IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

RESERVES DEVELOPMENT LLC and THE RESERVES DEVELOPMENT CORPORATION,	)	
Plaintiffs,	)	
v.	)	C.A. No. 05C-11-011-RFS
CRYSTAL PROPERTIES, LLC, BELLA VIA, LLC, WILLIAM ESHAM, WILLIAM BUCHANAN, JR., EYAL ELBOIM and YITSHAK RAFAELI,	)	
Defendants.	)	

OPINION ON REMAND[1]

Decided: May 18, 2009

Edward M. McNally, Esquire, and Fotini A. Skovakis, Esquire, Morris James LLP, Wilmington, Delaware

Richard E. Berl, Jr., Esquire, Smith O'Donnell Feinberg & Berl LLP, Georgetown, Delaware.

STOKES, Judge

[1] The Delaware Supreme Court has not published its order remanding the case to this Court. The Order is attached to this opinion as an appendix.

The Plaintiffs, Reserves Development LLC and The Reserves Development Corporation (collectively "Reserves") filed an action for damages against the Defendant, Bella Via, LLC ("Bella Via") on breach of contract grounds. Shortly before trial, the complaint was amended to include a misrepresentation claim personally against the four members of Bella Via, William Esham ("Esham"), William Buchanan, Jr. ("Buchanan"), Eyal Elboim ("Elboim") and Yitshak Rafaeli ("Rafaeli"). A bench ruling was made on January 3, 2008. Because a mortgage foreclosure was imminent, Reserves urged that the matter be decided without a trial transcript which could not be provided for several months. A damages award was entered against Bella Via only in the amount of $603,959.12 together with pre- and post-judgment interest and attorneys' fees. After consideration, attorneys fees

in the amount of $119,161.25 were awarded. The Supreme Court has remanded the matter for clarification on the misrepresentation claim presented at trial.

Specifically, the Remand Order states in pertinent part:

> (5) After careful consideration of the parties' respective positions, we conclude that we must remand this matter to the Superior Court for further findings of fact regarding Reserves' misrepresentation claim. The trial judge rejected Reserves' claim because he determined that Bella Via had the financial ability and capacity to fulfill its obligations. Therefore, the trial judge concluded that the managers did not misrepresent Bella Via's ability to perform as promised. On appeal, Reserves argues that

the trial judge prematurely ended his analysis because he failed to consider whether, regardless of their financial ability, the managers intended to breach the contract at the outset.

(6) We are unable to discern from the limited record whether Reserves fairly presented this argument at trial. If Reserves presented any issue beyond Bella Via's financial ability to perform - *i.e.*, if Reserves argued at trial that the managers never intended to perform, the trial judge shall fully address whether he considered those issues when he denied Reserves' misrepresentation claim and, if not, shall address that contention on remand.

On the subject of the misrepresentation claim, the following comments

were made in the bench ruling:

33. Reserves has sued the Bella Via principals individually, claiming that they did not have the financial capacity to complete the project and misrepresented their status.

I find from a review of the Severn Bank records that Bella Via principals did have the financial ability and capacity to develop the property. I find that the principals of defendants and plaintiffs were hard-headed, aggressive business persons. However, that does not translate into a fraud case.

The individual defendants took an unreasonable position, in hindsight, about how the $400,000 should have been handled in the Fresh Cut contract. This decision, in my mind, however,

does not translate into deception or actionable fraud to give rise to recovery under the circumstances. They did have the financial capacity under the evidence to perform.

Upon review of the record, this analysis was incomplete.

Consequently, supplementary findings of fact and conclusions of law are made. They will address only the arguments that were presented at trial.

Supplementary Findings of Fact[2]

1) On October 5, 2004, Severn Savings Bank ("Severn") approved the request of Bella Via for a $4,680,000 acquisition and construction loan to buy 30 lots from Reserves. At that time, Elboim, Rafaeli, Buchanan, and Esham had substantial personal assets: Esham's net worth was $3,105,000

[2] Part of the supplementary findings may overlap with a Stipulation of Facts ("the Stipulation") that the parties presented. For sake of convenience, the Stipulation is attached to the Appendix.

with liquid assets of $1,240,000 and an adjusted gross income in 2003 of $1,816,368; Buchanan's net worth was $15,380,000 with liquid assets of $1,230,000 and an adjusted gross income in 2003 of $920,394; Rafaeli's net worth was $1,489,569 with liquid assets of $159,842 and an adjusted gross income in 2003 of $142,297; Elboim's net worth was $1,493,450 with liquid assets of $126,000 and an adjusted gross income in 2003 of $219,582. (Pl. Ex. #49, Ex. #2, #16, thereto). Severn looked to them to personally guarantee the $4,680,000 loan as well.

2) Earlier, on or about March 24, 2004, Crystal Properties LLC ("Crystal") and Reserves executed an Agreement of Purchase and Sale of Real Property ("Agreement"). The purchase price of the 30 lots was $3,750,000. Crystal made a down payment of $50,000 from its own funds.

The Agreement was signed by Elboim, Rafaeli, and Esham as members of Crystal. Buchanan did not sign the Agreement. Later, Crystal assigned the Agreement to Bella Via, whose members included Elboim, Rafaeli and Esham together with Buchanan. Elboim was the managing member. By accepting the assignment, Bella Via assumed Crystal's obligation.

Reserves and Bella Via's obligations under the Agreement were to pay development costs based on the ratio of the lots they owned. Initially, the ratio was based on a total of 67 lots. Later, because of county regulations, the total was 71 lots; Bella Via's share was 30/71 or 42.25% and Reserves' share was 41/71 or 57.75%. Bella Via's share was reduced. At all times, it was understood that Reserves would be solely responsible for development costs for an additional 93 lots owned at an adjoining phase. The Agreement

required Bella Via to find a builder. Selection of a contractor had to be "reasonably acceptable" to Reserves under paragraph 4.B.(5)(iv). (Pl. Ex. #2).

3) The Agreement closed on or about October 6, 2004. Severn authorized the disbursement of $3,230,000. In addition to Bella Via's loan amount and Crystal's down payment, Bella Via paid $667,961.50 to complete settlement. (Pl. Ex. #5). Under the Agreement, funds were set aside to pay for the development. For Reserves' share, $1,500,000 was escrowed at MBNA, which was later acquired by Bank of America. For Bella Via's share, $1,450,000 was retained by Severn under its control in a construction trust agreement. A fund totaling $2,950,000 was established, reflecting the parties' responsibilities on a lot ownership basis.

4) Following settlement, Bella Via, through Esham and Elboim, sought to find a builder and attempted to obtain a construction bond. The bond was necessary to obtain a building permit without which construction could not begin. In May and June, 2005, Bella Via consulted and provided information to an insurance bond company for this purpose. (Def. Notebook Ex. #8, T. Tr. C at 77-78). It also discussed the obtaining of a letter of credit with Severn. (T. Tr. C at 70-71). Bella Via was not able to obtain a bond, but not because of financial weakness. The significant problem was the nature of the project's configuration - to get surety, the joint participation of Reserves and Bella Via was a practical necessity given their ownership of the 71 lots. (T. Tr. C at72). In the normal case only one owner would be involved, unlike the mixed ownership here. Severn would entertain a letter of credit on the 71

lots. Severn required personal guarantees, financial statements, and an additional appraisal which would take 45 days or more to process. (Pl. Ex. #49 at 44-47). Abraham Korotki ("Korotki"), the owner of Reserves, declined to participate with Severn.

5) Approximately, six (6) weeks after closing, on or about November 18, 2004, Reserves determined to use Obrecht-Phoenix, Inc. ("OP") for management services for all of the Reserves' project, including the 71 lots. Reserves did not consult Bella Via about its choice beforehand. (T. Tr. B at 113, 115, 116). Later, Bella Via accepted the decision to use OP and was comfortable to deal with Walter Maizel ("Maizel") who was OP's construction manager for Reserves. (T. Tr. B at 117).

6) During the time frame of October 2004 - June 2005, Bella Via

exercised good faith efforts to find a builder. Bella Via obtained a bid from Knorr Construction Company ("Knorr") to perform development work under the Agreement. Knorr's bid covered the 71 lots only. On March 24, 2005, Knorr revised its initial quotation. The Knorr bid was not acceptable to Reserves because of its price. Even with a lower price, Knorr would not have been acceptable to Reserves. Reserves was determined to have a contractor to do work not only in the 71 lots but also on its other 93 lots in the adjoining phase. (Def. Notebook Ex. #7; T. Tr. B at 118, 121, 124, 126).

7) In the spring of 2005, Reserves obtained information from Fresh Cut Custom Design Landscaping, Inc. ("Fresh Cut") concerning the costs of work. At a meeting on June 1, 2005, Reserves presented Bella Via with a Fresh Cut contract to sign. It was for approximately $6.5 million and called

for the development of the 164 lots. Bella Via declined to sign the contract. Esham asked that a separate one be drawn for Bella Via and Reserves to sign for the 71 lots. Reserves agreed. The Agreement confirmed an earlier email message on this subject sent on April 13, 2005 to Esham from Maizel that Bella Via would be a party to a contract (Def. Notebook Ex. 4). Although Maizel's email said a contract would be ready to review "late today," Esham did not see one until the meeting on June 1st. After June 1st, two Fresh Cut contracts were prepared for the different phases as requested by Bella Via. Reserves signed the Fresh Cut contract for the 71 lots on June 30, 2005. Reserves did not include Bella Via as a party nor did it tell Bella Via that it would not be a contracting party on June 30, 2005. (T. Tr.A. at 96, B at 66, 128-131).

8) At all times, Bella Via did not have responsibility for work that was not connected to its 30 lots. Elboim negotiated a clause with Korotki that was inserted in the Agreement that such unrelated expenses were the exclusive responsibility of Reserves (T.Tr. B at 45-48, C at 51-53).

Paragraph 4.B. (5)(iv) of the Agreement provided that:

> Purchaser shall have no obligation to participate in the construction of, or contribute to the costs of contracting (i) any bridge providing access to lot 179, or (ii) the clubhouse or recreational facilities or infrastructure related thereto, including site work, parking area, circle road, utility lateral connecting the clubhouse with water and sewer mains, or any and all bulkheading of storm water management ponds along the

clubhouse and tennis court areas . . .."[3]

9) In the spring of 2005, Bella Via reviewed expenses for the construction work at Reserves considering the Knorr and Fresh Cut bids. It was assisted by an experienced contractor named Bobby Kitchens ("Kitchens"). On or about April 14, 2005, Kitchens estimated the value of certain work that was not Bella Via's responsibility. The largest dollar items concerned the use of stamped concrete at Mirabella Circle ($188,565) and for the bulkheading ($205,000). For all such items, Kitchen's estimated that $438,604 should be segregated in the final contract amount. (Def. Notebook Ex. #1, T. Tr. B at 122). These exclusive costs were the subject of discussions with Maizel, including one with Korotki, Elboim and Esham on

[3] These items are referred to as exclusive costs, expenses or the like, in this opinion.

June 1, 2005. (T. Tr. B at 129).

10) In late April, Esham emailed Kitchens' estimate to Maizel, intending to reach an understanding about the exclusive items. Kitchens' estimate again was referenced in an email sent to Maizel on May 3, 2005 with a copy to Reserves' lawyer. Esham intended to secure a letter of credit from Severn and sought to define Bella Via's responsibility. It stated: "You received Bobby Kitchen's analysis last week so I await your response on this proposal before I can finalize the L.C." (T. Tr. B at 135-137 Def. Notebook #8). The "L.C." meant letter of credit.

11) On May 9, 2005, Reserves' lawyer emailed Maizel and asked whether Maizel had considered "the estimates on the various exclusions . . . with Abe." This comment referenced Bella Via's concern about Kitchen's

analysis. (Def. Notebook Ex. #8).

12) Both Korotki and Maizel knew that the exclusive cost subject was an important issue to Bella Via that had to be addressed in a contract. Maizel left OP in early June and did not have a chance to delineate the exclusive costs. For Maizel ". . . it just wasn't important to me at the time. And it sounds like it was an arithmetic issue between the partners and it could get resolved when I had time to get it resolved." (T. Tr. C at 53).

13) At the June 1st meeting, Esham and Elboim again pressed the issue that Reserves' exclusive costs had to be limited by a dollar ceiling. Kitchen's estimate that these expenses were in the $400,000 range was discussed with Maizel and Korotki. Korotki said that cost would be whatever it was, and Reserves would have responsibility for it. Reserves would bill

Bella Via as it was billed for nonexclusive costs. Reserves would not agree to a set dollar allocation of cost. This position was not acceptable to Bella Via because of its concerns that expenses between different parts of the work could nonetheless be commingled. (T. Tr. B at 49-51).

14) On or before June 1st, a construction bond had yet to be established. According to Maizel, "we were drawing the bond on the entire project and Bella Via had been 'actively' working on this effort." (T. Tr. C at 45-46). Concerning the bond, both Reserves and Bella Via had responsibility based upon their respective percentages of lot ownership. Their mutual cooperation was required as a practical matter. (T. Tr.C at 42-43). Korotki decided to put up his personal cash to get the bonding requirement satisfied with Wilmington Trust Company ("WTC"). He arranged for WTC to

provide two letters of credit for a permit to be issued on the 71 lots. The letters of credit are dated June 7, 2005. The money was wired on June 6, 2005. The use of cash to obtain the letters of credit from WTC was quicker than obtaining an insurance bond or from obtaining letters of credit from Severn. (T. Tr. A at 79).

15) On or about June 7, 2005, Reserves and Bella Via desired to proceed to develop the project. The real estate market was active. On or about April 13, 2005, Korotki had signed a sales contract with R.T. Properties ("RTP"), a New Jersey LLC, for 17 of the 41 lots at Reserves for $4,250,000. (Def. Notebook Ex. #36). The RTP contract could not close until the development was done. (T. Tr. B at 159-160). Part of the lots in the RTP was subject to a like-kind exchange with a closing date of June 11,

2005. The closing date for the remaining ones was to be within 90 days from the date of the contract, i.e., on or before July 13, 2005. (Def. Notebook Ex. 36, para 1(c)).

16) Over the weekend of June 3-5, 2005, Elboim spoke with Korotki about getting the letters of credit. Elboim, on behalf of Bella Via, agreed that Bella Via would pay its proportionate share of the cost for Korotki to obtain the letters of credit. Elboim understood that Korotki had to use his personal funds for this purpose. (T. Tr. A at 83-86).

17) On June 7, 2005, following an exchange of emails concerning various ways credit could be obtained from WTC, Esham advised Reserves' lawyer that Bella Via would pay its pro-rata share of that cost. Esham knew that Korotki had to use his personal funds for this purpose. Esham stated in

pertinent part that ". . . We are prepared to perform in the same manner as Abe in reference to the letter of credit with Wilmington Trust . . .. Our monies will be wired to meet our obligations in order for the letter of credit to be issued . . .. We will pay our pro-rated share of the monies needed be deposited for the letter of credit; the letter of credit fee; the lender fees; the permit fees; construction management fees; any other pro-ratable fees . . .. We are ready to perform now." (Pl. Ex. #10).

18) Korotki reasonably relied on Elboim's oral and Esham's written representations that he would be reimbursed for his personal expenses in obtaining the letters of credit from WTC immediately and without reservation.

19) On June 8, 2005, Reserves' lawyer advised Esham that Korotki

obtained the letters of credit and delivered them to OP so the permit could be pulled and that "Abe is now dealing directly with Ejal to follow through . . .." (Pl. Ex. #10). The reference to "Abe" and "Ejal" are to Korotki and Elboim, respectively.

20) On June 8, 2005, Korotki wrote a letter addressed to "Mr. Ejal Elboim, Crystal Properties, LLC, 12915 . . .." It requested $71,466.83 to reimburse Korotki for the letters of credit. These costs had nothing to do with the excluded items which concerned Bella Via. This sum was Bella Via's pro-rated share of 42.25%. (Pl Ex. #15).

21) On June 8, 2005, Korotki paid a $10,000 deposit from a Reserves' account on the construction management contract with OP. Reserves was billed for the deposit by invoice from OP dated June 1, 2005.

(Def. Notebook Ex. #13).

22) Korotki did not make a demand for repayment of Bella Via's share of the $10,000 deposit in his letter to Elboim on the same day. While Korotki anticipated payments for Bella Via's share of OP's expenses would be paid from Bella Via's construction trust at Severn, Korotki reasonably relied on Esham's statement that Bella Via would pay its share of the construction management fees without reservation. By signing the OP contract and issuing the $10,000 deposit, Reserves was responsible to pay the construction management costs.

23) At trial, Korotki was asked why he did not place Bella Via's name on the Fresh Cut contract for the 71 lots. After saying Fresh Cut was principally looking to Reserves for payment, Korotki had this to say:

. . . by the time I did sign the contract with Fresh Cut, it was the end of June at that point in time. After the first week of June the 6th, there were a couple calls during that week. But after that, there were no returned calls to me from Mr. Elboim, no returned phone calls by Mr. Esham to Mr. Beck's requests for the payment. All communications, it's like it dropped off the face of the earth and they were avoiding either me or Mr. Beck. I certainly wasn't adding anyone's name to any contract when they didn't pay me in the beginning and not returning any calls and not living up to the agreement. Not only the agreement in May and June the 3rd, 4th or 6th, during that period of time they didn't live up to the contract as it was originally drawn up in March of

‘04'. (T. Tr.A at 96) (underlining added).

Korotki’s reference to the May agreement is about a letter delivered in July to Severn which is discussed in paragraph 33 *infra*. The reference to the June dates concern the WTC letters of credit and Reserves’ interactions with Elboim and Esham, verbally and by email as previously discussed.

24) Before Maizel left OP, Korotki instructed Maizel to leave Bella Via out of the contracting process altogether. Korotki did not tell Bella Via about this change of direction. Upon Korotki’s return from Europe, Korotki told Maizel that things were not getting done and that Bella Via should be treated as if “Bella Via doesn’t exist.” (T. Tr. C at 39) (underlining added). Further, while there had been an “open book” in the relationship between Reserves and Bella Via, the book closed upon Korotki’s return from Europe.

At that point in time, Korotki took over everything. (T. Tr C at 63, 64). Korotki returned from Europe at the end of April. (T. Tr. A at 74). At that point in time, Korotki was motivated to close the RTP contract as well. Korotki's decision to treat Bella Via as if it did not exist explains why Esham did not receive a contract from Maizel before the June 1st meeting where one contract was presented for all the lots.

25) On June 30, 2005, Korotki signed the Fresh Cut construction contract and wrote a $250,000 check from Reserves' $1,500,000 escrow account to Fresh Cut. (Pl. Ex. #13).

26) As indicated, the Fresh Cut construction contract for the 71 lots was signed only by Reserves without communication to Bella Via. However, Bella Via's concerns about how the exclusive costs should be handled were

still unresolved. From his and Maizel's prior contacts with Bella Via, and from Bella Via's failure to be responsive from June 7th to June 30th among other things, Korotki knew the exclusive costs were a sticking point in a contract. This is one of the reasons why Korotki had Reserves sign the Fresh Cut contract by itself. The Fresh Cut contract was in a lump sum amount of $3,014,000. In this way, Reserves asserted control over the project and moved at its own speed.

27) In the Fresh Cut contract, there were items that were Reserves' exclusive responsibility. The items included costs for bulkheading and for construction of Mirabella Circle with the use of stamped concrete. Kitchen estimated that these particular costs were $188,565 for the stamped concrete at Mirabella Circle and $205,000 for the bulkheading associated with the

ponds. (T. Tr. B at 47-48, 152-154, T. Tr. C at 51-53, Def. Notebook Ex. 1). Bulkheading costs were reduced to approximately $30,000 in the Fresh Cut contract. (T. Tr. B at 154).

28) In July of 2005, Bella Via requested that Severn release money from the $1,450,000 construction trust account to pay for its pro rata share for obtaining the letters of credit, the OP deposit and for the deposit of the Fresh Cut contract. Severn received the OP and Fresh Cut contracts in July. (Def. Ex. #4 at 355).

29) On or about July 11, 2005, Brian Wood ("Wood"), Severn's loan officer, prepared a modification document for the $1,450,000 construction trust for Bella Via. It reflected Severn's view that the trust was a loan in progress. It recognized the change of percentages from the total of 67 to 71

lots. The modification referenced the Fresh Cut and OP contracts. (Pl. Ex. #49 at 29-32, Ex. 3, thereto)

30) After the modification was prepared in July, Severn disbursed two checks to Bella Via at its request. One was in the amount of $71,466.83. It represented Bella Via's percentage share for the costs of the WTC letters of credit. Technically, this money was not part of the construction trust. However, because there were more than enough funds in the construction trust to cover Bella Via's share under the Fresh Cut and OP contracts, Severn sent Bella Via a check to reimburse Korotki. (Pl. Ex. 49 at 81-82). Also, Severn disbursed a second check in the amount of $109,850 to Bella Via for its share of the deposits under the Fresh Cut and OP contracts.

31) In the disbursement process, Severn charged the $71,466.83

check against a $116,000 miscellaneous category of available funding in the construction trust. Severn authorized the balance of $44,535.17 to be used for interest. Severn determined there was sufficient funding to cover the project. (Pl. Ex. # 49 at 30-32, Ex. 3, thereto).

32) The two checks were delivered by Severn to Bella Via. Bella Via returned them because of its unresolved disagreement with Reserves over the exclusive items. Bella Via asked that they be redeposited to the construction trust. Severn determined that this could not be done for accounting purposes and Severn applied the money totaling $181,316.83 toward principal. (Def. Ex. #4 at 341-345). Upon Bella Via's request, however, $181,316.83 could be readvanced. (Def. Ex. #4 at 369, 370). This was an almost routine procedure and one which Severn expected to approve if a readvance was

requested. Over $1,200,000 remained in the construction account when Severn received a written demand from Severn's lawyers in December of 2005 to pay Reserves. At that time, the account was frozen by Severn.

33) When the disbursements were made in July, Severn received a letter addressed to Wood. (Pl. Ex. #49 at 29-32). It was signed by Elboim as managing member of Bella Via; also, it was signed by Korotki as managing member of Reserves. The letter stated:

> In reference to the development of lots in Phase Two in the Reserves development in Bethany Beach, Delaware, the seventy-one lots being developed are owned as follows: Bella Via LLC 30 lots (47.25%), Reserves Development LLC 41 lots (57.75%). The disbursement of monies will be subject to the terms and

conditions of the Agreement of Purchase Sale of Real Property dated March 24, 2004 in reference to the property. [Pl. Ex. 49, pp. 31-32, Ex. 3] (underlining added).

The letter was prepared by Esham, and it was signed by Korotki and Elboim on or about May 5, 2005 as alleged in paragraph 55 of Reserves' Amended Complaint.

34) On July 14, 2005, and thereafter, certain emails were exchanged between Esham and Reserves' lawyer about payments due under the Fresh Cut contract. Esham asserted that $400,000 of the Fresh Cut contract involved exclusive work. There was a reference to Kitchen's estimate discussed on June 1st. It reasserted that Bella Via would have no responsibility for them. Esham calculated that Bella Via's share under the

contract should be reduced to 36% if $400,000 was Reserves' exclusive cost and $400,000 was to be part of the payments expected from Bella Via. Bella Via reasserted that there should be a dollar limit built into the contract to protect it from being over billed. Reserves' position was that the $400,000 figure was a "place holder," and Bella Via would not be billed for any exclusive costs although the Fresh Cut contract might involve them. (Pl. Ex. #18).

35) Esham's calculation of the percentages is reflected in a memorandum. (Def. Notebook Ex. 3, thereto). It assumes the exclusive work was valued at $415,000 from the meeting of June 1, 2005. However, there was no agreement at the meeting about a particular value. Nevertheless, on or before June 30, 2005, Reserves knew Bella Via would not agree to be a

party to the Fresh Cut contract without a prior understanding about a liquidated dollar amount for the exclusive costs. Further, Reserves knew that Bella Via expected to be a party for the 71 lot phase following the June 1st meeting.

36) On July 15, 2005, Esham emailed Reserves' lawyer and stated: "I refer you to page 5 of the contract of sale, subsection (IV) and suggest that you speak with Abe. If it is your client's position that we are responsible for 42.25% of the $3,000,015 contract, then we have a significant misunderstanding (from the conversation held at the June 1, 2005 meeting). No monies will move until this issue is resolved." (Pl. Ex. #18).

37) In July, the checks disbursed to Bella Via were calculated on the basis of 42.25% set forth in the memorandum and not 36%.

38) After Bella Via returned the money to Severn, Esham advised Severn that there was an unspecified dispute with Reserves. (Pl. Ex. #49 at 56, 61).

39) Before the July letter to Wood was delivered, Esham wrote a note to himself on an unsigned copy. It circled the part concerning Severn's disbursement would be subject to all the terms and conditions of the Agreement. Esham wrote "i.e.: $400,000 to be paid by Abe exclusively." (Def. Notebook Ex. #2, T. Tr. C at 140, 142). This was a reference to paragraph 5 (IV) of the Agreement.

40) Esham did not make this particular point in the letter when it was presented to Korotki in May. For Esham, "it (the $400,000) was an open issue to be agreed upon at some future date, and I didn't want to leave it out

and say you've already agreed it's 42 percent, 58 percent. There is no more discussion about the $400,000." (T. Tr. C at 143). Esham's intent was to protect Bella Via's contractual rights under the Agreement, as to the exclusive costs.

41) Esham's emails were subject to routine deletions in his law practice. He did not intentionally or recklessly destroy emails with a mind to hide or destroy evidence. (T. Tr. C at 162-163).

Applicable Law

At trial, Reserves had the burden of proof to establish the following elements of a fraudulent inducement claim by a preponderance of the evidence. These elements are: (1) Defendant's false representation(s), usually of fact, (2) made either with knowledge or belief or with reckless

indifference to its falsity, (3) with an intent to induce the plaintiff to act or refrain from acting, (4) the plaintiff's action or inaction resulting from a reasonable reliance on defendant's representation, and (5) resulting damages from the reliance. *Browne v. Robb*, 583 A.2d 949, 955 (Del. 1990). Reasonable reliance is equivalent to justifiable reliance in the trials of cases of this nature. *Haase v. Grant*, 2008 WL 372471 at * 2n.16 (Del. Ch. 2008).

Further, the mere failure to keep a promise does not prove "that the promise was false" and would support only a breach of contract rather than a fraud claim. *Id.*, at * 2n.18. This is so "even if the promisor has no excuse for his failure to do so." 5 *Am.Jur.* Proof of Facts.2d 727 § 2. If the promise was originally made in good faith, there is no fraud even "if the promisor subsequently 'changes his mind and fails or refrains to perform.'" *Id.*

On the other hand, "a contractual promise made with the undisclosed intention of not performing it is fraud." *Restatement of the Law - Contracts*, § 473. Claims of this nature are factually intensive and ". . . there is no general rule for determining what facts will constitute fraud . . ." *5 Am. Jur.* Proof of Facts.2d 727, § 1.

Fraudulent representations may assume three forms: (1) a false representation concerning a past or existing fact; (2) a promise made with a present intention not to perform; and (3) a statement of an opinion made with intent to deceive." *Id.*

Moreover,: the courts pay particular attention in cases where promissory fraud is alleged to the promisor's state of mind. The gist of fraud in such cases is not the breach of the agreement to perform, but the fraudulent

intent of the promisor and the representation of an existing intention to perform, when such intent did not in fact exist. The courts have indicated that the state of the promisor's mind at the time he makes a promise is a fact, and one which is exclusively within his own knowledge; and if he represents his state of mind, that is, his intent as being one thing, whereas, it is the opposite, he misrepresents a then existent fact. . .. *Id.* § 2.

Concerning evidence to present a *prima facie* case: a fraudulent intent not to perform a promise, existing at the time it was made, may be inferred from the circumstances offered in proof; indeed, it has been held that circumstantial evidence of subsequent conduct is admissible and may be sufficient. One's intent not to perform, existing at the time the promise was made, is usually not susceptible of direct proof, but may be ascertained from

the promisor's subsequent conduct and speech. *Id.*

Further, whether a plaintiff has the right to rely on specific representations depends on whether "the representations relied upon involve matters which a reasonable person would consider important in determining his cause of action in the transaction in question." It may also depend on the willingness of the claimant to avail itself of all relevant information surrounding the transaction . . .. *WSFS v. Chillebilly's, Inc.*, 2005 WL 730060 at *12 (Del. Super. 2005), (aff'd 886 A.2d 1279 (Del. 2005)).

To impose personal liability on a member of a limited liability company for its torts, the member must have participated in them. *Spanish Tiles Ltd. V. Hensley*, 2009 WL 86609 at *2 (Del. Super. 2009). Individual liability may arise if a member "'directed, ordered, ratified, approved, or

consented to' the tortious act in question." *Id.*

Concerning spoilation of evidence: An adverse inference instruction is appropriate where a litigant intentionally or recklessly destroys evidence, when it knows that the item in question is relevant to a legal dispute or it was otherwise under a legal duty to preserve the item. Before giving such an instruction, a trial judge must, therefore, made a preliminary finding that the evidence shows such intentional or reckless conduct. *Sears, Roebuck & Co. v. Midcap, et al.*, 893 A.2d 542, 552 (Del. 2006).

Supplementary Conclusions

On September 13, 2007, Reserves presented its argument on the Fraudulent Inducement Claim to this Court in its Post -Trial Proposed Findings of Fact and Conclusions of Law. Specifically, Reserves proposed

that this Court make three findings of fact to support its fraudulent inducement claim.

The first proposed finding was as follows:

"25. The Defendants Esham, Elboim and Rafaeli all signed the Purchase and Sale Agreement. In doing so, they represented that Bella Via has 'the financial resources to enter into and perform this Agreement in accordance with its terms . . .' That was not true."[4]

The corresponding proposed conclusion of law was set forth at page 19:

7. The individual Defendants falsely represented that Bella Via had adequate financial strength to carry out its contractual

[4] Section G, Post Trial Proposed Findings of Fact and Conclusions of Law, filed September 18, 2007, heading G "The individual Defendants' False Statements," p. 15, *et seq.* references omitted.

obligations, when in fact it did not. The individual Defendants induced Reserves to enter into the Purchase and Sale Agreement, based on this representation that Bella Via possessed sufficient resources to perform under the Agreement. In actuality, Bella Via did not have the sufficient resources to perform under the Agreement, which the individual defendants knew at the time they signed on behalf of Bella Via.[5]

This contention is woven out of whole cloth.

For sure, in paragraph 8 of the Agreement, the Purchaser represented it had the ". . . financial resources to enter into and perform this Agreement in accordance with its terms . . ." When Bella Via accepted the assignment, it

[5] Section C. heading "The members of Bella Via committed fraud in inducing Reserves to execute the Purchase and Sale Agreement," paragraph 7, page 19.

assumed this representation. This was not a false representation of fact nor one made knowing the representation was false or with reckless indifference to the truth. A $50,000 down payment had been made at the time of the Agreement by Crystal. Bella Via brought $667,961.50 in additional funds to settle the land purchase. (Pl. Ex. #5). Severn advanced $3,280,000 from the Bella Via loan. From its loan commitment, Severn placed $1,450,000 into the trust account for Bella Via's share of the part of the development. With the funding, Bella Via had sufficient funding to perform. Further, Severn found that the value of the property as developed supported the $4,680,000 loan.

The second proposed finding of fact urged at trial was as follows:

26. As evidenced by their failure to obtain a construction bond on their

own and by their use of the construction trust to pay their interest on their loan from Severn, the Individual Defendants did not have the money to do what they promised to do. That use of the trust money was not part of their original agreement with Severn. If the defendants had the financial ability to perform their contract, then why is it that almost $250,000 is missing from the trust account?

Reserves did not establish that Bella Via or the individual defendants were impecunious. The failure to obtain a construction bond derived from the mixed ownership of the 71 lots. Bella Via actively sought to obtain a bond. Reserves and Bella Via should have participated together. They lacked mutual respect and trust. Korotki chose WTC and not Severn. Severn found the individual defendants to be well qualified to guarantee the $4,680,000

loan and had dealt with them before the Reserves project. Severn reported these four individuals had a net worth exceeding $20 million and a combined annual income exceeding $2,300,000, and liquid assets exceeding $2.5 million.

The complaint about the use of the construction trust to pay interest and the alleged shortfall of $250,000 is not persuasive. Concerning the two returned checks totaling $181,316.83, these were Bella Via's funds in the first instance. Also, Bella Via requested that the $181,316.83 be returned to the construction account but Severn's servicing department determined that this could not be done solely for accounting reasons. However, the money could have been readvanced later. In any event, these funds and balances pertain to Bella Via and not to the individual defendants. The use of

$44,533.17 from Bella Via's miscellaneous category of funds involved Bella Via's interest obligations. Severn approved this use. Independently from Bella Via, Severn concluded there was ample funding to fulfill Bella Via's percentage responsibilities under the OP and Fresh Cut contracts, considering its almost routine practice of readvancing funds, if necessary.

The third proposed finding of fact was:

"The individual Defendants also did not tell the truth when they told Korotki they would wire their share of funds needed to obtain the Wilmington Trust Letter of Credit" and "are prepared to perform now." Instead, as shown by the handwritten notes on the original draft of the letter to Severn (which was never disclosed to Korotki or Severn), they intended to withhold performance as leverage "to force concessions from Korotki."

(Esham's testimony)

This allegation concerns the June7th email from Esham which is detailed on page _____. The use of "we" refers to Bella Via and are part of its limited liability companies' representations. However, when this email was sent, there was no intention to pay the expenses for the letters of credit until the issue concerning the exclusive items had been resolved. The costs for the letters of credit had nothing to do with the construction costs associated with the Fresh Cut contract. The exclusive costs would only be an issue for the Fresh Cut contract. After the June 1st meeting, Esham expected Bella Via would be presented with a contract to sign and the exclusive cost question would be addressed again. Esham, in his email of June 7th, and Elboim, verbally over the weekend of June 3-5, advised Korotki that the

Bella Via's share of the WTC expense would be paid and expressed no reservations. The June 7th email states that "we are ready to perform now" (underlining added). The focus of the June 7th email is about fees associated with WTC's letter of credit. It also referenced OP by stating "construction management fees" would be prorated. At that time, OP's role as construction manager had been accepted by Bella Via. Bella Via's concerns about the exclusive costs did not affect Bella Via's position concerning OP.

Considering the above, Esham and Elboim promised Korotki between June 3-7, 2005, that Bella Via would pay its percentage share of the costs for the WTC letters of credit and for the OP management fees. As the managing member, Elboim participated in the June 1st meeting and coordinated Bella Via's position as expressed in the June 7th email and over the preceding

weekend. Given their involvement with Korotki and the relationship between themselves, Esham would not have sent the June 7th email without Elboim's approval. The representations of fact were false because at the time the promises were made, Esham and Elboim did not intend for Bella Via to pay its share of the WTC and OP expenses. Phone calls were not returned by them in June. All communication ended. Their purpose was to put Bella Via in a position to gain leverage over Korotki. Based on the false promises of immediate and unconditional performance, Korotki was induced to obtain the letters of credit with WTC and to sign the contract with the $10,000 deposit. This fraudulent intent was further shown by Bella Via's return of the money to Severn for its share of the WTC letter of credit and for OP's management fees and by Bella Via's refusal to request payment for OP's fees. These fees

had nothing to do with the concerns expressed about the exclusive costs. Korotki reasonably relied upon these oral and written promises on June 7-8, 2005. The consequential damages arising from his reliance are $71,466.83 for Bella Via's share of the WTC letters of credit and $80,967.71 for Bella Via's share of OP's management fees (Stipulation number 18b.), totaling $152,434.54.

The June 7th email also referenced "any other pro-ratable fees." Under the circumstances, this reference relates to other expenses concerning WTC's letters of credit and Sussex County fees, not to the Fresh Cut contract that was signed on June 30, 2005. Reserves' lawyer understood it this way in his response of June 8th to Esham. Following the June 1st meeting, Esham and Elboim reasonably believed a Fresh Cut contract would be forthcoming from

Korotki.

Reserves made a broadly based attack on the four members of Bella Via in its fraud claim which is not justified by the record.

There is no evidence of personal participation by Buchanan and Rafaeli in any fraud. They did not have significant contacts with Korotki. Reserves has failed in its burden of proof to impose individual liability on them.

No other proposed findings of fact were asserted by Reserves at trial.

Concerning additional conclusions of law, Reserves stated at page 19 of its post trial brief:

> 8. Because of this lack of funding and because Bella Via could not post the requested bond or secure a letter of credit, Esham, with the consent of the other individual Defendants,

decided to induce Reserves to supply the required letter of credit by promising to repay Bella Via's share of the funds advanced by Reserves to WTC to secure letters of credit and pay county fees.

At the time Esham made these representations to Reserves, the individual defendants knew that such representations were false. Bella Via did not have the funds to cover these fees.

The lack of funding reference relates back to proposed conclusion of law number 7 that Bella Via did not have adequate financial strength to perform. Paragraph 8 asserts that because Bella Via did not have the funds to cover these fees [,*viz*; letters of credit/county fees] Esham fraudulently induced Reserves. However, as previously discussed, Bella Via did have adequate financial strength and did have the funds. Without undue repetition,

there was a fraudulent intent by Esham and Elboim to hold back performance on the WTC and OP fees. Elboim and Esham desired to gain leverage in their anticipated negotiations with Reserves on the Fresh Cut contract for the 71 lots.

The next proposed conclusion of law was:

> 9. In reasonable reliance upon the Individual Defendant's representations, Reserves entered contracts with Fresh Cut and Obrecht-Phoenix, paid $260,000 in deposits for these contracts and advanced the funds ($2,500,000 by wire transfer) required to obtain the necessary letters of credit from WTC for payment of Sussex County fees.

In number 17 of the Stipulation, the parties agreed that: "Reserves

posted the costs based on the written assurance from Bella Via that Bella Via would pay its pro-rata share of the cash needed." (Op. 13).[6] Without undue repetition, Korotki relied upon Esham and Elboim's representations when he formalized his arrangements with WTC and OP by signing its contract. From the June 1st meeting through the time of Esham's June 7th email, Esham and Elboim believed that Bella Via would soon be receiving a Fresh Cut contract for it to sign with Reserves. Korotki changed his mind, however, when he was not reimbursed, and Korotki proceeded to sign the Fresh Cut contract on June 30, 2008, without having Bella Via as a party as had been intended. When Reserves signed the Fresh Cut contract and made a $250,000 deposit on June 30, 2008, Korotki knew there was a major problem with Bella Via;

[6] The opinion referenced is to the Court of Chancery case that was the subject of the Stipulation and is referenced later.

he did not rely upon any personal representations from Esham and Elboim. When the Fresh Cut contract was signed, there were no personal representations. As discussed in the bench ruling, Reserves' remedy was against Bella Via on principles other than fraud.

The next proposed conclusion of law at page 19 was:

> 10. Around the same time Bella Via signed a letter to the bank confirming that its respective share of the Project's costs was 42.25%, Esham added a handwritten note to Bella Via's copy of this letter (which was not disclosed to Reserves at the time), setting out Esham's secret intent that he only intended to pay approximately 36% of the costs because of a $400,000 set-off that he intended to claim. Reserves justifiably relied upon

this signed letter to the bank confirming Bella Via's share and justifiably relied upon assurances by the individual Defendants to make their contribution, thereby making payments on Bella Via's behalf. However, no funds were sent to Reserves despite Bella Via's draw on the funds from the bank. On July 14, 2006, Esham advised Reserves that "no funds will flow" until his demand for a $400,000 adjustment was satisfied and the future obligation of Bella Via was reduced to 36% of the site improvement costs. Esham had decided to make these demands at the time he assured Reserves that Bella Via would meet its obligations under the Purchase and Sale Agreement. Esham did not disclose his intent to demand such reductions.

The reference to the bank letter is to the one signed by Elboim and Korotki as managers of the companies. It was emailed and signed on or about May 5, 2005 by Bella Via and Reserves. The letter was delivered to Severn in July. It did nothing more than reflect the changed percentages because of an increase in the total of developed lots from 67 to 71. It referenced that the ". . . disbursement of monies will be subject to the terms and conditions of the Agreement of Purchase and Sale of Real Property dated March 24 in reference to the property." There is nothing nefarious about Esham writing: "i.e: $400,000 to be paid by Abe exclusively on an unsigned copy." A concern of this nature was a legitimate one under the Agreement.

Without undue repetition, Esham and Elboim had discussed Kitchens' estimate that its exclusive costs would be in the $400,000 range at different

times between April and June of 2005. Bella Via's desire to set a ceiling to protect itself was in the open and known to Korotki before and after he signed the May letter. Partly to avoid haggling and delay, Korotki directed Maizel to prepare a Fresh Cut contract as if Bella Via did not exist. The subject came up again at the June 1st meeting after the letter was signed. At the time when the letter to Severn was signed in May, there was no intent by Bella Via through Esham and Elboim not to perform the Agreement. Rather, the intent was to perform. The subject on how the exclusive costs would be handled remained an open item that Esham and Elboim expected would be addressed later in June in a contract between Fresh Cut and Reserves and Bella Via for the 71 lots.

Overview

This case was tried by Reserves on the premise that Bella Via did not have adequate financial strength to perform the Agreement. From this point, Reserves charged that the lack of funds caused Bella Via to defraud it and to fabricate a reason not to pay, i.e., the exclusive cost question. Bella Via and its members were accused of misrepresenting their available financial resources. The fraud argument was based on a misrepresentation of fact basis. Upon reconsideration, promissory fraud was part of the factual mix as discussed above.

Nevertheless, Reserves failed to establish by a preponderance of this evidence that Bella Via was actually in a distressed financial position and for that reason never intended to perform the Agreement. Severn felt secure in committing to a $4,680,000 loan to Bella Via and felt the individual members

were qualified to guarantee the loan.

Reserves has complained about "leverage." However, Korotki, is not an easily intimidated person; he is a person of means and determination. He was able to buy the property for Reserves and was instrumental in getting the first group of lots developed in the area of the entrance (not involving the 71 lots). He used $2.5 million from his own funds for WTC but declined to participate with Severn. Korotki sought to control the project by unilaterally hiring OP early on when there were no issues with Bella Via. In late April, Korotki practically took full control of the project. While Korotki was disappointed in the progress at that time, Bella Via was "actively" pursuing a bond according to Maizel. Bella Via did find a qualified contractor - Knorr- but Korotki's basic interest was to have one contractor do everything and his

intent was to accomplish this purpose despite Bella Via's position.

At the June 1st meeting, Korotki presented Bella Via with a $6.5 million contract, reminiscent of how the OP hiring was presented to Bella Via earlier as a *fait accompli*. His exercise of control also helped him pursue his separate contract with RTP. While the Agreement did not establish a joint venture or partnership, it needed mutual cooperation, trust and participation to be successful. At times, Reserves and Bella Via acted as if they were the proverbial ships passing in the night. The "leverage" was hardly one-sided as suggested by Reserves. Both Reserves and Bella Via were stubborn to their mutual detriment.

Upon remand, Reserves attempted to put forward arguments that were not fairly presented at trial. Reserves expanded at oral argument that the

Superior Court should follow the Vice Chancellor's belief that before July 15th, Reserves reasonably relied on Bella Via's conduct, "meaning that Bella Via would pay its share of the infrastructure expenses on a pro rata basis." *Reserves Dev. LLC and The Reserves Dev. Corp. v. Severn Savings Bank, FSB, Alan J. Hyatt and Bella Via, LLC*, 2007 WL 4054231 at *15 (Del. Ch.). After oral argument, Reserves submitted a letter suggesting it was confused at oral argument. It argued that the Superior Court was required to find reasonable reliance through mid-July because of *res judicata* and *collateral estoppel* principles. These arguments were not fairly presented previously. Nor were they mentioned in the Stipulation which was understood by the parties to set forth facts that they agreed or contended were conclusively established in the Chancery trial. Paragraph 17 of the Stipulation referenced

page 13 of the Chancery Opinion. It referred to Esham's June 7th email as a written assurance that Bella Via would pay its share of the letters of credit. It is limited to that fact alone.

Further, the damages awarded at trial included amounts that exceeded the interim relief granted in the Chancery Court. Bella Via moved to reargue the judgment, saying the Superior Court was restricted in its recovery on grounds of *res judicata* and *collateral estoppel*. This position was rejected.[7] Reserves gained the benefit of a higher damage award and acquiesced in the result.

Upon remand, Reserves tried to present another argument that was not fairly presented before, i.e., that Sussex County might require WTC to pay

[7] Attached letter to counsel dated January 28, 2008.

the two letters of credit. At oral argument, counsel indicated this issue was being litigated in another suit in the Chancery Court.[8] In any event, a claim of this nature did not appear before in this Superior Court action.

Considering the foregoing, the bench ruling is modified only to the extent that a judgment *in personam* is entered against Esham and Elboim, jointly and severally, in the amount of $152,434.54 together with pre- and post-judgment interest at the legal rate together with costs. On this aspect of the case, there is not a sufficient basis to award attorneys' fees. Esham and Elboim did not act so egregiously that the Court must depart from the American Rule that litigants ordinarily bear these expenses. *Chrysler Corp. v. Dann*, 223 A.2d 384, 386 (Del. 1966) (American Rule requires that "a

[8] Judicial notice is taken that this case is styled *Reserves Dev. Corp. v. Wilmington Trust Co, et al.*, Del. Ch., C. A. No. 4144-CC.

litigant must himself defray the cost of being represented by counsel.")

DiSimplico v. Equitable Variable Life Ins. Co., 1988 WL 15394 (Del. Super. 1998) at * 4 (generally attorneys fees cannot be awarded for common law fraud).

IT IS SO ORDERED.

APPENDIX

EFiled: Jan 14 2009 9:48AM EST
Filing ID 23298783
Case Number 56,2008

IN THE SUPREME COURT OF THE STATE OF DELAWARE

RESERVES DEVELOPMENT LLC and THE RESERVES DEVELOPMENT CORPORATION,	)	No. 56, 2008
Plaintiffs Below Appellants,	)	Court Below: Superior Court of the State of Delaware in and for Sussex County
v.	)	C.A. No. 05C-11-011
CRYSTAL PROPERTIES, LLC, BELLA VIA, LLC, WILLIAM ESHAM, WILLIAM BUCHANAN, JR., EYAL ELBOIM and YITSHAK REFAELI,	)	
Defendants Below Appellees.	)	

Submitted: December 17, 2008
Decided: January 14, 2009

Before **STEELE**, Chief Justice, **HOLLAND** and **BERGER**, Justices.

ORDER

This 14th day of January 2009, it appears to the Court that:

(1) Reserves Development, LLC filed a breach of contract action against Crystal Properties, LLC and Bella Via, LLC in the Superior Court. In that action, Reserves claimed that Crystal and Bella Via breached their obligations arising from a purchase and sale agreement for 30 lots in Phase II of The Reserves, a residential community in Sussex County. Reserves sought to hold the managers of Bella Via personally liable for breaching the contract because Reserves asserted

that they misrepresented their ability to perform and, perhaps, their willingness to perform.

(2) The trial judge found that Crystal and Bella Via breached the contract. He concluded that Crystal and Bella Via failed to fulfill their contractual obligations to oversee and partially fund the development of Phase II. The trial judge granted Reserves damages, but made certain set offs. Because he found that Bella Via had the financial ability to perform as promised, the trial judge found no misrepresentation and refused to hold the managers personally liable.

(3) On appeal, Reserves contends that the trial judge erred by offsetting certain damages. Reserves argues that the trial judge's conclusions were unsupported by the record and were the product of an illogical deductive process. Reserves also asserts that the trial judge failed to fully address whether Bella Via's individual managers misrepresented their intentions to perform as promised.

(4) On cross-appeal, Crystal seeks a reversal of the trial judge's conclusion that Reserves is not liable for trespass for maintaining a construction entrance across a lot owned by Crystal. Crystal and Bella Via also contend that the trial judge failed to recognize Crystal's assignment of its obligations to Bella Via.

(5) After careful consideration of the parties' respective positions, we conclude that we must remand this matter to the Superior Court for further findings of fact regarding Reserves' misrepresentation claim. The trial judge rejected

Reserves' claim because he determined that Bella Via had the financial ability and capacity to fulfill its obligations. Therefore, the trial judge concluded that the managers did not misrepresent Bella Via's ability to perform as promised. On appeal, Reserves argues that the trial judge prematurely ended his analysis because he failed to consider whether, regardless of their financial ability, the managers intended to breach the contract at the outset.

(6) We are unable to discern from the limited record whether Reserves fairly presented this argument at trial. If Reserves presented any issue beyond Bella Via's financial ability to perform – *i.e.*, if Reserves argued at trial that the managers never intended to perform, the trial judge shall fully address whether he considered those issues when he denied Reserves' misrepresentation claim and, if not, shall address that contention on remand.

NOW, THEREFORE, IT IS ORDERED that this matter is REMANDED for further proceedings consistent with this order. Jurisdiction is retained.

BY THE COURT:

/s/ Myron T. Steele
Chief Justice

EFiled: Nov 28 2007 4:38PM EST
Transaction ID 17447112
Case No. 05C-11-011 RFS

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

Reserves Development LLC and The Reserves Development Corporation,	)	
Plaintiffs,	)	C.A. No. 05C-11-011 RFS
v.	)	
	)	Non-Arbitration
Crystal Properties, LLC, and Bella Via, LLC,	)	
Defendants.	)	

POST-TRIAL STIPULATION OF BINDING FACTS

Per the Court's request, Plaintiffs, Reserves Development LLC ("Reserves LLC") and The Reserves Development Corporation ("Reserves Development"), and Defendants Crystal Properties LLC ("Crystal") and Bella Via, LLC ("Bella Via") submit this Post-Trial Stipulation of Binding Facts based on the Court of Chancery's November 9, 2007 decision as follows:

I. Background To The Parties And The Agreements

1. Reserves LLC, a Delaware limited liability company, and Reserves Development, a Delaware corporation (collectively referred to as "Reserves"), are owned by Abraham Paul Korotki.

2. Reserves is the developer of a residential community approved for 185 homes in Sussex County, Delaware, known as The Reserves Resort, Spa and Country Club ("The Reserves").

3. On or about March 24, 2004, Reserves entered into an Agreement of Purchase and Sale (the "Purchase and Sale Agreement") for the sale of 30 unimproved in Phase II of the Project to Crystal Properties, LLC ("Crystal). These 30 lots plus the remaining 41 lots retained by Reserves in Phase II constitute the Project.

4. Before the closing of the Purchase and Sale Agreement in October 2004, Crystal assigned its rights and obligations under that Agreement to Bella Via, LLC ("Bella Via"), a Delaware limited liability company created by its four members, William Esham, II, Eyal Elboim, Yitshak Rafaeli, and William Buchanan in September 2004 to acquire the 30 lots in The Reserves.

5. Severn Savings Bank, FSB ("Severn") loaned Bella Via the money for the Purchase and Sale Agreement and recorded a mortgage on the 30 lots acquired by Bella Via to secure the loan. Severn and Bella Via also entered into a Construction Trust Agreement that provides for the disbursement of certain funds under the loan to Bella Via to pay for Bella Via's share of the infrastructure costs for the Project.

II. The Purchase And Sale Agreement

6. The Purchase and Sale Agreement provides for: (1) the sale of 30 out of 67 lots contained within the Project to Bella Via; and (2) site development of the Project under the direction of Bella Via. The Purchase and Sale Agreement assigns Bella Via the burden of arranging for the site development work and outlines who bears the costs of the infrastructure.[1]

7. Under the Purchase and Sale Agreement, Reserves is not to be constructing infrastructure for the Project; rather, Bella Via has the burden to "construct and/or pay for the cost of constructing the Infrastructure for the Real Property" and ensure that it complies with applicable laws, codes, regulations, and agreements.

8. In addition to requiring the $2,250,000 purchase price to Reserves, the Purchase and Sale Agreement also calls for Bella Via to deposit $1,500,000 into an escrow account from which Reserves' share of the cost of the infrastructure would be paid.

9. The Purchase and Sale Agreement requires Reserves and Bella Via to share the cost of infrastructure development in proportion to their relative ownership after the Project was expanded to include 71 lots: Bella Via's proportionate share is 42.25% and Reserves' share is 57.75%, subject to the conditions of the Purchase and Sale Agreement relating to exclusive costs

III. The Escrow Agreement

10. The Escrow Agreement, entered into on October 6, 2004, provided that Bella Via's counsel, Lynn R. O'Donnell, as Escrow Agent, would establish an interest-bearing escrow account and that she would serve as signatory for the account and no disbursements from the account would be made on Reserves' behalf in the absence of written approvals by Bella Via, Reserves, and Severn. Further, disbursements from the escrow account were to be made directly to the contractor

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[1] Bella Via was "to obtain and pay for the installation of roads, street lights, utilities, drainage systems, landscaping and other site improvements for all of Phase II (excluding clubhouse and recreational facilities, hereinafter called 'Infrastructure') in order to meet the requirements of the recorded plats and obtain the inspection, approval and acceptance of governmental authorities having jurisdiction." Purchase and Sale Agreement § 3(c).

performing the site development of the Project after approval by Severn and Bella Via.

11. The escrow account was not established or operated strictly in accordance with the requirements of the Escrow Agreement. As a signatory on the account, Korotki made disbursements and signed checks from it, spending funds in the range of $30,000 on Obrecht-Phoenix invoices outside the scope of the Project. The escrow account still has over $600,000 left.

12. Severn and Bella Via knew that Korotki was signing checks from the escrow account to pay invoices on the Project because they were in receipt of monthly statements; Korotki did not obtain approval from Bella Via or Severn before making those disbursements, as required by the Escrow Agreement.

IV. Development Of The Infrastructure

13. Although Bella Via was responsible for obtaining a site contractor, Bella Via did not enter into a contract with a site contractor. Recognizing the hot real estate market, the limited availability of contractors, and the scarcity of bids, Korotki, Esham, and Walter Maizel, a representative from Obrecht-Phoenix (a construction management firm retained by Reserves) met in October or November of 2004 to discuss locating a site contractor.

14. After the meeting, Bella Via obtained a bid from Knorr Contracting, Inc. for $4,155,325 covering the Project.

15. Reserves and Obrecht-Phoenix obtained a bid from Fresh Cut Custom Design Landscaping, Inc. for approximately $3,000,000 covering the Project. After negotiating with Bella Via for a breakdown of the Fresh Cut contracts, which originally was just one contract including land owned solely by Reserves, Reserves entered into two contracts with Fresh Cut. Reserves did not make Bella Via a party to the contract for the 71 lot Project.

16. Between October 2004 and May 2005, Bella Via was unable to secure a construction bond required by Sussex County to obtain permits necessary for the Project's infrastructure construction. Reserves responded to Bella Via's delay by posting nearly $2,500,000 ($1,701,428 and $514,805, both on June 7, 2005) in cash to obtain letters of credit from Wilmington Trust.

17. "Reserves posted the cash based on written assurance from Bella Via that Bella Via would pay its pro rata share of the cash needed." (Opinion 13.)

V. Expenses Incurred

18. Reserves has paid for all of the infrastructure construction expenses, totaling over $2,500,000, and Bella Via has contributed nothing. Specifically, the Court of Chancery found the following payments made by Reserves:

a. Applications 1 through 10 were all inspected and approved for payment. The amount paid to Fresh Cut by Reserves for Applications 1 through 10 is $2,107,889.00; 42.25% of that amount is $890,583.10.

b. Applications 1 through 10 were all inspected and approved for payment. The amount paid to Obrecht-Phoenix by Reserves for Applications 1 through 10 is $191,639.54; 42.25% of that amount is $80,967.71.

c. The bonding costs and fees paid by Reserves in June 2005 was $169,152.26; 42.25% of that amount is $71,466.83.

d. Reserves paid an invoice from One Source Associates for $78,030.00; 42.25% of that amount is $32,967.68.

e. Reserves paid a $5,000 deposit to Satterfield & Ryan for the installation of lights; 42.25% of that amount is $2,112.50.

VI. The Land Swap Deal

19. On December 30, 2005, Reserves, without notice to either Bella Via or Severn, entered into an Assignment of Rights to Conveyance by Deed with Christopher Wayne Glenn, President and sole shareholder of Fresh Cut. By April 2006, Reserves had transferred eight lots to Glenn, in connection with approximately two million dollars in invoices from Fresh Cut.

20. Glenn is a separate and distinct legal person from Fresh Cut, and payments to Glenn in his individual capacity do not constitute payment to Fresh Cut.

VII. Facts Reserves Contends Are Part Of The Court of Chancery Decision But Bella Via Disputes

21. The Court of Chancery did not find any construction defects, nor did that Court accept such defense as an excuse for nonpayment.

22. The breach of contract allegations concerning the geothermal well and the construction entrance on Lot 6 do not warrant denying relief to Reserves.

23. The Court of Chancery did not accept Bella Via's excuse that it was awaiting the resolution of what its pro rata share was (36% or 42.25%) before paying any bills. The Court stated, "Bella Via has not presented any reasonable excuse for its

failure to pay even 36% of the infrastructure expenses, as they were incurred." (Opinion 29.)

24. As to Bella Via's argument for a lower percentage of 36% for its share of expenses covered by Applications 2 and later, the Court found that excuse "to border on frivolous." (Opinion 38.)

VIII. Facts Bella Via Contends Are Part Of The Court of Chancery Decision But Reserves Disputes

25. From the point of view of Bella Via and Severn, those transfers reasonably can be viewed as different from a direct payment by Reserves to Fresh Cut.

26. Taken together, Reserves' failure to adhere strictly to the requirements of the Escrow Agreement and its unilateral and undisclosed payments of the later Fresh Cut invoices by means of land transfers, rather than cash, to a principal of Fresh Cut, instead of the company directly, supports the doctrine of unclean hands. Reserves is not entitled to any relief for transfers of land to Glenn that it made in "payment" of Fresh Cut invoices.

27. As a result, Reserves is not entitled to reimbursement for Fresh Cut Payment Applications 4 through 10, expenses related to the mulch fire, or payments to One Source Lighting and Satterfield & Ryan. (Opinion 48, including footnote 126.)

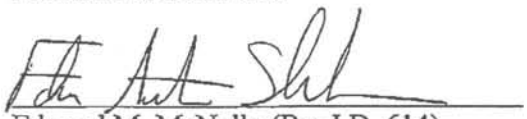
28. The Court of Chancery did not make Findings of Fact with respect to construction defects, specifically leaving that issue for resolution by the Superior Court (*see* Paragraph 21, above).

29. The Court of Chancery did not make Findings of Fact with respect to construction defects, specifically leaving that issue for resolution by the Superior Court. Additionally, Crystal Properties was not a party to the Chancery Court action, and as a result, the Court did not make Findings of Fact or Conclusions of Law with respect to Lot 6 (*see* Paragraph 22, above).

30. The Court of Chancery found that a dispute regarding Bella Via's pro rata share might be legitimate in another context (*see* Paragraphs 23 and 24, above).

DATED: November 28, 2007

MORRIS JAMES LLP



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Case No. 05C-11-011 RFS

SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

SUSSEX COUNTY COURTHOUSE
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GEORGETOWN, DELAWARE 19947
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January 28, 2008

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Re: ***The Reserves v. Crystal Properties***
C.A. No. 05C-11-011-RFS

Dear Counsel:

I have reviewed the motion for reargument filed by Defendants as well as the response by Plaintiffs. After review, the Court did not overlook controlling precedent or legal principles or misapprehended the law or facts such as would have changed the outcome of the bench ruling on January 3, 2006. The motion, therefore, is denied.

Defendants claim that the bench ruling did not include a final disposition with respect to the construction entrance. This subject was in context with the question of the lost home sale on lot 6 that Defendants purchased for resale. Defendants knew of the defect which caused the loss of the sales contract and could not recover for that reason alone. The defect was the construction road affecting part of the lot which was used by all the parties for the duration of the project. There are conveyances of record to Reserves' predecessors concerning the right of way. The deed to lot 6 was subject to the record including the Declaration of Restrictions. The Restrictions referenced prior easements and rights of way placed on the property in the chain of title. Nevertheless, Defendants' injury was self-inflicted by their knowledge and failure to pay the expenses to develop the project to eliminate the need for access. The precise location and uses of the construction road across lot 6 were not issues necessary for decision. Nor will I consider new arguments on the reargument concerning the possible need for the parties to have recorded an individualized easement for lot 6.

Defendants request reconsideration of the $750,000 credit from the land swap transaction on grounds that the associated Court of Chancery case ended that particular determination. For

sure, points were concluded which resulted in a stipulation between the parties. On the subject of the credit, the Superior Court did not lose its role to determine a legal damages award on a breach of contract claim as discussed below.

Defendants urge the Vice Chancellor's denial of Reserves' motion for reargument supports their position.[1] After review, however, the Vice Chancellor left this area open for the Superior Court to decide.

In this regard, consider the following excerpts of the opinion:

> The possibility that there is less uncertainty today than previously as to the ramifications of Reserves' use of land swaps to pay Glenn for Fresh Cut invoices may impact the Superior Court's decision on the ultimate merits of the parties' underlying disputes. It does not support, however, an award of additional equitable relief in this case, . . . I considered that fact in fashioning appropriate equitable relief to address the situation of the parties in the interim before the adjudication of the merits of their underlying disputes in the companion litigation in Superior Court . . . I could not rule out the possibility of such continuing uncertainty without additional proceedings and expense in this action. . . . The cited developments may be important in the Superior Court action and in the ultimate resolution of the parties' disputes. In this case, however, Reserves relies on equitable principles to justify the Court's imposition of interim relief pending final disposition of the Superior Court action. Such relief is extraordinary . . . (Emphasis added).

Clearly, the Chancery Court did not foreclose the Superior Court's final judgment on damages as Defendants suggest. The Vice Chancellor chose his words carefully with this in mind. The cited developments (including calculation of the credit) were important here.

Obviously, there were no additional proceedings in the Chancery Court; the standards for legal and equitable relief are different; and the Vice Chancellor did not decide $750,000 could not be included in Reserves' Superior Court contract damages claim. Quite the opposite was intended. The doctrines of *res judicata* or *collateral estoppel* did not forbid a damages award. The legal claims and conclusions were not the same; the facts about the amount of the $750,000 credit were not actually litigated, essential, or necessary to the specialized nature of the Chancery Court judgment.[2]

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[1] *Reserves Development LLC v. Severn Sav. Bank, FSB*, 2007 WL 4644708 at *3, *4 (Del. Ch. Dec. 31, 2007).

[2] *See Betts v. Townsends, Inc.*, 765 A.2d 531 (Del. 2000) (Different claims are not barred by *res judicata* on conclusions of law; unidentical issues are not barred by *collateral estoppel* on questions of fact); *Sanders v. Malik*, 711 A.2d 32 (Del. 1998) (As standards for proving ineffective assistance of counsel in criminal cases were equivalent to legal malpractice standards in civil proceedings, a former client was collaterally estopped from suing his trial defense lawyer after having

Defendants acknowledge attorneys fees may be awarded under their contract with Reserves. However, they argue that because Plaintiffs' overall claim was reduced, there should be no award. Defendants' unreasonable attitude in refusing to pay for clearly proper expenses - or even to review them - made this litigation inevitable. Hoping to gain leverage, Defendants tested Plaintiffs' resolve. After adopting what became a losing strategy, Defendants bear the consequences and the risks of the ensuing litigation.

Finally, an argument is made that Defendants should receive a judgment rather than set off for the award of $10,000 representing the additional well expense for the lot held for resale.[3] Plaintiffs' larger award was reduced by $10,000. Defendants received full credit. Typically, "judgments concerning claims and cross claims are generally offset, and there is only one final judgment for the balance owed the party with the larger judgment."[4] Defendants do not have a tenable objection.

Plaintiffs shall file an affidavit and any supporting material for the Court to determine the attorneys fee award on or before **Thursday, February 7, 2008.**

The Defendants' motion for reargument is denied.

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

RFS/cv
cc: Prothonotary

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lost post conviction relief alleging the same grounds).

[3] In their response to Defendants' motion, Plaintiffs point out that the set off for the particular lot and the 30 others was asserted against the wrong party. The applicable deed of restrictions established the responsibility of the Declarant to put in a central water system. The Declarant is Reserves Development Corporation, a co-plaintiff. It appointed Reserves Management Corporation to carry out the responsibilities. Despite this, Reserves Development Corporation retained legal responsibility. Mr. Korotki controlled the corporations but chose not to modify the restrictions.

[4] 47 Am. Jur. 2d *Judgements* § 828 (2006).