IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

ANGUILLA RE, LLC, a Delaware limited liability company and successor by assignment from DAVID B. SMALL and DAVID B. SMALL 2004 ANNUITY TRUST U/A/D 7/21/04,

Plaintiff and Counterclaim Defendant,

v.

LUBERT-ADLER REAL ESTATE FUND IV, L.P., a Delaware limited partnership, et al.,

Defendants and Third-Party Plaintiffs,

v.

DAVID B. SMALL, an individual,

Third-Party Defendant.

C.A. No. N11C-10-061 MMJ CCLD

Submitted: October 25, 2012
Decided: November 5, 2012

OPINION

On Anguilla and Third-Party Defendant David B. Small's Motion for Summary Judgment

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Stuart M. Brown, Esquire, Laura D. Hatcher, Aleine Porterfield, Esquire, DLA Piper LLP (US), Wilmington, Delaware; Gregory S. Otsuka, Esquire (argued), DLA Piper LLP (US), Chicago, Illinois, Attorneys for Defendants Lubert Adler Real Estate Fund IV, L.P., Lubert Adler Capital Real Estate Fund IV, L.P., and Lubert Adler Real Estate Parallel Fund IV, L.P.

JOHNSTON, J.

INTRODUCTION

This complex litigation arises from a contractual dispute between Plaintiff Anguilla RE, LLC ("Anguilla") and the Lubert Adler Real Estate Fund IV, L.P., Lubert Adler Capital Real Estate Fund IV, L.P., and Lubert Adler Real Estate Parallel Fund IV, L.P. (collectively referred to as the "Lubert Adler Defendants" or "Guarantors"). Anguilla filed suit against the Guarantors, seeking the return of a multi-million dollar deposit paid in contemplation of purchasing a private Villa from Barnes Bay Development Ltd.

Anguilla and Third-Party Defendant David B. Small ("Small") filed this Motion for Summary Judgment, arguing that there are no genuine issues of material fact that: (1) Small paid Seller the full amount of the required deposits; (2) all deposits remitted by Small were timely; and (3) Seller breached the terms of the parties' agreement. Anguilla and Small claim that, as a matter of law, Anguilla is entitled to the return of the deposits.

For the following reasons, Anguilla's and Small's Motion for Summary Judgment is granted.

FACTUAL BACKGROUND

The Original Purchase and Sale Agreement

For purposes of this motion, the majority of the following facts are undisputed. To the extent the Defendants and Third-Party Plaintiffs dispute certain facts, such facts are neither genuine issues of material fact[1] nor relevant.[2]

On May 21, 2005, Small and Barnes Bay Development Ltd. ("Seller") entered into a Purchase and Sale Agreement (the "Original PSA") for the purchase of Unit 6 (the "Villa") of The Villas at Anguilla (the "Resort"), located in the British West Indies. Pursuant to the Original PSA, Small agreed to purchase the Villa for $6,250,000.00, less a 10% incentive, subject to additional terms and conditions. The Original PSA obligated Small to make two separate deposits totaling 40% of the purchase price, and to remit the outstanding balance at closing. Seller agreed to deliver the Villa to Small by May 2007.

That same day, Small and Seller also executed the following documents: (i) Incentive Addendum to Purchase and Sale Agreement The

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[1] *See* Super. Ct. Civ. R. 56(c).

[2] In support of their Motion for Summary Judgment, Movants filed two declarations, accompanied by supporting exhibits. Neither the Lubert Adler Defendants nor SOF 82 filed any responding affidavits, as permitted by Rule 56(c). However, the Court need not decide the motion based on facts contained in either declaration.

Villas at Anguilla ("Incentive Addendum"); (ii) Furnishings Addendum to Purchase and Sale Agreement The Villas at Anguilla ("Furnishings Addendum"); (iii) Addendum to Purchase and Sale Agreement The Villas at Anguilla ("Addendum"); and (iv) Non-Deed Use Restricted Addendum to Purchase and Sale Agreement The Villas at Anguilla ("Non-Deed Use Restricted Addendum") (collectively, referred to as "Addenda").

Rider A and Assignment

On February 20, 2006, Small, Seller, and the Lubert Adler Defendants executed Rider A, which modified the Original PSA. Rider A required Small to make two additional deposits,[3] and further extended the deadline for delivery of the Villa to December 2008. Rider A provided that if Small's Villa was not completed by December 2008, Small had the right to terminate the PSA and have his deposits returned.

Rider A contained a guaranty which provided that if Small made all deposits as required under the PSA, such deposits would be guaranteed by the Guarantors.

Rider A further authorized Small to assign his interest in the Original PSA. Exercising his authority under Rider A, Small transferred his interest

[3] Under Rider A, Small was required to pay an additional "20% deposit of the Purchase Price," and a deposit for the construction of an office within the Villa.

and obligations under the Original PSA, Addenda, and Rider A to Anguilla on August 2, 2008.

Deposits

In accordance with the Original PSA and Rider A, Small paid the following deposits:

(1) $25,000 on February 14, 2005, representing the initial refundable deposit to be credited against the first 20% deposit;

(2) $2,275,050 on April 14, 2006, representing the initial 20% deposit required under the Original PSA, the additional 20% deposit required under Rider A, and the office deposit; and

(3) $1,125,000 on September 28, 2008, representing the final 20% deposit due under the Original PSA and Rider A.

May 4, 2009 Letter Agreement

On May 4, 2009, Small, Seller, and the Guarantors executed a letter agreement, which further modified the Original PSA, Addenda, and Rider A (all executed documents collectively referred to as the "PSA").[4] The letter agreement expressly provides: "Buyer has the right to terminate the

[4] For reasons not apparent to the Court, Small signed the letter agreement despite having assigned all interest to Anguilla.

transaction contemplated by the Purchase Agreement at any time and for any reason prior to Closing."

Bankruptcy Proceedings

On March 17, 2011, Seller filed for Chapter 11 bankruptcy protection in the United States Bankruptcy Court for the District of Delaware. Seller remains insolvent.

The Resort, including the Villa, subsequently was sold at a public auction.[5] SOF 82 Anguilla Holdings LLC ("SOF 82") emerged as the highest bidder,[6] and is the owner of the Resort.

"Tender" of Villa

On April 28, 2011, during the pendency of Seller's Chapter 11 case, Seller's Chief Restructuring Officer informed Small that the Villa was ready for occupancy and that Seller was prepared to close. As an incentive, Seller offered Small a discounted purchase price, as well as additional savings on closing costs.

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[5] On July 27, 2011, Seller sought and was granted leave of the Bankruptcy Court for Seller's first priority chargee, SOF-VIII-Hotel II Anguilla Holdings LLC ("SOF-VIII-Hotel II"), to exercise its power of sale through a public auction of the Resort, including the Villa.

[6] On September 20, 2011, the Bankruptcy Court entered an order authorizing SOF-VIII-Hotel II relief from the automatic stay to take the necessary steps to transfer title to the Resort to SOF 82.

In order to close on the Villa, Seller's Chief Restructuring Officer advised Small that he must execute a new PSA (the "New PSA"). In addition to a reduced purchase price, the New PSA included a provision requiring the buyer to "irrevocably waive[], release[] and discharge[] any and all Guaranty claims."[7]

The New PSA provided that upon execution of the New PSA, the PSA would be terminated. Small was further advised that if he elected not to execute the New PSA, he would no longer be eligible for the "quick close" discount as set forth in the Original PSA and Incentive Addendum.[8]

Anguilla's Demand and Termination

By letter dated August 15, 2011, Anguilla notified the Guarantors that the Seller was in default of its obligations under the PSA: "Defaults and events of defaults have occurred and are continuing under the Purchase and Sale Agreement because, among other things, the transaction contemplated by the agreement has not yet closed." Anguilla demanded the immediate return of the deposits totaling $3,425,050.00.

[7] Seller's Second Amended Joint Chapter 11 Plan of Liquidation, filed on June 13, 2011 in the United States Bankruptcy Court for the District of Delaware, outlined the procedure for those purchasers electing to execute the New PSA.

[8] The "quick close" discount refers to the 10% reduction in the original purchase price, as set forth in the Incentive Addendum.

Anguilla sent a second demand letter to the Guarantors on October 5, 2011 expressly terminating the PSA, effective that date.

The Guarantors did not refund the deposits.

PROCEDURAL CONTEXT[9]

On October 6, 2011, Anguilla filed suit in this Court against the Lubert Adler Defendants, alleging breach of contract against each of the Guarantors.

On November 17, 2011, the Lubert Adler Defendants filed an Answer to Anguilla's Complaint and asserted Counterclaims. That same day, the Lubert Adler Defendants also filed a Third-Party Complaint against Small.

Small and Anguilla moved to dismiss the Lubert Adler Defendants' Counterclaims and Third-Party Complaint. The Court granted Small and Anguilla's motions, but expressly permitted the Lubert Adler Defendants leave to re-plead.[10]

On April 19, 2012, the Lubert Adler Defendants, as well as SOF 82, filed an Amended Answer to Anguilla's Complaint and asserted three Counterclaims, alleging, *inter alia,* breach of contract. The Lubert Adler

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[9] The procedural history is more fully set forth in the Court's October 16, 2012 Memorandum Opinion. *Anguilla RE, LLC v. Lubert-Adler Real Estate Fund IV, L.P.,* 2012 WL 5351229 (Del. Super.).

[10] *Anguilla RE, LLC v. Lubert-Adler Real Estate Fund IV, L.P.,* 2012 WL 1408857 (Del. Super.).

Defendants, joined by SOF, also filed an Amended Third-Party Complaint against Small, alleging, *inter alia*, breach of contract.

Small and Anguilla again moved to dismiss the Lubert Adler Defendants' Amended Counterclaims and Amended Third-Party Complaint. On October 16, 2012, the Court granted Small and Anguilla's motions in part, leaving only the Lubert Adler Defendants and SOF 82's claims for breach of contract.[11]

While Small and Anguilla's motions to dismiss were under advisement, Small and Anguilla filed the pending Motion for Summary Judgment. Following briefing, the Court held oral argument on this motion on October 25, 2012.

STANDARD OF REVIEW

Summary judgment is granted only if the moving party establishes that there are no genuine issues of material fact in dispute and judgment may be granted as a matter of law.[12] All facts are viewed in a light most favorable to the non-moving party.[13] Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if there is a

[11] 2012 WL 5351229, at *8-9.

[12] Super. Ct. Civ. R. 56(c).

[13] *Hammond v. Colt Indus. Operating Corp.*, 565 A.2d 558, 560 (Del. Super. 1989).

need to clarify the application of law to the specific circumstances.[14] When the facts permit a reasonable person to draw only one inference, the question becomes one for decision as a matter of law.[15] If the non-moving party bears the burden of proof at trial, yet "fails to make a showing sufficient to establish the existence of an element essential to that party's case," then summary judgment may be granted against that party.[16]

ANALYSIS

The Controlling Documents

"When the issue before the Court involves the interpretation of a contract, summary judgment is appropriate only if the contract in question is unambiguous."[17] When presented with a contract dispute on a motion for summary judgment, the threshold inquiry is whether the plain language of the contract is clear and unambiguous.[18]

For purposes of the pending motion, the parties' relationship is governed by three separate agreements – the Original PSA, Rider A, and the May 4, 2009 Letter Agreement – collectively referred to as the PSA. The

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[14] Super. Ct. Civ. R. 56(c).

[15] *Wootten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).

[16] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

[17] *United Rentals, Inc. v. RAM Holdings, Inc.*, 937 A.2d 810, 830 (Del. Ch. 2007).

[18] *Id.*

Court will briefly summarize the relevant portions of each document before analyzing the contracts' terms.

The Original PSA

The Original PSA, executed by Seller and Small on May 21, 2005, provides:

> 2. **Purchase Price of the Property**: The purchase price of the Property (the "*Purchase Price*") is **Six Million Two Hundred Fifty Thousand Dollars** (*$6,250,000.00*) U.S., subject to the provisions contained within the "Incentive Addendum" attached hereto. The Purchase Price includes the "Furnishings", more specifically described hereinafter. The Purchase Price does not include closing costs described in this Agreement, or any fees or costs incurred by Purchaser in connection with any financing procured by Purchaser to complete Closing, all of which also will be payable by Purchaser. The Purchase Price consists of and shall be paid as follows:

Purchase Price:	**$6,250,000.00**
Less 10% Incentive*	**$625,000.00**
Net Purchase Price	**$5,625,000.00**

**subject to the terms and conditions of the "Incentive Addendum" attached hereto*

Payment of Purchase Price	
Deposit (20% of Purchase Price), due and payable on date of this Agreement, which shall be released immediately to Seller	**$1,125,000.00**
Additional Deposit (20% of Purchase Price in addition to the Deposit), due and payable upon fifteen (15) days written notice from Seller indicating that the Unit's roof has been secured and completed and which shall be immediately released to Seller	**$1,125,000.00**
Balance of Purchase Price, due and payable at Closing:	**$3,375,000.00**

(All of the amounts set forth above shall be payable only in the form of cashiered or certified funds, or via wire transfer)

Rider A

On February 20, 2006, Seller, Small and the Lubert Adler Guarantors executed Rider A, which modified the Original PSA. Paragraph 2 of Rider A provides:

> 2. The resort and villas have an anticipated completion date of May 31, 2007. If the resort and villas, including Purchaser's Unit are not completed (but for punch-list items) by December, 2008, then Purchaser shall have the right to terminate the Agreement and upon termination Seller shall immediately return all of the Purchaser's Deposits and all obligations under the Agreement shall be null and void, except those that expressly survive termination.

Rider A also obligated Small to make two additional deposits on the Villa prior to Closing. Paragraph 16 of Rider A provides:

> 16. Notwithstanding anything to the contrary contained in Section 2 of the [Original PSA], the Deposits, pursuant to the [Original PSA], are to be funded as follows:
>
> > 20% of the Purchase Price at signing of the [Original PSA];
> >
> > 20% of the Purchase Price nine (9) months following the signing of the [Original PSA];
> >
> > 20% of the Purchase Price upon the Unit's roof having been secured and completed; and
> >
> > The Office Deposit [$50,050.00] upon the execution of this Rider "A".

Rider A further provides that such deposits will be guaranteed by the Lubert Adler Defendants:

> 15. In the event Purchaser has made all Deposits required under this Agreement, such Deposits and all the terms, conditions and obligations of Seller under this Agreement and all ancillary written agreements to the Agreement shall be guaranteed by: 1) Lubert Adler Real Estate Fund IV, L.P., a Delaware limited partnership; 2) Lubert Adler Real Estate Parallel Fund IV, L.P., a Delaware limited partnership; and 3) Lubert Adler Capital Real Estate Fund IV, L.P., a Delaware limited partnership as to an undivided one-third obligation each, totaling the entire amount of such Deposits.

Should Small default under the PSA, Paragraph 13 of Rider A provides: "Purchaser shall have 10 days following written notice from Seller to cure any defaults under the Agreement.".

May 4, 2009 Letter Agreement

On May 4, 2009, Small, Seller and the Lubert Adler Defendants executed a letter agreement, which further modified the Original PSA, Addenda, and Rider A. The letter agreement expressly provides:

> Notwithstanding anything to the contrary in the Purchase Agreement or this Letter Agreement, the parties agree that Buyer's right to terminate the Purchase Agreement pursuant to Section 2 of Rider A shall be interpreted to mean that Buyer has the right to terminate the transaction contemplated by the Purchase Agreement at any time and for any reason prior to the Closing.

Contract Construction

Where the language of a contract is clear and unambiguous, the Court must construe the contract terms by their ordinary and usual meaning.[19] "Contract terms themselves will be controlling when they establish the parties' common meaning so that a reasonable person in the position of either party would have no expectations inconsistent with the contract language."[20] Upon a finding that the contract clearly and unambiguously reflects the parties' intent, the Court must refrain from destroying or twisting the contract's language, and confine its interpretation to the contract's "four corners."[21]

A contract is not rendered ambiguous merely because the parties dispute the meaning of its terms.[22] "Rather, a contract is ambiguous only when the provisions in controversy are reasonably or fairly susceptible of

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[19] *GMG Capital Invs., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 780 (Del. 2012) (citing *Paul v. Deloitte & Touche, LLP*, 974 A.2d 140, 145 (Del. 2009)). *See also Rhone-Poulenc Basic Chems. Co v. American Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992) ("Ambiguity does not exist where the court can determine the meaning of a contract 'without any other guide than a knowledge of the simple facts on which, from the nature of the language in general, its meaning depends.'").

[20] *GMG Capital Invs*, 36 A.3d at 780 (citing *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997)).

[21] *Doe v. Cedars Academy, LLC*, 2010 WL 5825343, at *5 (Del. Super.); *O'Brien v. Progressive Northern Ins. Co.*, 785 A.2d 281, 288-89 (Del. 2001).

[22] *GMG Capital Invs*, 36 A.3d at 780 (citing *Rhone-Poulenc*, 616 A.2d at 1195).

different interpretations or may have two or more different meanings."[23] "[W]here reasonable minds could differ as to the contract's meaning, a factual dispute results and the fact-finder must consider admissible extrinsic evidence."[24] In such instances, summary judgment is improper.[25]

The Court finds the plain language of the Original PSA, Rider A, and the May 4, 2009 Letter Agreement clearly and unambiguously reflects the parties' intentions. These agreements are not reasonably susceptible to differing interpretations. Therefore, the parol evidence rule bars evaluation of the controlling documents on the basis of extrinsic evidence.[26]

The Court's interpretation of the Original PSA, Rider A, and the May 4, 2009 Letter Agreement is confined to each document's four corners. The Court must "render a reasonable, fair and practical interpretation of the contract's clear and unambiguous terms. In addition, the court must be mindful that [a] contract should be read as a whole and every part should be interpreted with reference to the whole, and if possible should be so

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[23] *Rhone-Poulenc*, 616 A.2d at 1196.

[24] *GMG Capital Invs*, 36 A.3d at 776.

[25] *See id.* at 783 (citing *Eagle Indus*, 702 A.2d at 1232); *Riverbend Cmty., LLC v. Green Stone Eng'g, LLC*, 2012 WL 4950759, at *2 (Del. 2012).

[26] *Galantino v. Baffone*, 46 A.3d 1076, 1081 (Del. 2012) ("The parol evidence rule bars the admission of extrinsic evidence to an unambiguous, integrated written contract for the purpose of varying or contradicting the terms of that contract.") (citing *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997)).

interpreted as to give effect to its general purpose. In this regard, the court must interpret the contract so as to conform to an evident consistent purpose and in a manner that makes the contract internally consistent."[27]

Interpretation of Controlling Contracts

The Parties' Contentions

At issue here is whether Small is entitled to the return of his deposits on the Villa. Anguilla and Small argue that summary judgment is appropriate because there are no genuine issues of material fact refuting that Small timely paid the full amount of the deposits as required by the Original PSA and Rider A. Anguilla and Small further argue that Seller breached the terms of the PSA by requiring Small to execute the New PSA, which contained terms materially different from those contained in the PSA, before Small could close on the Villa.

In response, the Lubert Adler Defendants and SOF 82 contend that summary judgment is improper because there is a question of fact as to whether Small is entitled to the return of his deposit. In support of this contention, the Lubert Adler Defendants and SOF 82 advance three arguments. First, the Lubert Adler Defendants and SOF 82 contend that there is a genuine issue of material fact as to whether Small ***timely*** submitted

[27] *Cedars Academy*, 2010 WL 5825343, at *5 (internal citations and quotation marks omitted).

his deposits to Seller as required by the PSA. Second, the Lubert Adler Defendants and SOF 82 argue that a factual dispute exists as to whether Small paid the ***full amount*** of the deposits as required by the PSA. Third, the Lubert Adler Defendants and SOF 82 claim that there is a factual dispute as to whether Small breached the PSA by ***refusing to accept tender*** of the Villa.

Small Fully Paid All Deposits

The undisputed record establishes that Small paid Seller three deposits totaling $3,425,000.00:

(1) $25,000 representing the initial refundable deposit to be credited against the initial 20% deposit;

(2) $2,275,050 representing the initial 20% deposit required under the Original PSA, the additional 20% deposit required under Rider A, and the office deposit; and

(3) $1,125,000 representing the final 20% deposit due under the Original PSA and Rider A.

It is equally undisputed that neither Seller nor the Guarantors refunded any of Small's deposits.

The parties, however, dispute whether Small paid the full amount of deposits, as required by the Original PSA and Rider A, such that the guaranty was triggered. The Lubert Adler Defendants and SOF 82 contend that under the Original PSA and Rider A, Small was required to pay 60% of

the *Purchase Price* (60% x $6,250,000.00 = $3,750,000.00) plus the Office Deposit ($50,050.00) for a total deposit of $3,800,050.00. Because Small only paid deposits totaling $3,425,050.00, the Lubert Adler Defendants and SOF 82 contend that Small failed to satisfy the express conditions precedent to triggering the guaranty contained in Rider A.

In response, Anguilla and Small argue that both the Original PSA and Rider A obligated Small to pay 60% of the *Net Purchase Price* (60% x $5,625,000.00 = $3,375,000.00) plus the Office Deposit ($50,050.00) for a total deposit of $3,425,050.00. By submitting all deposits as required by the Original PSA and Rider A, Anguilla and Small contend that the guaranty was triggered.

The Court finds that Small fully paid all deposits as required under the Original PSA and Rider A, thereby triggering the guaranty. Section 2 of the Original PSA defines the "Purchase Price" as $6,250,000.00, less a 10% reduction per the Incentive Addendum. The Original PSA reflects that the Net Purchase Price, taking into account the 10% incentive, is $5,625,000.00.

The Original PSA also establishes a payment schedule requiring Small to pay two deposits, each totaling "20% of the Purchase Price." Each of these deposits is in the amount of $1,125,000.00. $1,125,000.00 is 20% of $5,625,000.00, the Net Purchase Price. Clearly, the terms "Net Purchase

Price" and "Purchase Price" are used interchangeably within the Original PSA.[28]

Construing the PSA as a whole, in a manner that makes the PSA internally consistent, the Court finds that Small was required to pay three deposits of $1,125,000.00, which constituted 60% of $5,625,000.00, as well as an Office Deposit in the amount of $50,050.00. The undisputed record reflects that Small paid all required deposits, which totaled $3,425,050.00. Therefore, the Court finds that Small paid all deposits, thereby satisfying the conditions precedent to trigger the guaranty.

Even if Small had failed to pay the full amount of the deposits, Rider A included a provision whereby Small could cure any defaults before forfeiting his deposit. Paragraph 13 of Rider A provides: "Purchaser shall have 10 days following written notice from Seller to cure any defaults under the Agreement." At oral argument, counsel for Lubert Adler Defendants and Guarantors conceded that no written notice was provided to Small concerning any default with respect to the deposits.

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[28] Although Rider A modified the payment schedule set forth in Section 2 of the Original PSA, Rider A did not change the amount of the deposits. Rider A only required Small to pay two additional deposits - (1) an another deposit of "20% of the Purchase Price," and (2) an Office Deposit. Because Rider A does not separately define the term "Purchase Price," the Court must refer back to Section 2 of the Original PSA in order to define this term.

Small Timely Paid All Deposits

The parties dispute whether Small timely paid the deposits as required by the Original PSA and Rider A. However, none of the controlling contracts explicitly define what constitutes "timely" payment.

The Original PSA and Rider A set forth three specific events, each of which triggered Small's obligation to remit a deposit in the amount of 20% of the purchase price:

1. 20% of the Purchase Price at signing of the [Original PSA];
2. 20% of the Purchase Price nine (9) months following the signing of the [Original PSA]; and
3. 20% of the Purchase Price upon the Unit's roof having been secured and completed.

Additionally, Rider A required Small to pay a $50,050.00 office deposit upon the execution of Rider A. The Original PSA provided that the balance of the purchase price was due at closing.

Although the PSA does not assign precise dates to these triggering events, or specify the closing date, the Original PSA includes a clause providing that "time is of the essence" with respect to "every provision of the [PSA]." "When time is of the essence in a contract, a failure to perform

by the time stated is a material breach of the contract that will discharge the non-breaching party's obligation to perform its side of the bargain."[29]

The undisputed record establishes that Small remitted the following payments:

(1) $25,000.00 on February 14, 2005 representing the initial refundable deposit to be credited against the first 20% deposit;

(2) $2,275,050.00 on April 14, 2006 representing the initial 20% deposit required under the Original PSA, the additional 20% deposit required under Rider A, and the office deposit; and

(3) $1,125,000.00 on September 28, 2008 representing the final 20% deposit due under the Original PSA and Rider A.

Some of Small's payments were submitted some period of time following the events listed in the contracts.

In the absence (or waiver) of a declaration that "time is of the essence," Delaware law permits the parties "a reasonable time in which to tender performance."[30] The reasonableness standard applies regardless of whether the contract designates a specific date on which such performance is to be tendered.[31]

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[29] *HIFN, Inc. v. Intel Corp.*, 2007 WL 1309376, at *9 (Del. Ch.).

[30] *Brasby v. Morris*, 2007 WL 949485, at *3 (Del. Super.) (quoting *Novozymes A/S v. Codexis, Inc.*, 2005 WL 1278355, at *3 (Del. Ch.)).

[31] *Id.*

Because the determination of whether a party has performed within a reasonable time is generally a question of fact, it is often inappropriate for the Court to resolve such a factual dispute at the summary judgment stage.[32] That is not to say, however, that "reasonableness" can never be decided as a matter of law.[33] Delaware courts have recognized that resolution of the "reasonableness" inquiry is appropriate at summary judgment if a trial would offer nothing additional to assist the trier of fact.[34]

Under the facts and circumstances of the case, the Court finds that Seller tendered the deposits within a reasonable amount of time. This multi-million dollar deal required Small to remit over 60% of the purchase price, or $3,425,050.00, prior to closing on the Villa. Despite repeated set-backs and delays, which extended completion of the Villa by nearly four years, Small paid all required deposits within a commercially reasonable period of time following the contractually established events.

Had Seller believed that Small breached the PSA by remitting untimely deposits, Seller could have refused to accept such deposits. By failing to provide written notice of default, or otherwise objecting to the timing of

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[32] *HIFN*, 2007 WL 1309376, at *11.

[33] *Id.*

[34] *Id.* (citing *Seaford Golf & Country Club v. E.I. DuPont de Nemours & Co.*, 2006 WL 2666215, at *5 (Del. Super.)).

deposit payments, the Court finds: (1) that Seller accepted the payments as reasonably timely; and (2) that Seller has waived any timeliness dispute that could have been raised under that clause.[35]

The Court finds that Small timely paid all deposits as required by the PSA. Therefore, the guaranty was triggered.

Seller Failed to Tender Pursuant to the PSA

The Lubert Adler Defendants and SOF 82 argue that summary judgment is inappropriate because a genuine issue of material fact exists as to whether Small breached the PSA by refusing to accept tender of the Villa. According to the Lubert Adler Defendants and SOF 82, Seller fully performed under the PSA when it tendered the Villa to Small on April 28, 2011. Small's refusal to close on the Villa, therefore, constituted a breach of the PSA.

In response, Anguilla and Small argue that Seller breached its obligations under the PSA by failing to tender the Villa by December 2008. Anguilla and Small further contend that Seller breached the PSA by conditioning tender of the Villa on the execution of the New PSA, which was materially different from the PSA.

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[35] *See Clements v. Castle Mortgage Serv. Co*, 382 A.2d 1367, 1370 (Del. Ch. 1977).

Under the PSA, Small was entitled to a 10% reduction in the purchase price if he complied with all terms and conditions of the PSA on or before the closing date. Additionally, Rider A contained a guaranty, providing that in the event that Small paid all deposits as required by the Original PSA and Rider A, the Lubert Adler Defendants would guarantee such deposits.

When the Villa was eventually tendered to Small on April 28, 2011, Seller informed Small that it would be necessary to execute the New PSA in order to close on the Villa. Although the New PSA provided a reduced purchase price, it also included a provision whereby Small would be required to "irrevocably waive[], release[] and discharge[] any and all Guaranty Claims."

The Court finds that Seller breached its obligations by failing to tender the Villa pursuant to the PSA. The undisputed record establishes that Seller conditioned tender of the Villa on Small's execution of the New PSA, which included, *inter alia*, a provision releasing all claims against the Guarantors. Such a provision plainly constituted a material change in the PSA. In light of this material change, Small was under no obligation to close on the Villa or execute the New PSA.

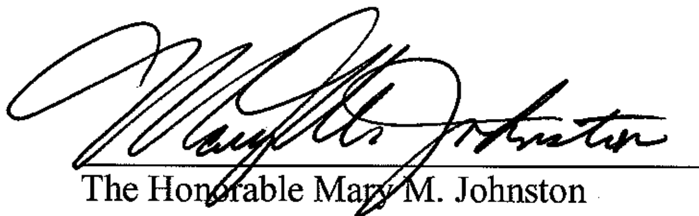
CONCLUSION

Based upon the undisputed facts, the Court finds, as matter of law, that Small timely remitted all deposits as required by the PSA. The payment in full of such deposits, which totaled $3,425,050.00, triggered the guaranty.

The Court further finds Seller breached the PSA by failing to tender the Villa in accordance with terms of the PSA. By conditioning sale of the Villa on Small's execution of the New PSA, which was materially different from the PSA, Seller breached its obligations under the PSA.

THEREFORE, Plaintiff Anguilla RE, LLC and Third-Party Defendant David B. Small's Motion for Summary Judgment is hereby **GRANTED.** The Guarantors' obligations have been triggered. The Lubert Adler Defendants and SOF 82's Counterclaim and Third-Party Complaint, alleging breach of contract are hereby **DISMISSED**.

IT IS SO ORDERED.



The Honorable Mary M. Johnston