from insisting upon compliance with the conditions governing exercise of the option.

The Lease, according to its terms, expired on June 1, 2004. Although Barnes continued to reside in the Property after that date, there is no basis for concluding that she was anything other than a holdover tenant. The rights of Barnes, as a holdover tenant, to exercise a purchase option must first be assessed by reference to the Lease. The Lease addresses the continuing rights of a holdover tenant as follows: "Should Lessee remain in possession of the demised premises with the consent of Lessor after the natural expiration of this Lease, a new month-to-month tenancy shall be created between Lessor and Lessee which shall be subject to all the terms and conditions hereof. . . ."[15] Barnes has offered no proof that she remained in the Property "with the consent of [the Jacksons]." Thus, the holdover provision provides no guidance. The purchase option was, however, expressly premised on its exercise before the expiration of the Lease: "This purchase option . . . shall not be effective . . . upon any termination of this lease."[16]

[15] PX 1, at ¶ 15.
[16] PX 1, at ¶ 22.

The Lease unambiguously required that the option be exercised, if at all, in writing. Barnes never exercised the option in writing. That may well preclude the relief which she seeks in this action.[17] More importantly, Barnes has not proved that she ever sought to exercise the option before the Lease expired. Barnes, at some point in 2003, had a conversation with the Jacksons in which she asked them questions which may have been preliminary to an exercise of the option, but the evidence is inconclusive and the absence of any follow-up to that conversation further supports the Court's conclusion that the conversation did not constitute a direct effort to exercise the option. Barnes also asked LeMon to arrange for the purchase of the Property, but the Court concludes that the conversation between LeMon and the Jacksons' attorneys—the only effort that he made—did not occur until at least June 2004 after the Lease had expired. Accordingly, Barnes never exercised her option right in a legally cognizable fashion before it expired with the termination of the Lease, in accordance with its terms, on June 1, 2004.

The Court also turns to Delaware's Residential Landlord-Tenant Code[18] for guidance because of its broad regulation of the relationships among

[17] *See Greenville Ret. Cmty., L.P. v. Koke,* 1993 WL 328082 (Del. Ch. Aug. 11, 1993).
[18] 25 *Del.C.* Part III.

landlords and tenants. By 25 *Del.C.* § 5108, when there is a holdover tenancy, as a general matter, "the term [of the holdover agreement] shall be month-to-month, and all other terms of the rental agreement shall remain in full force and effect." As explained in *Bateman v. 317 Rehoboth Avenue, LLC*,[19] if the lease agreement does not otherwise specify the outcome, a right of first refusal does not survive into the period of holdover tenancy.[20] Although acknowledging differences between a right of first refusal and an option to purchase,[21] the Court cited favorably to opinions from other jurisdictions which concluded that holdover tenants could no longer exercise

[19] 2005 WL 1691676 (Del. Ch. July 19, 2005).

[20] *Bateman*, 2005 WL 1691676, at *1, *8. The Court, which was considering 25 *Del.C.* § 5108, concluded that the phrase, "all other stipulations of the rental agreement shall remain in full force and effect," did not include a right of first refusal which did not implicate the "use and occupancy" of the rental unit. In arriving at its conclusion, the Court looked to the definition of "rental agreement" as provided in the statute. The Court found dispositive the inclusion of the phrase "use and occupancy" as a modifier applying to all elements of the definition. *See Id.*, at *4 - *8.

It should be noted that, in *Bateman*, the lease at issue was governed by an earlier version of 25 *Del.C.* § 5108, which was revised in 1996. Here, the Lease was executed in 2002, and, therefore, the current formulation of 25 *Del.C.* § 5108(a) controls. This distinction, however, does not diminish the impact of *Bateman* on Barnes's contentions. The only relevant change made by the 1996-revision to 25 *Del.C.* § 5108(a) was to substitute "terms of the rental agreement" for "stipulations of the rental agreement." Furthermore, the definition of "rental agreement," as provided in both the original and revised versions, remains unaltered. Based on the analysis employed in *Bateman*, the substitution of "terms" for "stipulations" has no effect with regard to the issue of the option's survival.

[21] The principal difference is that the holder of an option may act while the holder of a right of first refusal may only react.

options to purchase.[22] The logic supporting this view has been expressed as follows: "While a lessor may be content for a fixed time to be restricted to a fixed price for the sale of his property, it is another matter altogether to conclude that an option to purchase is to continue for an indefinite period under the authority of a 'hold-over' tenancy. . . ."[23] Therefore, Barnes's option to purchase the Property did not survive expiration of the Lease on June 1, 2004.

Even if Barnes failed to exercise the option within the limit established by the Lease, there may be instances when the right to exercise an option would survive because of inequitable conduct by the landlord.[24] The less than helpful response of the Jacksons during their 2003 conversation with Barnes in which she asked about exercising the option does not constitute the type of inequitable conduct that would allow the

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[22] *Wanous v. Balaco*, 107 N.E.2d 791 (Ill. 1952); *Spaulding v. Yovino-Young*, 180 P.2d 691 (Cal. 1947). Those decisions "declined to treat provisions of leases that relate only to commercial relationships between landlords and tenants and provisions governing use and occupancy of leased property as equally applicable to holdover tenancies, finding no policy reason for provisions that do not relate to use and occupancy to continue during a holdover tenancy. I find that reasoning persuasive." *Bateman*, 2005 WL 1691676, at *7. For the purpose of ascertaining whether an option to purchase survives into the holdover period, there appears to be no principled distinction between residential and commercial leases.

[23] *Spaulding*, 180 P.2d at 694. *See also Williams v. Bass*, 847 So. 2d 80, 83 (La. Ct. App. 2003); *Gross v. Bartlett*, 547 So. 2d 661, 663-64 (Fla. Dist. Ct. App. 1989); *Synergy Gas Corp. v. H. M. Orsburn & Son, Inc.*, 689 S.W.2d 594, 597 (Ark. Ct. App. 1985) (holding that tenants' options to purchase do not survive into holdover-tenancy periods).

[24] *See, e.g.*, *Rehoboth Bay Marina, Inc. v. Rainbow Cove, Inc.*, 318 A.2d 632, 634-35 (Del. Ch. 1974); *Old Time Petroleum Co. v. Turcol*, 156 A. 501, 505 (Del. Ch. 1931).

Court to afford (or persuade the Court that it would be proper to afford) Barnes a continuing opportunity to exercise the option. The inconclusive evidence, coupled with the absence of any effort to acquire the Property during the substantial period remaining under the Lease,[25] leads the Court to conclude that there is no basis for finding that the option survived termination of the Lease.

The stance of the Jacksons' attorney—adamantly rejecting the notion that Barnes had any rights under the option—could well have constituted the type of conduct that would have allowed for equitable relief. "An outright refusal by a party to perform a contract or its conditions"[26] will constitute repudiation of that agreement. Repudiation of a valid option before the expiration of its exercise period may allow the Court to enforce the option holder's rights even after the option otherwise might have expired. Barnes's claim here fails because the Lease had already expired by the time of LeMon's conversation with the Jacksons' attorney. Therefore, instead of constituting an anticipatory breach or repudiation of the purchase option, the Jacksons' attorney was confirming that which the Court has found as a

[25] *See Greenville Ret. Cmty.*, 1993 WL 328082, at *6 ("In both [*Rehoboth Bay Marina* and *Turcol*] the grantor of the option took steps to terminate a lease in order to destroy the option. . . . Neither of these cases is of help to this plaintiff, *whose own inaction* has caused its option to expire under the language of the contract it drew." (emphasis added)).
[26] *Frontier Oil Corp. v. Holly Corp.*, 2005 WL 1039027, at *27 (Del. Ch. Apr. 29, 2005) (quoting *CitiSteel USA, Inc. v. Connell Ltd. P'ship*, 758 A.2d 928, 931 (Del. 2000)).

matter of fact: by the time LeMon contacted the Jacksons, it was already too late—the Lease had terminated in accordance with its terms and the option did not survive into the holdover period.[27]

In sum, Barnes has failed to prove that she properly exercised her option timely or that she was ready, willing, and able to complete the purchase of the Property in accordance with any effort to exercise the option. Similarly, she has not demonstrated that the Jacksons engaged in any inequitable conduct that would allow the Court to relieve her of the consequences of the expiration of the Lease. Accordingly, Barnes is not entitled to specific performance of the option provision set forth in the Lease and the Jacksons are entitled to entry of judgment in their favor.

An order will be entered in accordance with this memorandum opinion.

[27] In addition, Barnes has not met her evidentiary burden in attempting to prove that she was ready, willing and able to complete the purchase of the Property. She was "pre-approved" for a nonconforming mortgage, which indicates that she likely would have been able to obtain mortgage financing. However, there is insufficient evidence that the mortgage would have covered all of her closing costs or that she otherwise had sufficient funds to pay the closing costs. But, more importantly, Barnes never sought and, thus, never obtained a commitment for a mortgage. If the Jacksons had repudiated the option agreement, perhaps it would not have been necessary for her to have secured a commitment. Coupled, however, with her failure to exercise her option under the Lease, the absence of a mortgage commitment and the lack of credible evidence that she could have paid whatever closing costs would not be covered by any mortgage, indicate that she was not ready, willing, and able to complete the acquisition of the Property while her option rights remained in effect.