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

THE RESERVES DEVELOPMENT CORPORATION and THE RESERVES MANAGEMENT CORPORATION,	)	
Plaintiffs,	)	C.A. No. 07C-12-123 PLA
v.	)	
WILLIAM ESHAM,	)	
Defendant.	)	

UPON DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT
GRANTED in part and DENIED in part

Submitted: November 6, 2009
Decided: November 10, 2009

Steven Schwartz, Esq., SCHWARTZ & SCHWARTZ, Dover, Delaware, Attorney for Plaintiffs

Richard E. Berl, Jr., Esq., SMITH O'DONNELL FEINBERG & BERL, LLP, Georgetown, Delaware, Attorney for Defendant

ABLEMAN, JUDGE

I. Introduction

In an arrangement that most first-year law students could have identified as potentially problematic, Defendant William Esham ("Esham") entered into an agreement with Plaintiffs for the purchase of an undeveloped lot, despite the fact that he planned for a limited-liability company to take title to the property. At settlement, Plaintiffs executed a deed in favor of a limited-liability company formed by Esham and several partners. Plaintiffs now claim that Esham has breached the purchase agreement and is personally liable for a $10,000.00 payment required by the agreement and for unpaid homeowners' association assessments accrued after closing.

In the Motion for Summary Judgment before the Court, Esham contends that he is no longer individually obligated under the sale agreement, given that Plaintiffs executed a deed in favor of an artificial entity. Esham further asserts that Plaintiffs' claims are barred by the running of the statute of limitations and by the principles of merger by deed, estoppel, and waiver. Plaintiffs deny that they released Esham from his contractual obligations by execution of the deed or waiver. Furthermore, Plaintiffs argue that Esham waived any defense based upon the statute of limitations and should be collaterally estopped from asserting either estoppel or waiver by rulings in other litigation between the parties.

As will be discussed more fully below, the Court holds that Esham has waived any statute of limitations defense, but does not find his other defenses barred by collateral estoppel. The Court concludes that a provision in the agreement of sale stating that Esham agreed to be "bound by" restrictive covenants burdening the lot cannot reasonably be interpreted to confer obligations beyond those in the restrictions, which impose responsibility for assessments upon each lot's title owner. Because Esham was never a title owner of the lot, he is entitled to partial summary judgment on the portion of Plaintiffs' claim premised upon a breach of the restrictive covenants.

The Court also concludes that Esham's remaining defenses do not entitle him to summary judgment, but rather highlight issues of material fact regarding whether he continued to be obligated after settlement for the $10,000.00 payment Plaintiffs allege is owed under the sale agreement.

Accordingly, for the reasons discussed herein, Esham's Motion for Summary Judgment will be granted in part as to Count II of the Plaintiffs' Complaint and denied in part as to Count I.

II. Facts

This case arises from a real estate deal that seems to have developed as much litigation as land.[1] Defendant Esham partnered with Yitshak Refaeli, Eyal Elboim, and William Buchanan to purchase property owned by The Reserves Development Corporation ("Reserves"; with The Reserves Management Corporation, "Plaintiffs") in a Sussex County subdivision called The Reserves Resort Spa and Country Club. Esham and his partners planned to develop the unimproved land as part of the subdivision.

A. The Sale of Lot 6

At issue in this particular action is the purchase of Lot 6. On March 24, 2004, Esham and Refaeli signed an agreement of sale for the lot ("the Sale Agreement") with Reserves. The Sale Agreement designated Esham and Refaeli collectively as "the Buyer." Reserves president Abraham Korotki executed the Sale Agreement on behalf of Reserves as "the Seller."

Section 9 of the Sale Agreement included the following arrangement for miscellaneous payments to the Reserves Maintenance Corporation:

> Within seven (7) months after Closing: (a) Buyer shall pay (or cause to be paid) to The Reserves Maintenance Corporation, the

[1] *See, e.g.*, *Reserves Dev. LLC v. Crystal Props., LLC*, 2009 WL 1514929 (Del. Super. May 18, 2009); *Reserves Dev. Corp. v. Wilm. Trust Co.*, 2008 WL 4951057 (Del. Ch. Nov. 7, 2008); *Smith v. Reserves Dev. Corp.*, 2008 WL 3522433 (Del. Ch. Aug. 12, 2008); *Reserves Dev. LLC v. Severn Sav. Bank, FSB*, 2007 WL 4054231 (Del. Ch. Nov. 9, 2007); *Reserves Dev. Corp. v. Crystal Props., LLC*, C.A. No. 07J-11-042 (Del. Super.).

> sum of $11,700 which includes the sum of $5,000 towards the cost of common area improvements construction, an additional $5,000 as an initial contribution to the homeowners association, and an additional $1,700 towards homeowners dues for the calendar year 2004; to secure which, (b) Buyer shall at closing give Seller a Promissory Note in the form appended hereto. . . .[2]

Section 10 of the Sale Agreement provided as follows:

> Buyer . . . acknowledges receiving a copy of, reading and agreeing to be bound by the covenants and restrictions for The Reserves Resort, Spa and Country Club, which among other things obligates Buyer to obtain Seller's prior written approval of the plans for any improvements to be constructed on the Lot; to be and remain a member in the homeowners association while holding title to the Lot, and to pay annual dues.[3]

The parties also included a provision regarding succession, which stated:

> This Agreement shall benefit and bind the parties hereto, their respective heirs, personal representatives, successors and assigns; provided, however, that neither party shall assign this Agreement or any rights or interests hereunder without the prior written consent of the other.[4]

According to Esham, Korotki was aware that he, Refaeli, Elboim, and Buchanan planned to take title at closing as an artificial entity.[5] Pursuant to

[2] Pls.' Resp. to Def.'s Mot. for Summ. J, App. A (Agreement of Sale), at § 9.

[3] *Id.* at § 10.

[4] *Id.* at § 8.

[5] Aff. of William E. Esham, III, at ¶ 2.

this plan, a certificate of formation for Cristal Properties, LLC ("Cristal")[6] was filed in March 2004, on the same day that Esham and Refaeli signed the Sale Agreement.

Following the creation of Cristal, both parties apparently proceeded on the assumption that Cristal would take title to Lot 6. On May 11, 2004, counsel for Cristal sent Korotki a package of documents prepared in anticipation of settlement. The submission letter explained that the documents were "necessary to transfer [Lot 6] to Cristal Properties, LLC."[7] Among the documents was a corporate resolution for Reserves that authorized the sale of Lot 6 to Cristal. The resolution, which was passed by Reserves' Board of Directors on May 12, 2004, stated in relevant part:

> RESOLVED that the proper officers of the Company be authorized to execute, acknowledge, and deliver a Deed conveying [Lot 6] to [Cristal Properties, LLC] for the sum set forth above, and further execute such other papers as might be necessary to consummate this transaction.[8]

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[6] The Court is given to understand that "Cristal" is the proper spelling. Whether by simple inadvertence or in deference to rapper Jay-Z's campaign against the champagne of the same name, the company has also been referred to as "Crystal Properties" in various documents filed in this case and other litigation related to the Reserves Resort project. *See* Douglas Century, *Jay-Z Puts a Cap on Cristal*, N.Y. TIMES, July 2, 2006, *available at* http://www.nytimes.com/2006/07/02/fashion/02cris.html.

[7] Def.'s Mot. for Summ. J., Ex. C.

[8] Def.'s Mot. for Summ. J., Ex. D.

At settlement on May 14, 2004, Reserves executed a deed transferring Lot 6 to Cristal.[9] Cristal was identified on all settlement papers as the purchaser.

B. The Disputed Assessments

In 2007, Plaintiffs began to take action regarding amounts they claim are owed for Lot 6 assessments under the Sale Agreement and the recorded restrictions on the property.[10] The restrictions burdening Lot 6 ("the Reserves Resort restrictions") require an initial assessment of $5,000.00 upon conveyance of lots in the development and permit Plaintiffs to levy annual assessments.[11] Under the Reserves Resort restrictions, such assessments, along with interest, costs, and reasonable attorneys' fees associated with the collection thereof, are "the personal obligation of the person who was the Owner of [the lot] at the time when the assessment was due."[12] The term "Owner" is specifically defined elsewhere in the

[9] Def.'s Mot. for Summ. J., Ex. E.

[10] *See* Def.'s Mot. for Summ. J., Ex. G.

[11] Pls.' Resp. to Def.'s Mot. for Summ. J., Ex. H (Declaration of Restrictions), at Art. VII.

[12] *Id.* at Art. VII, § 1.

restrictions to mean "the legal owner of each Lot . . . within The Reserves."[13]

On January 12, 2007, Plaintiffs sent a letter to Elboim in his capacity as a member of Cristal to demand payment of outstanding Lot 6 assessment fees from 2006. Apparently, Cristal continued to be delinquent in paying assessments. Reserves and Reserves Management filed suit against Cristal in the Court of Common Pleas, alleging violations of the restrictions and seeking a judgment for quarterly assessments, plus interest and attorneys' fees.[14] A default judgment in the amount of $7,945.40 was entered against Cristal. Cristal subsequently paid the judgment, which encompassed assessment fees for the four quarters from July 2006 through April 2007, and at least $382.00 in attorneys' fees.[15] The Court of Common Pleas action against Cristal did not include any claim for the $11,700.00 payment required under Section 9 of the Sale Agreement.

[13] *Id.* at Art. I.

[14] *Reserves Dev. Corp. v. Crystal Props., LLC*, C.A. No. 2007-03-128 (Del. Com. Pl.). Judgment in this action was transferred to this Court. *See* C.A. No. 07J-11-102 (Del. Super.).

[15] Def.'s Mot. for Summ. J., Ex. P; Pls.' Resp. to Def.'s Mot. for Summ. J., ¶ 4-5 & Ex. I.

On December 14, 2007, Plaintiffs filed the instant suit against Esham and Refaeli.[16] Plaintiffs' Amended Complaint asserts two breaches of the Sale Agreement. Under Count I, Plaintiffs seek to recover $10,000.00 that they allege Esham was obligated to pay within seven months of closing under Section 9 of the Sale Agreement.[17] Count II alleges that Esham is liable for quarterly assessments levied against Lot 6 for the time periods of April 2006 through June 2006 and September 2007 through June 2009.[18] Plaintiffs claim that Esham's liability for these dues, along with management fees, costs, and attorneys' fees, arises from Section 10 of the Sale Agreement, in which he assented to the Reserves Resort restrictions. On August 20, 2009, Esham filed this Motion for Summary Judgment.

III. Parties' Contentions

Esham's Motion asserts myriad defenses against Plaintiffs' Complaint. First, Esham argues that Plaintiffs' claim for the $10,000.00 payment described in Section 9 of the Sales Agreement is barred by the 2-

[16] Default judgment was entered against Refaeli on March 10, 2008.

[17] Plaintiffs have received $1,700.00 of the Section 9 payment, reflecting prorated annual dues for 2004. Pls.' Am. Compl., ¶ 9.

[18] Plaintiffs concede that they have recovered assessment payments for the four quarters from July 2006 through April 2007 through default judgment against Cristal in the Court of Common Pleas action. Pls.' Resp. to Def.'s Mot. for Summ. J., ¶ 5.

year statute of limitation for breach of contract claims.[19] Next, Esham asserts that the Plaintiffs can have no legally enforceable rights against him because the Sales Agreement has merged with the deed and can no longer provide the basis for a suit. Moreover, to the extent any obligations under the Sales Agreement survived merger, Esham argues that they became obligations of Cristal when the company took ownership of Lot 6; thus, by executing the deed to Cristal, Plaintiffs relinquished any right to enforce the Sales Agreement against him.

Esham also asserts that res judicata bars Plaintiffs' claims for attorneys' fees and quarterly assessments under Count II of the Complaint, because those amounts were or should have been recovered in Plaintiffs' previous Court of Common Pleas action against Cristal. Furthermore, according to Esham, Plaintiffs waived recovery of a 15% management fee in the Court of Common Pleas suit. Finally, Esham contends that the annual assessments sought in Count II of the Complaint are unenforceable because they were not established in compliance with the Reserves Resort restrictions.

In their response, Plaintiffs argue that a defendant must affirmatively raise a defense based upon the statute of limitations and that Esham is barred

[19] *See* 10 *Del. C.* § 8106.

from asserting the running of the statutory period by his failure to do so. Next, Plaintiffs suggest that the language of the Sale Agreement contemplates survival of the $11,700.00 payment obligation set forth in Section 9. Plaintiffs acknowledge that the Reserves Resort restrictions obligate lot owners to pay assessments, but urge that this does not preclude Esham from also bearing responsibility under the Sale Agreement as surety for performance of the contractual obligations he delegated to Cristal.

With regard to Esham's waiver and estoppel arguments, Plaintiffs suggest that Esham's own position may be subject to collateral estoppel on the basis of decisions by this Court and the Delaware Supreme Court in *Reserves Development LLC v. Crystal Properties, LLC*,[20] which found contractual liability against Esham individually and against the assignor of a real estate purchase agreement for breach of that agreement.

Plaintiffs assert that all annual assessments were properly fixed and that Esham remains responsible under the Sale Agreement for all unpaid assessments. Finally, Plaintiffs deny waiving the 15% management fee applicable to the assessments they claim are owed.

IV. Standard of Review

[20] *Reserves Dev. LLC v. Crystal Props., LLC*, --- A.2d ---, 2009 WL 3648447 (Del.), *aff'g in part and rev'g in part on other grounds*, 2009 WL 1514929 (Del. Super. May 18, 2009).

When considering a motion for summary judgment, the Court examines the record to ascertain whether genuine issues of material fact exist and to determine whether the moving party is entitled to judgment as a matter of law.[21] Summary judgment will not be granted if, after viewing the evidence in the light most favorable to the non-moving party, there are material facts in dispute or if judgment as a matter of law is not appropriate.[22] Summary judgment is also inappropriate "if, upon an examination of all the facts, it seems desirable to inquire thoroughly into them in order to clarify the application of the law to the circumstances."[23]

V. Analysis

A. Esham Waived the Statute of Limitations Defense

Superior Court Civil Rule 8(c) states that "[i]n pleading to a preceding pleading, a party shall set forth affirmatively . . . statute of limitations . . . and any other matter constituting an avoidance or affirmative defense." Rule 12(b) similarly provides that "[e]very defense, in law or fact, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required." Together, Rules 8(c) and 12(b) require that a

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

[22] *Storm v. NSL Rockland Place, LLC*, 898 A.2d 874, 879-80 (Del. Super. 2005).

[23] *Ebersole v. Lowengrub*, 180 A.2d 467, 468-69 (Del. 1962).

defendant asserting the statute of limitations defense must plead that affirmative defense in his or her Answer.[24] Ordinarily, the defendant's failure to raise the limitations period will result in a determination that the defense has been waived.[25]

Upon review of Esham's Answer to Plaintiffs' Complaint, the Court finds that Esham has not affirmatively pled the limitations period as a defense. Accordingly, the defense is waived and the Court will not consider the merits of Esham's limitations period argument.

B. Esham Is Not Liable for Lot Assessments Under Section 10

Esham argues that he cannot be held liable for any of the assessments due because assessments are personal obligations of the lot owner under the Reserves Resort restrictions. Esham's argument has merit as to the assessment amounts that Plaintiffs claim under Section 10 of the Sale Agreement; however, the restrictions are not the source of the $11,700.00 payment obligation described in Section 9, and therefore do not resolve Esham's potential liability under that section.

Despite the extensive bad blood between the parties and the complexity of their dealings, Section 10 of the Sale Agreement presents a

[24] *See, e.g.*, *Kaplan v. Jackson*, 1994 WL 45429, at *2 (Del. Jan. 20, 1994).

[25] *Id.*

relatively straightforward issue of contract construction. The proper interpretation of language in a contract is a question of law.[26] The Court's goal in interpreting a contract is to determine and give effect to the parties' intentions.[27] In accomplishing this task, the Court must "construe the agreement as a whole, giving effect to all provisions therein."[28]

Because Delaware has adopted the objective view of contracts, the Court must interpret the contractual language as would an objectively reasonable third-party observer.[29] Thus, where the Court can discern the meaning of a contractual provision "without any other guide than knowledge of the simple facts on which, from the nature of language in general, its meaning depends," the provision is unambiguous and the parties are bound by its plain meaning.[30]

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[26] *Delmarva Power & Light Co. v. First S. Util. Constr., Inc.*, 2008 WL 495739, at *4 (Del. Super. Feb. 21, 2008).

[27] *E.I. du Pont de Nemours and Co., Inc. v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del. 1985).

[28] *Id.*

[29] *See, e.g.*, *Concord Steel, Inc. v. Wilm. Steel Processing Co., Inc.*, 2009 WL 3161643, at *6 (Del. Ch. Sept. 30, 2009).

[30] *Martinez v. Regions Fin. Corp.*, 2008 WL 2413858, at *6 (Del. Ch. Aug. 6, 2008) (citing *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195-96 (Del. 1992)).

The plain language of Section 10 and the Reserves Resort restrictions referenced therein express no intent to hold Esham responsible for assessments levied when he did not hold title to Lot 6. Section 10 states that Esham agreed to "be bound by the covenants and restrictions" for the Reserves Resort and briefly describes that those restrictions "among other things [obligate] Buyer . . . to be and remain a member in the homeowners association while holding title to the Lot, and to pay annual dues."[31] The Reserves Resort restrictions provide that each lot owner in the development agrees "by acceptance of a Deed or other transfer document" to pay certain assessments to the homeowners' association.[32] Further, the restrictions specifically provide that assessments due, "together with interest, costs, and reasonable attorney's fees for the collection thereof, shall . . . be the personal obligation of the person who was the Owner of such property."[33]

Section 10 of the Sale Agreement ensured that a potential new title owner was on notice of the restrictions and covenants burdening the property. Nothing in the relevant language of Section 10 indicates that the parties intended to create obligations *beyond* those contained in the

[31] Pls.' Resp. to Def.'s Mot. for Summ. J, App. A, at § 10.

[32] Docket 12, Ex. H, at 9.

[33] *Id.* at 9-10.

restrictions by stating that the buyer would be "bound" by them. Indeed, the Sale Agreement itself emphasizes that participation in the homeowners' association created by the restrictions is required only "*while holding title to the Lot*." As Esham did not accept a deed transferring title to him and never became an owner of Lot 6, the Reserves Resort restrictions invoked by Section 10 do not render him liable for lot assessments or associated fees and costs.[34]

In contrast to Section 10, the promise of an $11,700.00 payment contained in Section 9 of the Sale Agreement creates an obligation independent from the Reserves Resort restrictions, even though its subject matter overlaps with the restrictions. Under Section 9, Esham as buyer promised either to pay or cause to be paid $11,700.00 to the Reserves Maintenance Corporation within seven months after closing, with portions of the payment designated for common area improvements construction, an initial homeowners' association contribution, and prorated 2004 homeowners' association dues. The Reserves Resort restrictions also address homeowners' association assessments, but notably, Section 9 makes no mention of the Reserves Resort restrictions or any obligations arising

[34] Having concluded that Esham was not personally bound by the Reserves Resort restrictions, the Court will not address Esham's alternative defenses to Count II.

from them. As Section 10 indicates, Reserves was fully capable of referencing the restrictions directly if it intended to do so. Further, Section 9 states that Esham could "cause" the payment to be made, indicating that the obligation was distinct from those set forth in the restrictions, which anticipate that Reserves Management Corporation will look solely to lot owners for the payment of dues. The language of Section 9 also creates a specific time-frame for payment that is not described in the restrictions. Thus, although Esham presents several arguments regarding his potential liability under Section 9 that the Court will address, it is evident as a starting point that Section 9 creates obligations that are separate from a lot owner's duties under the restrictions.

C. The Section 9 Payment Obligation Did Not Merge with the Deed

Because Esham did not take title to Lot 6 in his individual capacity, Plaintiffs' suit alleges breaches of the Sale Agreement, not the deed. Plaintiffs' approach raises the specter of the merger doctrine. The doctrine of merger arises because a seller's conveyance of property to a purchaser by deed discharges the preceding agreement of sale.[35] Thus, as a general rule, "after a property has been conveyed to a purchaser, the rights of the parties

[35] *Pryor v. Aviola*, 301 A.2d 306, 308 (Del. Super. 1973) (quoting 6 CORBIN ON CONTRACTS § 319).

are to be determined by the covenants of the deed and not by the agreement of sale."[36]

Merger by deed does not necessarily extinguish all promises contained in an agreement of sale. Under Delaware law, the merger doctrine is limited in scope and applies only to questions of land use, quantity, and title.[37] In addition, merger will not bar the enforcement of a promise that the parties clearly intended to survive the deed.[38]

For two separate reasons, the Court concludes that the promise of payment set forth in Section 9 survived the deed. First, the promise pertains to a monetary payment, and is not related to a question of land use, quantity, or title. The merger doctrine is therefore inapplicable. Furthermore, even if a promise of payment were within the scope of the merger doctrine, the language of Section 9 demonstrates an intent that the promise survive the deed.[39] The time for payment under Section 9 runs for seven months from

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[36] *Haase v. Grant*, 2008 WL 372471, at *2 (Del. Ch. Feb. 7, 2008).

[37] *E.g.*, *Clarke v. Quist*, 560 A.2d 489, 1989 WL 27737, at *1 (Del. Feb. 21, 1989) (TABLE).

[38] *Wilson v. Pepper*, 1995 WL 562235, at *2 (Del. Super. Aug. 21, 1995).

[39] Esham contends that Plaintiffs' failure to respond to a Request for Admission stating that "[t]he Agreement of Sale for the conveyance of Lot 6 did not contain a survival clause" resolves this issue in his favor. Requests for admission are not an opportunity "to deprive a party of a decision on the merits," and the Court cannot be bound by requests that improperly demand that a party admit the truth of a legal conclusion. *See Bryant* ex rel. *Perry v. Bayhealth Med. Ctr. Inc.*, 937 A.2d 118, 126 (Del. 2007).

the date of closing, indicating that the parties expected performance to occur after the deed was executed. In the absence of any conflicting or superseding agreement in the deed to eliminate the payment obligation entirely, it would be inconsistent with the plain language of the Sale Agreement to permit the deed to extinguish a promise clearly intended for post-closing performance.[40]

The parties' intent that the payment obligation under Section 9 survive the deed will control; what remains to be determined is who bears liability for nonpayment, given the change in identity of the buyer between the Sale Agreement and the deed.

D. Esham Is Not Collaterally Estopped from Raising Estoppel and Waiver

Esham's remaining defenses—that waiver and estoppel both bar Plaintiffs from asserting claims against him—cannot be resolved in his favor upon summary judgment. A material dispute exists as to whether Esham

[40] *See Moore v. Carrollton Enters. Ltd. P'ship*, 1995 WL 108706, at *3 (Del. Super. Feb. 7, 1995) (holding that sales agreement provision "explicitly contemplate[d] surviving the execution of the deed" because it could only be triggered at settlement and pertained to a contingency that was not addressed in the deed or a subsequent indemnity mortgage); M. O. Regensteiner, *Deed As Imposing Upon Vendee Obligations Additional to, or As Superseding or Merging Obligations Imposed by, Antecedent Contract*, 52 A.L.R.2d 647, at § 4 ("Various contractual provisions absolutely or conditionally requiring the vendee to make additional payments after delivery of the deed, as additional or deferred consideration for the conveyance, have been held not to be merged in deeds containing no reference to the particular obligation.").

was released from his obligations under Section 9 by novation, but this issue must await the full airing of facts at trial.

Before reaching the substance of Esham's arguments, the Court must reject Plaintiffs' position that Esham is collaterally estopped from raising either estoppel or waiver by the Delaware Supreme Court's holding in *Reserves Development LLC v. Crystal Properties, LLC*.[41] That case, another action related to the Reserves Resort project, involved allegations that Esham, Buchanan, Elboim, and Refaeli, as well as two limited-liability companies that they created (Cristal and Bella Via), breached a contractual duty to pay development costs for the Reserves Resort subdivision and that the individual defendants misrepresented their ability or willingness to perform. Plaintiffs argue that the defendants in that case raised "[t]he same Waiver/Estoppel argument [that Esham presents here] and yet judgment was entered against both companies, assignor and assignee" and "against Mr. Esham personally for . . . fraudulent misrepresentations."[42]

[41] *Reserves Dev. LLC*, 2009 WL 3648447. Plaintiffs requested, and the Court has allowed, that the record be supplemented to permit consideration of the Delaware Supreme Court's decision, which was released as this Court was finalizing its opinion. Previously, Plaintiffs based their collateral estoppel theory on the trial court's opinion in *Reserves Development v. Crystal Properties*.

[42] Pls.' Resp. to Def.'s Mot. for Summ. J., at ¶ 3.

The doctrine of collateral estoppel "precludes a party to a second suit involving a different claim or cause of action from the first from relitigating an issue necessarily decided in a first action involving a party to the first case."[43] Collateral estoppel will bar consideration of an issue if the Court determines that the following conditions are met:

> (1) The issue previously decided is identical with the one presented in the action in question, (2) the prior action has been finally adjudicated on the merits, (3) the party against whom the doctrine is invoked was a party or in privity with a party to the prior adjudication, and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.[44]

Plaintiffs' position founders on the first element—which necessarily implies that the fourth element cannot be satisfied either. The issues of delegor-delegee liability and Esham's personal liability before the Court in *Reserves Development v. Crystal Properties* are significantly different from those presented here.[45] The parties in that case were litigating over contracts other than the Lot 6 Sale Agreement and transfer. Although the case was

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[43] *One Va. Ave. Condo. Ass'n of Owners v. Reed*, 2005 WL 1924195, at *10 (Del. Ch. Aug. 8, 2005).

[44] *Betts v. Townsends, Inc.*, 756 A.2d 531, 535 (Del. 2000) (quoting *State v. Machin*, 642 A.2d 1235, 1239 (Del. Super. 1993)).

[45] Although both attorneys and judges in Delaware have played somewhat loose with the relevant terminology, the Delaware Supreme Court emphasized in the *Reserves Development v. Crystal Properties* decision that contractual obligations are "delegated" if transferred, rather than "assigned." 2009 WL 3648447, at *5 n.24.

similar to this one in that it involved the assignment of a real estate purchase agreement from Cristal to Bella Via, that assignment was made with the express understanding that the Reserves plaintiffs would only consent to the assignment "on condition that it did not thereby relieve [Cristal] of liability."[46] After a bench trial, the trial court imposed liability upon both Cristal and Bella Via. On appeal, the Supreme Court noted there was no evidence that Reserves' assent to that assignment evinced an intent to consider Bella Via, as the assignee/delegee, to be the sole source of liability.[47]

Here, by contrast, the parties vigorously dispute whether Esham, as the assignor/delegor, remained personally liable under Section 9 of the Sale Agreement after closing. In *Reserves Development v. Crystal Properties*, the parties *expressly* agreed that the assignment of the purchase agreement would not relieve the original obligor of liability—in other words, there was no colorable basis to view the assignment as a novation or any other form of agreement releasing the original obligor. Crucially, Plaintiffs have not brought to the Court's attention any express agreement in this case that Esham was not to be released from his obligations under the Sale

[46] Amended Compl. at ¶ 9, *Reserves Development LLC v. Crystal Properties, LLC*, C.A. No. 05C-11-011 RFS (Del. Super. July 3, 2007).

[47] *Reserves Dev. LLC*, 2009 WL 3648447, at *5.

Agreement. Accordingly, as will be further discussed in this section, a material factual dispute exists as to whether a novation occurred.

Furthermore, an *in personam* judgment was entered against Esham in *Reserves Development v. Crystal Properties* for fraudulent misrepresentations that merited imposing individual liability on him for acts undertaken in his capacity as a member of a limited-liability company.[48] In this case, however, Reserves alleges that Esham is liable as a signatory to the Sale Agreement. The instant action involves a different contract, different facts, and a different theory of recovery vis-à-vis Esham. Thus, although the defendants' waiver and estoppel defenses did not prevail in *Reserves Development v. Crystal Properties*, Esham is not collaterally estopped from raising them in this action.

E. Material Factual Disputes Exist Regarding Esham's Liability Under Section 9

The ability to present a defense, however, does not guarantee its viability. Although additional facts may exist to support Esham's estoppel and waiver theories, on the record currently before it, the Court cannot conclude as a matter of law that Plaintiffs are barred from arguing at trial that Esham is individually liable for the Section 9 payment obligation.

[48] *See* 2009 WL 1514929, at *10.

Estoppel applies where "a party by his conduct intentionally or unintentionally leads another, in reliance upon that conduct, to change position to his detriment."[49] The party asserting estoppel must be able to demonstrate that he (1) lacked knowledge and the means to obtain knowledge of the truth of the facts in question; (2) relied upon the conduct of the party against whom the estoppel is claimed; and (3) suffered a prejudicial change of position as a result.[50] No basis for an estoppel exists where the party claiming its benefit has failed to exercise reasonable diligence in pursuing the truth.[51]

Esham does not claim in his Motion that Plaintiffs misrepresented their intent to hold him personally liable under the Sale Agreement after settlement. In the absence of such affirmatively misleading conduct, Esham can only contend that he relied to his detriment on Plaintiffs' transferring ownership of the lot to Cristal without explicitly stating their intent to hold Esham individually liable for any breaches of the Sale Agreement. But

[49] *Wilson v. Am. Ins. Co.*, 209 A.2d 902, 904 (Del. 1965).

[50] *Waggoner v. Laster*, 581 A.2d 1127, 1136 (Del. 1990); *Wilson*, 209 A.2d at 904.

[51] *Beech Treat, Inc. v. N.Y. Underwriters Ins. Co.*, 301 A.2d 298, 302 (Del. Super. 1972); *Keene Corp. v. Hoofe*, 267 A.2d 618, 623-24 (Del. Ch. 1970), *aff'd* 276 A.2d 269 (Del. 1971) ("Since the whole doctrine [of equitable estoppel] is a creature of equity and governed by equitable principles, it necessarily follows that the party who claims the benefit of an estoppel . . . must have acted with good faith and reasonable diligence; otherwise no equity will arise in his favor." (quoting 3 POMEROY'S EQUITY JURISPRUDENCE § 813)).

Esham cannot be said to have lacked the means of obtaining knowledge of Plaintiffs' position. He is a sophisticated party who had the ability to rectify Plaintiffs' apparent silence by inquiring as to their intent regarding his post-closing obligations. Had he done so, the parties almost certainly would have avoided the current dispute by clarifying the situation. The Court cannot apply estoppel against Plaintiffs as a matter of law under these circumstances.[52]

Similarly, Esham's waiver defense does not merit judgment in his favor as a matter of law. A waiver occurs where a party voluntarily relinquishes a known right or engages in conduct warranting an inference that it has done so.[53] A waiver may be implied "from the circumstances, i.e., the conduct of the waiving party," but an implied waiver must be established by a clear, unequivocal, and decisive act showing the requisite intent to waive.[54] Ordinarily, the existence of an implied waiver is a question for the

[52] The Court's holding does not preclude Esham from presenting his estoppel argument at trial if there are further facts to support it. To the extent that additional development of the record could suggest that Plaintiffs misrepresented their intent such as to induce Esham's reasonable reliance on their statements or conduct, Esham may still possess an estoppel defense appropriate for determination by the trier of fact. *See Dervaes*, 1980 WL 333053, at *7 ("Unless only one inference can be drawn from the evidence, the existence of estoppel is a question to be determined by the trier of fact.").

[53] *Dervaes v. H.W. Booker Constr. Co.*, 1980 WL 333053, at *7 (Del. Super. May 28, 1980).

[54] *Id.*

trier of fact, which must "decide whether a litigant's conduct evidences a conscious and voluntary abandonment of [the] right or privilege."[55]

The Court has previously articulated the difference between waiver and estoppel:

> [A waiver] involves both knowledge and intent, and is based on the idea of consent, express or implied. In strictness, waiver is referable to the act or conduct of one party only. It depends on what one party intended to do, rather than upon what he induced his adversary to do, as in estoppel. The doctrine does not necessarily imply that one party to the controversy has been misled to his detriment in reliance on the conduct of the other party; and waiver is not only consistent with, but is generally created upon knowledge of all the facts by both parties. There may, therefore, be a waiver of an existing right apart from any element of estoppel.[56]

This distinction may prove relevant to the case at bar. Esham's estoppel defense presumes that Plaintiffs never abandoned the intent, originally expressed in the Sale Agreement, to hold Esham personally obligated under Section 9. In the absence of any affirmative misrepresentations by Plaintiffs, however, Esham cannot show that he acted with reasonable diligence under the circumstances in discovering Plaintiffs' position. A waiver defense, on the other hand, suggests that Plaintiffs actual intent upon executing the deed

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[55] *St. Jones River Gravel Co. v. Hartford Fire Ins. Co.*, 1980 WL 308672, at *5 n.12 (Del. Super. July 7, 1980).

[56] *Collins v. Sussex Trust Co.*, 1989 WL 70901, at *2 (Del. Super. June 15, 1989) (quoting *Miller v. N. Ins. Co. of N.Y.*, 39 A.2d 23, 25 (Del. Super. 1944)).

in favor of Cristal was to release Esham from personal responsibility. This theory focuses on Plaintiffs' conduct, not Esham's.

The Court observes that Esham's waiver argument implicates the concept of novation, which was not fully explored by either party. Plaintiffs correctly recite the general rule that "where one party . . . to a contract assigns his contract to another . . . he remains liable as surety for performance of the assigned contract."[57] This principle is subject to the notable exception that novation can relieve a party of its contractual liability.[58]

A party claiming that a contract was novated bears the burden of proving: "(1) a valid pre-existing obligation; (2) a valid new contract; (3) extinction of the old contract; and (4) the consent of all parties to the novation transaction."[59] "A party's knowledge of and consent to a novation need not be express but may be implied from his or her conduct or from the

[57] Pls.' Resp. to Def.'s Mot. for Summ. J., ¶ 3 (citing *Schwartz v. Centennial Ins. Co.*, 1980 WL 77940, at *2 (Del. Ch. Jan. 16, 1980)).

[58] *Schwartz*, 1980 WL 77940, at *2-3; *Lillis v. AT&T Corp.*, 2007 WL 2110587, at *11 (Del. Ch. July 20, 2007) ("It is a well known rule of contract law that the original signatory remains liable on a contract unless the other party consents to an assignment or there has been a novation.").

[59] *Caldera Props.-Lewes/Rehoboth VII, LLC v. Ridings Dev., LLC*, 2009 WL 2231716, at *26-27 (Del. Super. May 29, 2009) (quoting *Schwartz*, 1980 WL 77940, at *3).

surrounding circumstances."[60] Where a novation is implied from the parties' actions, "it must be clear that a novation was intended."[61]

In this case, Plaintiffs entered into the Sale Agreement with Esham and Refaeli when the apparently universal understanding among the parties was that a limited-liability company would take title at settlement. The Sale Agreement included a provision barring either party from assigning its rights or interests without prior written consent of the other party.[62] The record presented by the parties does not include any writing in which Reserves clearly and definitively consented to an assignment or novation. Nevertheless, Reserves countenanced the assignment and delegation of at least some of Esham and Refaeli's rights and obligations under the Sale Agreement by passing a corporate resolution authorizing the sale to Cristal, executing a deed for the lot in Cristal's favor at closing, and accepting payment from Cristal.

The record raises a genuine issue as to whether the parties' conduct is consistent with an implied novation of the Sale Agreement, which would relieve Esham of any obligation to perform under Section 9. Whether

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[60] *Viking Pump, Inc. v. Liberty Mut. Ins. Co.*, 2007 WL 1207107, at *26 n.110 (Del. Ch. Apr. 2, 2007) (quoting 30 WILLISTON ON CONTRACTS § 76:15 (4th ed. 2004)).

[61] *Caldera Props.*, 2009 WL 2231716, at *26.

[62] Pls.' Resp. to Def.'s Mot. for Summ. J, App. A., at § 8.

Esham's argument is framed as an issue of waiver or novation, it is evident that this line of defense raises factual questions regarding intent and the reasonable inferences to be drawn from the parties' conduct. Such questions must be left for the trier of fact.[63] Accordingly, Esham is not entitled to judgment in his favor as a matter of law on the basis of waiver.

VI. Conclusion

As a final matter, the Court would like to offer a few words of caution. The Motion and Response before the Court both contained incomplete statements of applicable law, and both parties' explorations of their own arguments were often lacking. The page limitations placed upon motion filings can pose a challenge, but the Court does not view this challenge as insurmountable—nor does it justify "cherry-picking" legal principles. Had the parties avoided or conceded positions contrary to clear and established law, the Court expects that they would have discovered the space to fully develop their strongest arguments.

At trial, the Court will expect the parties to demonstrate a thorough grasp of the legal issues that are implicated by the facts of this case. Indeed, before the case proceeds any further, the Court would urge the parties to

[63] *See St. Jones River Gravel Co.*, 1980 WL 308672, at *5 n.12; *Fontana v. Julian*, 1979 WL 4633, at *3 (Del. Ch. Oct. 29, 1979) ("Where the evidence is in conflict, the issue of whether or not there was a novation is one of fact for the trier of fact.").

view one particular fact—the amount remaining in controversy—in light of the time and resources that have been consumed by this case so far and that will be expended by a trial. Settlement discussions, if not already underway, may be well worth considering at this stage.

In conclusion, Esham's Motion for Summary Judgment is hereby **GRANTED in part** as to Count II of the Complaint and **DENIED in part** as to Count I of the Complaint.

IT IS SO ORDERED.

Peggy L. Ableman, Judge

Original to Prothonotary
cc: Steven Schwartz, Esq.
Richard E. Berl, Esq.