IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

MICHAEL POULS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. SS08C-05-014 RFS
	)	
WINDMILL ESTATES, LLC, a licensed Delaware limited liability company,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

Decision after Bench Trial. Verdict for Defendant.

Submitted: May 18, 2010
Decided: June 10, 2010

James D. Taylor, Jr., Esquire, and William E. Manning, Esquire, Saul Ewing LLP, Wilmington, Delaware, attorneys for the Plaintiff.

Richard E. Berl, Jr., Esquire, Smith, O'Donnell, Feinberg & Berl, LLP, attorney for the Defendant.

STOKES, J.

This is the Court's decision following a bench trial on a breach of contract action. Plaintiff Michael Pouls ("Pouls") filed a Complaint against Defendant Windmill Estates, LLC, ("Windmill") seeking the return of its $500,000 deposit in a real estate transaction. Windmill cross-claimed to retain the deposit. After consideration of the facts in evidence and the applicable law, the Court finds that Pouls breached the contract by refusing Windmill's proposed settlement date and that Windmill acted reasonably in pursuing the various agency approvals for the subdivision. Windmill is entitled to retain the $500,000 in deposit money.

Facts

Pouls is a self-described entrepreneur with multiple business and real estate interests. Windmill Estates, LLC, consisted of three individuals: Jack Stanton, a real estate broker and developer; Don Lockwood, a builder; and Darin Lockwood, an engineer whose company, Meridian Architects & Engineer's ("Meridian") was retained to manage the Windmill Estates project through to completion.

In January 2005, Pouls contracted with Windmill to purchase a 160-acre parcel of unimproved land in Sussex County, Delaware. The contract, referred to herein as the Agreement, also included an Addendum which pertained to approval dates. The development project was known as Windmill Estates. The Addendum states that "Settlement shall occur within 18 months, however buyer agrees to extend the settlement

date until seller can deliver a recorded site plat plan."[1] Stanton testified that he had been told by someone from the County to expect the approval process to take at least 18 months, and that was why he put in the extension language. Under the contract terms, Windmill was obligated to obtain development approvals for the property. No outside time limit was set for closing. Windmill's real estate agent, Brian Koyanagi, confirmed at trial that the 18-month estimate came from Windmill and that both parties contemplated "reasonable" extensions. The term "reasonable" is not defined in the Addendum.

The purchase price was based on a per lot figure of $24,250, with a cap of $5,165,250. The number of lots was limited to 214 because any more would have necessitated a traffic impact study, which would take 12 to 15 months, at a cost of $20,000 to $50,000. Upon execution of the Agreement, Pouls made the required deposit of $100,000, and made a required second deposit of $250,000 ninety days later. A third and final deposit of $150,000 was made three days after preliminary subdivision approval was granted by Sussex County on September 14, 2006. That is, Pouls made the final deposit after the 18-month target closing date had passed in June 2006. This deposit money, totaling $500,000 is the subject of the dispute before the Court.

The Agreement provided for two options if the parties reached the 18-month mark without final subdivision approval. As the Buyer, Pouls had the option of purchasing the property for a total sum of $2 million and continuing with the subdivision process on his

[1]Addendum at ¶ 4.

own, or declaring the contract null and void and accepting a refund of his deposits. Pouls exercised neither option.

The process for obtaining approvals began in March 2005, when Windmill submitted plans for approval from the Primary Land Use Service (PLUS). The PLUS application, which includes a site plan, is required by Sussex County for any subdivision with more than 49 units in Sussex County. Upon receipt of a PLUS application, various State agencies have the opportunity to provide responses early in the planning process in order to avoid problems later on. After a developer receives PLUS comments, the plan is often modified. There is no requirement that the application to PLUS and the application to Sussex County be made simultaneously. That is, a developer may benefit from submitting the County application only after receiving and responding to any PLUS comments. Darrin Lockwood testified that Pouls told him he was in no hurry and that he wanted to see the PLUS comments prior to submitting the plan to the County. Thus, the plan was modified before being filed with the County, with Pouls' ostensible knowledge and approval.

In July 2005, Meridian submitted the application to the County. It was returned to change the nomenclature from a standard subdivision to a "cluster" subdivision, and resubmitted in August 2005. Jessica Nichols, the initial Meridian project engineer, recalled that Pouls was involved in making the PLUS changes. She also stated that she could not recall ever submitting a PLUS application and a County application

simultaneously. Based on the uncontroverted evidence that the PLUS application is intended to be a preliminary process to avoid later problems and delays, there was no unreasonable delay in Meridian's submission of the PLUS application in March 2005 and the County application in July 2005.

At trial, Stanton testified that Windmill did not yet own the property when the parties entered into the Agreement. Windmill put the Property under contract with its owner, Marty Ross, for approximately $1 million, with financing from County Bank for $1.75 million to cover the purchase price and future development costs. Windmill began its own due diligence and arranged for soil investigation and a boundary survey. The County held a public hearing on the application 11 months later, on July 27, 2006. This is a typical waiting period because of the numerous applications received by the County.

In September 2006, Pouls retained Jeff Clark, a land planner in Sussex County to monitor Windmill's progress.[2] In response to inquiries from Clark, Meridian's project engineer emailed Clark to say that final approvals were expected in January 2008. Lockwood testified that Pouls accepted this date and was not concerned about time. Also in the fall of 2006, Windmill hired Duffield Associates to begin wastewater designs. Although Lockwood disputed a bill submitted by Duffield, the problem was resolved without apparent delay or stoppages in the work. A sewer analysis from Duffield Associates was dated September 11, 2007. Windmill also began to work closely with

[2]Clark also managed the subdivision process for the two Laurel tracts that Pouls had acquired.

DelDOT to resolve issues pertaining to the entrance road to the development, turn lanes and shoulder widths. After negotiations and resubmittal of the site plan, a DelDOT approval letter was obtained on August 30, 2007. Windmill did not apply for Fire Marshall approval until the spring of 2008, after learning that Pouls had filed an application for a different plan on the same property.

During the summer of 2007, Pouls began to re-envision the Windmill property as an "active adult community," that is, restricted to those 55 and older. Pouls saw this as a way of obtaining additional lots and increased income. Traffic engineer Derrick Kennedy told Clark that such a community would be permitted by DelDOT without having to complete a costly traffic impact study. Under this plan, Pouls could have 241 lots, 27 more than the pending plan of 214 lots. Lockwood was told of the new plan in the fall of 2007. He testified that he had no problem with it because he was not paying for the work, and it did not affect his obligations under the Agreement.

The new plan would necessitate a new application process, and a typical 12 to 14 month waiting period for a hearing before the Planning and Zoning Commission. Thus, while Windmill's target date for final approval for the original plan was January 2008, the new application would not receive preliminary approval until late 2008 or early 2009, and final approval at an undetermined time in the future. Clark filed the new application with PLUS in September or October 2007 and with the County on December 31, 2007.

Lockwood asked for a settlement date of April 15, 2008, which he asked for because he wanted to get paid. Clark rejected that date, stating that Pouls wanted a closing date much later in the year. Lockwood declined a later date, unless Pouls made additional cash concessions, which were not forthcoming. Lockwood testified that Pouls told him repeatedly that he did not have the financing to close, but Pouls testified that he was ready, willing and able to close at any time. The parties never agreed on a final closing date. On Septmeber 18, 2008, Pouls sent Lockwood an email rejecting Lockwood's proposition and stating "No hard feelings and good luck."

Final subdivision approval would trigger the County's "sunset ordinance," giving Windmill five years to commence substantial work on the subdivision or having its approvals revoked. Windmill had invested more than $1.5 million in the project, had no potential buyer to replace Pouls and no market for the subdivision. Thus, at this point, Windfall applied for and was granted a final one- year extension on the preliminary subdivision approval. Final subdivision approval was granted in December 2008 and the subdivision was recorded in January 2009.

On April 11, 2008, Pouls wrote to demand the return of his deposit. On April 16, 2008, Windmill's counsel responded by denying the requested refund and stating that approvals would be obtained in 8 to 10 weeks. In a letter to Roy Frick, Windmill's prior accountant, Pouls agreed to an additional 60 days to complete the process and stated, for the first time, that time was of the essence. Lockwood testified that he never received

either of two letters to Frick that Pouls produced at trial. Pouls then asked David Weidman, Esquire, to investigate the potential for approvals in the estimated time frame. In reviewing the Sussex County Planning & Zoning file, Weidman saw a notice of a May 14, 2008 hearing seeking another extension of time for Windmill to obtain approvals. Weidman wrote to Windmill's counsel, asking for information and a return of the deposit. After receiving no response, Pouls filed suit in May 2008.

Lockwood testified that he continued to work on the subdivision because he had to get the permits in any event. However, he acknowledged that early in 2008 he had most of his approvals, and he slowed down somewhat to see what Pouls would do. He had no back-up contract or other potential buyers. Windmill had made a substantial investment in the property, which it could not profit from until closing. Windmill purchased the property for $1 million, financed with a mortgage of $1.75 and an additional $600,000 in development costs. At closing, Windmill could satisfy its mortgage and derive a profit of approximately $3 million. Pouls, on the other hand, was involved in other costly projects. In June 2005, Pouls had settled on Village Brooke, an approved subdivision in Laurel, Delaware for $4,444,000. In February 2007, he settled on Daniel Farm for $3,500,000, also located in Laurel.

The Parties' Contentions

Pouls argues that Windmill breached the contract and that he is entitled to judgment as a matter of law. Pouls argues that (1) Windmill failed to deliver the

approved plan within the 18-month time frame set forth in the contract, or on the later agreed-upon date of January 2008; (2) Windmill failed to obtain the recorded site plan, which was a condition precedent to Pouls going to closing; and (3) Windmill failed to pursue the various necessary approvals with reasonable expediency.

Windmill argues that (1) Pouls' allegations of avoidable delay are not supported by the record and that Windmill acted reasonably in pursuing the subdivision approval and (2) Pouls breached the Agreement by attempting to delay closing in order to minimize the time between closing and the approval on his new 55-and-older development plan.

Standard of Review

In a bench trial, the Court is the finder of fact and the parties must prove the elements of each claim by a preponderance of the evidence.[3] Thus, the Court shall find in favor of the party upon whose side the greater weight of the evidence is found.[4]

Discussion

The Final Approval as Condition Precedent to Closing. Pouls' argument pertaining to Defendant's failure to timely obtain final approval and his argument regarding the condition precedent are factually and legally related. The Court addresses them as two parts of the same argument.

In Delaware to make a breach of contract claim, a party must show (1) the

---

[3] *Patel v. Patel*, 2009 WL 427977, at *3 (Del. Super.) (citing *Reynolds v. Reynolds*, 237 A.2d 708, 711 (Del. 1967)).

[4] *Id.*

existence of a contract, (2) a breach of that contract, and (3) damages resulting from the breach.[5] The parties acknowledge that they had a valid contract, and they both seek the same amount of damages, that is, the $500,000 in deposit money. Thus, the question before the Court is whether either party breached the contract in any material way. Pouls argues that Windmill breached that contract by failing to fulfill a condition precedent in a timely manner.

> As defined in *Black's Law Dictionary*, a condition precedent is:
> An act or event, other than a lapse of time, that must exist occur before a duty to perform something promised arises. If the condition does not occur and is not excused, the promised performance need not be rendered. The most common condition contemplated by this phrase is the immediate or unconditional duty of performance by a promisor.[6]

Although the Addendum did not use the phrase "condition precedent," its language regarding Windmill's duty to obtain final approval for the project established a condition precedent to Pouls going to settlement. The parties agree that Windmill had such a duty but disagree at to when it was to be fulfilled. The Addendum provided that "Settlement shall occur within 18 months, however, buyer agrees to extend the settlement date until seller can deliver a recorded site plat plan."[7] Because the Agreement was signed in January 2005, settlement should have occurred and final approvals obtained by July 2006.

---

[5]*Bramble Constr. Co. v. Exit Reality, LLC*, 2009 WL 3069386, at *2 (Del. Super.).

[6]*Black's Law Dictionary* 289 (7th ed. 1999).

[7]Addendum at ¶ 4.

However, preliminary approval was not obtained from Sussex County until September 14, 2006, and final approvals were not in sight. Despite these facts, Pouls made his final deposit under the Agreement three days after preliminary approval was obtained in September 2006.

A condition precedent may be waived by the party for whose benefit the contingency clause was inserted in the contract.[8] It could be argued that the approvals were to the benefit of both parties, but Windmill suffered no loss in delaying the approval process because by September 2006 it owned the property and could do with it as it pleased. Furthermore, Windmill had in its possession deposit money in the amount of $500,000, which Pouls had timely paid. Pouls did not attempt to exercise his right under the Agreement to purchase the property for a total sum of $2 million and continue the approval process on his own. Nor did he attempt to declare the Agreement null and void and demand a refund of his deposits, as he was entitled to do under the Agreement. Instead, he paid the final installment of the deposit after the preliminary approval was obtained. A condition precedent may be waived by conduct which evidences such an intention.[9] The Court finds that the conduct of both parties evidences their intent to waive

---

[8]*Nemeth v. Patterson-Schwartz and Assoc., Inc.*, 1987 WL 12444 (Del. Super.)(citing 17A C.J.S. *Contracts* § 491 a. (1963), 91 C.J.S. *Vendor and Purchaser* § 110 e. (1955)).

[9]*Id.* Courts in other jurisdictions agree. *See, e.g., Union Pacific Railroad Co. v. Cedar Rapids and Iowa City Railway Co.,* 477 F. Supp. 980 (N.D. Iowa 2007) (party to contract who is entitled to performance of condition precedent may waive it either expressly or by conduct indicating waiver)(citing *ARDI Exchange v. Valley Nat'l Bank*, 493 N.W. 2d 862 (Iowa 1992)); *Miller v. Bristol-Myer Squibb Co.*, 121 F. Supp. 2d 831 (D. Maryland 2000)(either party to

compliance with the July 2006 settlement date.

The next question pertains to the length of time permissible to "extend the settlement date until seller can deliver a recorded site plat plan." The Addendum does not supply the time frame for the extension, but the parties agree that they intended the time frame to be a reasonable one. Thus, the question is what was reasonable under the circumstances. In September 2006, Clark was informed by Meridian's project engineer, Jessica Nichols, that final approvals would be complete in January 2008. Neither Pouls nor Clark objected to this date, and the Court construes this to mean that they accepted it as reasonable.

A critical event occurred in September 2007, when Pouls filed a new PLUS application plan for an age-restricted development. In other words, he initiated a separate approval process for the same property, despite having agreed to a January 2008 target date for approvals on the initial development plan. The expected waiting period for preliminary approval would be 12 to 14 months, indicating that Pouls would obtain such approval from the County no sooner than September 2008, with final approvals at some unknown date in the future. Windmill concedes that, having become aware of the second development plan and understanding that the final date would be far beyond the January 2008 target date for the initial plan, it slowed its efforts to obtain the approvals.

---

contract may waive any of the provisions made for his benefit); *Honeywell International Inc. v. Air Products & Chemicals, Inc.*, 858 A.2d 392 (Del. Ch. 2004) (applying New York law and finding that New York courts permit deviation from written agreement to the extent that the conduct was unequivocably referable to the modification).

The Court rejects Windmill's argument that Pouls' decision to pursue a new development application was a breach of the Agreement. Nothing in the Agreement prohibits from Pouls from coming up with a different idea for development of the property but his decision did have ramifications. Pouls' conduct excused Windmill from any duty to act as though time was of the essence in its fulfillment of the Agreement. The Agreement did not stipulate that time was of the essence, and it was not asserted by Pouls until he used it in a letter addressed to Windmill's previous accountant in 2008, at the same time when he was attempting to obtain a closing date later than the April 2008 date proposed by Windmill.[10] The course of dealing between the parties makes no indication that time was of the essence, and after filing a second application for a different development plan, Pouls cannot assert that he expected Windmill to act as though time was of the essence. Moreover, Pouls' refused to accept an April 2008 settlement date and pushed for a date later in the year. In light of this fact, it was not unreasonable for Windmill to slow its pace on pursuing the approval process. The Court credits Lockwood's testimony that he came to believe that Pouls wanted to delay closing as long as possible. For this reason, the Court finds that Windmill's conduct in slowing down the process, particularly in regard to the Fire Marshall's approval, was reasonable under the circumstances, as discussed below.

---

[10]*Patel v. Patel*, 2009 WL 427977, at *3 (Del. Super.)(citing *Reynolds v. Reynolds*, 237 a.2d 708, 711 (Del. 1967)(when determining whether time is of the essence, the court looks at whether the contract language so states and whether the course of dealing between the parties implies that time was of the essence.).

Reasonable dispatch in pursuing agency approvals. Pouls argues that Windmill failed to pursue the various agency approvals with reasonable dispatch and thus breached the contract. Darin Lockwood was one of the three principals in Windmill. He was also the owner and operator of Meridian Architects and Engineers, the firm which provided development engineering services and surveying services to the Windmill Estates project.[11] After the Agreement was signed, Meridian began working with Pouls on the plan, although Pouls contests his involvement. Lockwood testified that Pouls' main concern was that the houses maintain a character suitable to his vision of the project. Lockwood also stated that prior to submission of the application to the County, Pouls and Lockwood met or talked via telephone about every two weeks. Pouls denied this assertion. Lockwood asserted that Pouls approved the plan submitted to PLUS and was present at the PLUS meeting.

Windmill filed an application with the County in July 2005. As stated previously, the evidence showed no requirement that the PLUS application and the County application be filed simultaneously. The responses to the PLUS application are often helpful to the developer in preparing the application to the County. The public hearing for the subdivision application took place in July 2006. The application was deferred because of the lack of a septic feasibility study. By August 10, 2006, the study was submitted to the State and approved by the Division of Water Resources. The subdivision

[11]Lockwood sold Meridian's assets to Artesian Water Company in July 2008.

received preliminary approval in September 2006. Meridian then began to make contact with the various State agencies involved in the planning process. The waste water permits were expected to take the longest to procure. The development was not located in a sewer district run by the County and the developer was required to obtain a permit to construct an on-site system and get the utility company to run it. Because the subdivision included more than 49 units, the developer was required to construct its own sewer system which would eventually be operated by the utility company. Artesian Water Company had been approved to serve as both the water and sewer service.

Jeff Clark of LandTech was hired as a consultant by Pouls in September 2006 to oversee the project. Clark also managed Pouls' other subdivision projects. At trial, Clark had little criticism of Meridian's performance in pursuing approvals for the Windmill project. Clark testified that if he had become aware of unnecessary delays he would have raised the issues.

Duffield was the waste water treatment design engineering firm, with a contract dated December 6, 2006. Windmill hired Duffield for the design of the facility, not for its construction. Duffield projected that the end date would be January 2008. Although this projected date was beyond the 18-month contract completion date, Lockwood asserted that neither Clark nor Pouls objected to it. Pouls denied having agreed to a completion date of January 2008.

At some point, Meridian and Duffield had a disagreement about bills being paid. Artesian had made requests which affected Duffield's design work, and Pouls requested changes in the spray irrigation areas, which also entailed additional work by Duffield. Initially, Meridian resisted paying for the additional work but based on Duffield's breakdown of the work, an agreement was reached. Meridian told Duffield it would take legal action if Duffield stopped working. Nothing in the record shows that Duffield stopped working or otherwise delayed the development process.

Kenneth Christenbury was hired to monitor any delays and report back to Pouls. He testified as an expert witness at trial. Christenbury stated that four years was "excessive" to obtain final approval, that "several avoidable delays" contributed to the excessive length of time. He stated his opinion that three years from the date of application was on the "outside of reasonable[ness]." Christenbury identified options that were apparently not pursued and could have diminished the need for further monitoring and hastened the progress by three to six months. He stated that the soil and wastewater approvals could have been pursued with greater diligence, and that Windmill delayed seeking approval from the Fire Marshall's Office until early 2008. He noted a dispute between Duffield and Meridian where Darin Lockwood did not return phone calls or emails and let certified letters sit idle for more than a month. Christenbury presented a time line showing the effort expended by Windmill and Meridian in the initial 18-month period. Christenbury did not identify any delays that were not explained in a credible

fashion by Lockwood.

Water monitoring was a significant issue. In a new development, monitoring wells have to be installed before the end of a calendar year because ground water is observed from January through May when the water tables are typically area at their highest. This is a crucial factor because a spray effluent will be applied to the ground once the development is up and running, a process known as ground water mounding. The first wet season that could have been monitored was January through May 2006 because the Agreement was not signed until January 2005. DNREC found that lower than usual rains were expected in the 2006 season, but permitted soil scientists to use the data and calibrate it to historical data to obtain an accurate prediction of the effect of the spray effluent on the property in its wettest season. Meridian chose not to make the calibrated projections and instead waited until the 2007 wet season to do the water monitoring. Although this constituted a one-year delay in the water monitoring, the actual monitoring in 2007 took place at the same time as the waste water treatment plant (WWTP) was being designed. The water monitoring was completed only one month after the WWTP was finished. The Court finds this brief delay to be insignificant.

Another issue was wetlands delineation. Any potential wetlands must be identified by a developer and left alone throughout and following the development process. The record shows that two different wetland consultation firms were used by Meridian because the original consultant relocated, and Christenbury was critical of this fact,

although it was out of Meridian's control. The record shows that additional wetlands investigation was required by DelDOT for a condition which was eventually shown to be on another property that was not part of Windmill Estates. Thus, any delay was attributable to DelDOT, not Meridian.

Approval was also needed from the Office of the State Fire Marshall, which oversees road geometry, location of the water district system, water main size and location of hydrants. After the initial plans were submitted, and returned by the Fire Marshall with required changes, Meridian apparently did not respond. But by March 2008, Pouls had announced his intention of not going to closing, so there was no reason for Meridian to complete the fire marshal plan and thus start the five-year Sunset clock.

Based on the record evidence and a review of the parties' post-trial submissions, the Court does not find that Windmill delayed unnecessarily in obtaining the agency approvals. In light of the fact that Windmill knew Pouls was pursuing a second plan, the Court finds that Defendant took reasonable measures to obtain the various approvals.

Pouls' material breach of the contract. Pouls did not voice objections when the target date closing passed in July 2006, and instead paid his third and final deposit under the Agreement in September 2006. During the application process, Pouls agreed to a January 2008 date for obtaining final approval, but then rejected an April 2008 closing date. Windmill continued to pursue the agency approvals. Windmill continued to indicate that April 2008 was the latest date it would go to closing. Pouls made it clear he

would not close in April 2008.

On April, 11, 2008, Pouls sent Lockwood a message stating his belief that Windmill had breached the contract by not using the "best practices" to obtain the approvals. He also indicated that he was ready to file an action against Windmill. Windmill responded with a letter stating its expectation of going forward with closing within 8 to 10 weeks and that Pouls would be considered to be in breach of contract if he did not go forward. Pouls maintains that he was ready, willing and able to go to closing at any time but that Windmill failed to satisfy the condition precedent in a reasonable period time, thus constituting a material breach of the Agreement. On April 16, 2008, counsel for Windmill wrote to say that approvals would be obtained in 8 to 10 weeks and that Windmill expected Pouls to go to settlement. Pouls filed suit in May 2008 for the return of his down payments.

The working relationship between the parties began to fall apart in September 2007, when Lockwood learned from Clark that Pouls was pursuing a 55-and older development plan for the property. Although Lockwood testified that he was not bothered by this fact, he also acknowledged that he slowed down his efforts in obtaining final approvals when Pouls refused an April 2008 settlement date. The Court finds that this refusal on Pouls' part was a defining moment in terms of the Agreement. Windmill was seeking to obtain approvals and to set a definite closing date. In contrast, Pouls refused to agree to proceed to settlement.

A repudiation of a contract is an outright refusal by a party to perform a contract or its conditions.[12] The traditional rule with respect to repudiation is that when one party repudiates a contract, the nonrepudiating party is discharged from its obligation to perform, and can seek damages for the repudiatory breach.[13] A party acts at his peril if he refuses to perform his duty based on a mistaken belief that he is within his rights to do so.[14] Erroneously, Pouls did believe that he was within his rights to refuse to agree to a settlement date because Windmill did not yet have final approval for the project. Windmill acted reasonably in seeking to obtain the approvals until it learned that Pouls would not agree to a settlement date, at which time, it slowed its efforts. The upshot is that Pouls committed a material breach of the contract when he rejected an April 2008 closing date and that Windmill is therefore entitled to retain the deposits in the amount of $500,000.

Verdict is entered for Defendant Windmill in the amount of $500,000, the total amount of deposit money paid by Pouls pursuant to the Agreement.

IT IS SO ORDERED.

Richard F. Stokes

Original to Prothonotary

[12]*Medek v. Medek, CMH, Inc.,* 2009 WL 2005365 (Del. Ch.).

[13]*Id.* at *12 (citing *Morgan v. Wells*, 80 A.2d 504, 506 (Del. Ch. 1951); Restatement (Second) of Contracts § 225 (1981)).

[14]Restatement (Second) of Contracts § 250 cmt. d (1981).