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Re: Brandywine River Properties, LLC v. Maffett
C.A. No. 2655-VCN
Date Submitted: September 24, 2007

Dear Counsel:

The Court issued a Bench Ruling in this case on September 5, 2007, specifically enforcing Plaintiff Brandywine River Properties, LLC's ("BRP") exercise of an option to purchase certain real property known as 1330 East 12th Street in Wilmington, Delaware (the "Property") from Defendants Carol and Sidney Maffett (the "Maffetts"). The Maffetts now move, under Court of Chancery Rule 59(f), for reargument of those portions of the Court's decision

concerning the apportionment of taxes and the mortgage payment start date in connection with the judicially enforced sale of the Property. Specifically, the Maffetts argue that, in light of the Court's determination that BRP became the equitable owner the Property as of April 29, 2006, BRP ought to be responsible for the payment of property taxes and other incidental property costs, such as water and sewer, from that date.[1] In addition, the Maffetts argue that BRP's mortgage payments on the Property should be deemed to commence on July 1, 2006, the Court's hypothetical closing date, instead of thirty days later as would be customary if BRP had obtained a mortgage from a commercial lender.

In its Bench Ruling, the Court expressed its desire to implement an equitable remedy that would place the parties in the position they would have been in had they performed in accordance with BRP's exercise of the option on April 29, 2006. To that end, the Court accepted the Maffetts' concession at post-trial oral argument that the exercise of the option gave BRP an equitable ownership interest in the

[1] The parties focused much of their efforts, both in their post-trial briefs and at oral argument, on the issue of whether BRP validly exercised the option to purchase the Property. As such, the parties' arguments concerning the broader ramifications of BRP's status as an equitable owner and vendee in possession in the interim between the exercise of the option and the presumed closing date are not very well developed. The Maffetts essentially implore the Court, after the fact, to charge the property taxes and other incidental property costs to BRP as a matter of fairness and equity, but their motion largely contains conclusory arguments and a paucity of authority to support their position.

Property as a vendee and, thus, BRP was no longer required to pay rent under the lease agreement for its use of the Property because the parties' landlord-tenant relationship terminated upon the exercise of the option. In addition, the Court determined that given a hypothetical closing date of July 1, 2006, BRP's first mortgage payment would have been on August 1, 2006, as would be customary if BRP had obtained a mortgage from a commercial lender.

The parties were instructed to calculate the amount that would be necessary for BRP to close on the property within sixty days of an order implementing the Bench Ruling. Such an effort would include credits to the Maffetts for unpaid rent due and owing at the time BRP exercised the option, mortgage payments (principal and interest) from the hypothetical July 1 closing date, taxes and other costs associated with the Property from the hypothetical July 1 closing date, and the $100,000 down payment required under the terms of the parties' agreement. That amount would then be offset by any rent payments actually paid by BRP after it exercised the option and BRP's attorneys' fees awarded in this action. The net result of that computation would be the amount (in addition to other closing costs) necessary for BRP to complete the purchase of the Property.

The standard for reviewing a motion for reargument under Court of Chancery Rule 59(f) is well established. In order to prevail, the moving party must demonstrate that the Court "overlooked a decision or principle of law that would have [had] a controlling effect or that the Court . . . misapprehended the law or the facts so that the outcome of the decision would be affected."[2] For the reasons set forth below, the Court denies the Maffetts' motion in its entirety.

1. PAYMENT OF TAXES AND OTHER INCIDENTAL PROPERTY COSTS

Once BRP exercised the option to purchase the Property, the Agreement of Sale became the operative document governing the parties' relationship. Thus, the Court must first look to the terms of the parties' agreement to determine their intent with respect to the payment of taxes and other incidental property costs.[3] BRP suggests in its response to the Maffetts' motion that Section 6 of the Agreement of Sale is dispositive of the tax issue. The Court agrees; the language of Section 6 is unambiguous. In its entirety, Section 6 provides:

> **TRANSFER TAXES; PRO-RATED.** Applicable transfer taxes shall be paid one-half by Buyer and one-half by Seller. Taxes, water,

[2] *In re Kent County Adequate Pub. Facilities Ordinances Litig.*, 2007 WL 2565566 (Del. Ch. Aug. 29, 2007) (citing *Miles, Inc. v. Cookson Am., Inc.*, 677 A.2d 505, 506 (Del. Ch. 1995)).
[3] *See, e.g., Kansas City Southern v. Grupo TMM, S.A.*, 2003 WL 22659332, at *2 (Del. Ch. Nov. 4, 2003) ("To ascertain the parties' shared expectations the Court will look first to the Agreement itself.").

> sewer and any other lienable charges imposed by the State of Delaware, any political subdivision thereof or any school district, shall be prorated as shall rents and prepaid operating expenses if the property is sold subject to a lease.

A plain reading of the parties' agreement yields the conclusion that taxes and other incidental property costs should be prorated between the parties as of the date of the closing. Although the Court is not unsympathetic to the Maffetts' overarching arguments concerning the fairness of BRP's use of the Property at no cost in the interim between the exercise of the option and the date of closing,[4] the

[4] The Court is troubled by the notion that BRP in effect will receive free use of the Property in the interim between the exercise of the option and the hypothetical July 1, 2006 closing date. Under the facts presented in this case but in a world where the issues are perfectly framed by the parties, the Court might well have concluded that the Maffetts remain liable for the payment of taxes and other incidental property costs and that BRP must pay fair "rent" for its use and enjoyment of the Property as a vendee in possession in the interim between the exercise of the option and the hypothetical closing.

At common law the equitable rule was that a vendee in possession under an executory real estate sale contract should not enjoy the beneficial use of both the premises and his purchase money without compensating the vendor for either. *See, e.g.*, *Hanson v. Duffy*, 435 N.E.2d 1373, 1378 (Ill. App. Ct. 1982). The application of that particular equitable principle may be one of first impression in Delaware, but the Court discerns no compelling reason why it ought not to apply in this case, except that the Maffetts have not made that particular argument. Moreover, the Maffetts have not sought reargument on that point of law, and, in any event, they appear to have conceded the issue of rent during that period to BRP both in their motion for reargument, *see* Sidney & Carol Maffetts' Mot. for Rearg. ¶ 8 ("As it stands, BRP pays no rent for May and June 2006. For purposes of this motion, Maffett [sic] does not dispute this point of law."), and at post-trial oral argument. *See generally* Transcript of Post-Trial Oral Argument 23-27 ("MR. GOUGE: If Your Honor does find that the option was properly exercised, I do believe the law is pretty clear that [BRP] . . . could certainly have an equitable interest in the property . . . effective around April 25th of 2006. If that would occur, then you would not have an obligation for rent. Again, the law is pretty clear on that, and I conceded that in the brief. There is no argument to

Court is bound to honor the clear and unambiguous terms of the parties' agreement with respect to the apportionment of liability for taxes and other incidental property costs.[5] Thus, under the terms of the Agreement of Sale, the Maffetts are responsible for the payment of all taxes and other incidental property costs accruing up to the hypothetical July 1, 2006 closing date.[6] Accordingly, their motion for reargument on this issue is denied.

2. MORTGAGE PAYMENT START DATE

The Maffetts have neither cited any authority nor raised any persuasive argument that the Court has overlooked or misapprehended a controlling decision or principle of law in determining that, given a July 1, 2006 closing date, BRP's first mortgage payment would be due and payable on August 1, 2006. Under the

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the contrary that I'm going to try to make. It's clear." Counsel for the Maffetts subsequently suggested an equitable resolution that would require BRP to pay taxes and mortgage payments from the hypothetical July 1, 2006 closing date, but he did not suggest that any amount of "rent" would be due and owing for the interim period between the exercise of the option and the closing date). The Court is therefore bound by the terms of the parties' Agreement of Sale and the Maffetts' concessions in this case with the arguably unhappy result that BRP gains a windfall for its use and enjoyment of the Property during the interim period between the exercise of the option and the hypothetical July 1, 2006 closing date.

[5] *See, e.g.*, *Palese v. Del. State Lottery Office*, 2006 WL 1875915, at *4 (Del. Ch. June 29, 2006) ("[The Court] must honor the express terms the parties' agreement.").

[6] This conclusion is also consistent with the Maffetts' obligation under Section 7(a) of the Agreement of Sale to deliver marketable title by deed of special warranty that is free and clear of all liens, including possible tax liens. *Cf.* 9 Del. C. §§ 8301, *et seq*. (In Delaware, taxes assessed against the property are chargeable first to the legal owner of record).

Court's ruling on September 5, 2007, interest is to be calculated on the purchase money mortgage from July 1, 2006, the hypothetical closing date. Thus, the Maffetts can hardly argue that BRP is gaining free use of the property after the closing date because interest is accruing under the mortgage. Although it may be true that the Maffetts are in essence receiving mortgage payments a month behind, as opposed to a month ahead as in the case of rent payments pursuant to a lease, that is the conventional way in which a mortgage works. If the Maffetts desired to have BRP make its monthly mortgage payments in advance, they could have contracted for that, or, perhaps, they could have gone to closing on the transaction sooner than July 1 had they not rejected BRP's exercise of the option in April 2006. Moreover, the Maffetts would have received $100,000 in cash as of the date of the closing had they performed in accordance with BRP's exercise of the option. In sum, the Maffetts have not explained why BRP's mortgage payments should not be calculated and payable in the conventional manner, and, accordingly, the Court denies their motion for reargument on this point.

* * *

Because the Court neither misapprehended any material fact nor misapplied any established principle of law, the Maffetts' motion for reargument is denied.

Thus, with these issues resolved, the Court anticipates that the parties will now be able to perform the calculations ordered by the Court in its September 5, 2007 Bench Ruling and that it will receive an implementing order promptly.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K