IN THE SUPREME COURT OF THE STATE OF DELAWARE

LA GRANGE COMMUNITIES, LLC,	§	
and LA GRANGE PROPERTIES, LLC,	§	No. 56, 2013
	§	
Defendants Below,	§	Court Below: Superior Court of
Appellant,	§	the State of Delaware in and for
	§	New Castle County
v.	§	
	§	C.A. No. N11C-05-016
CORNELL GLASGOW, LLC,	§	
	§	
Plaintiff Below,	§	
Appellee.	§	

Submitted: July 10, 2013
Decided: September 9, 2013

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

O R D E R

On this 9th day of September, 2013, it appears to the Court that:

(1) Defendants-Below/Appellants La Grange Communities, LLC and La Grange Properties, LLC (collectively "La Grange") appeal from a Superior Court denial of their motion for partial summary judgment, and the court's entry of judgment for Plaintiff-Below/Appellee Cornell Glasgow, LLC ("Cornell"). La Grange raises two claims on appeal. First, La Grange claims Cornell breached its real estate development agreement with La Grange and is not entitled to damages based on what it would have received under that agreement. Second, La Grange claims the doctrine of judicial estoppel precludes Cornell from contesting that the agreement establishes a firm sales pace schedule. We find no merit to La Grange's

appeal and AFFIRM.

(2) In 2005, La Grange Communities, LLC purchased land in Wilmington for the purpose of developing real estate. In 2009, La Grange began negotiations with Cornell, seeking to engage Cornell to construct residences on the purchased land (the "development"). During negotiations Cornell documented several bullet point goals and expectations in an e-mail. The e-mail emphasized that the contract must include a "notice and cure" provision, and noted that "Cornell [agreed] to perform on timeliness of construction (not necessarily perform with regard to sales pace because profits are as important to pace in a lot of ways and pace is a wildcard in this economy)."[1]

(3) Cornell and La Grange executed a real estate development contract (the "Agreement"). Under the Agreement, La Grange gave Cornell the exclusive right to build, market, and sell 185 of the 227 residences in the development. Residences were town houses, duplexes or single-family homes. La Grange was required to complete all necessary site improvements before Cornell began building on the lots. Cornell was required to design, construct, market and sell the residences. La Grange was required to reimburse Cornell for the costs and expenses thereto. The Agreement contemplated that upon the closing of each sale, Cornell would be paid a fix management fee. The parties would then share profits

[1] Appendix to Appellant's Opening Brief (herein "App.") at A114-15.

from the development once sales exceeded a threshold of profitability.

(4) Consistent with the parties' negotiations, the Agreement included a "time is of the essence" provision and a "Sales Projection Schedule" for the residences. The "time is of the essence" provision (the "Time provision") stated, "Time is of the essence as to all matters to be performed by the parties under this Agreement."[2] The Sale Projection Schedule projected the number of each type of residence to be sold every financial quarter for eleven quarters. The Agreement stated, "La Grange hereby grants to Cornell the right to undertake the Construction Project per the timeframe set forth in the Sales Projection Schedule . . . commencing on the date of this Agreement . . . in accordance with the provisions of this Agreement."[3]

(5) The agreement also required that, by November, 2009, each party would independently obtain financing to support their obligations. Cornell obtained a revolving line of credit by the deadline. La Grange did not obtain financing due to federal lending limits and La Grange's existing outstanding debt. This led Cornell and La Grange to negotiate an amendment to the Agreement (the "Amendment"). Under the Amendment, Cornell paid off some of La Grange's debt, which freed La Grange to procure the requisite financing. In exchange, La Grange gave Cornell the exclusive right to design, construct, market, and sell all 227 residences on the

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[2] App. at A153.
[3] App. at A142.

development. Deeds to 20 of the residential lots were placed in escrow to be released to third-party buyers upon a sale or to Cornell upon a default by La Grange under the Agreement or the Amendment.

(6) Once the Agreement and Amendment were finalized the parties began performance. By June, 2010, Cornell's sales of town houses and duplexes were ahead of the Sales Projection Schedule, but sales of single-family homes lagged. Even with the low single-family homes sales pace, the development's total profitability was $250,000 ahead of projections by September, 2010. Around this same time, disputes concerning the reimbursements to Cornell and related accounting practices began.

(7) In January, 2011, La Grange sent an e-mail to Cornell documenting multiple concerns including, *inter alia*, ongoing accounting disputes. By early February the relationship between the parties had deteriorated to the point that management and counsel from both parties expressed the desire to terminate the business arrangement. An attorney representing Cornell faxed and e-mailed a Notice of Default to La Grange concerning La Grange's refusal to reimburse Cornell for costs and expenses under the Agreement. Later that same day, La Grange's head management official entered Cornell's sales office on the development and informed the Cornell staff that they were to immediately leave and not return. Cornell sent a second Notice of Default to La Grange reiterating

the original reimbursement claims and adding ouster from the development as a claim. Cornell then instructed the escrow agent to release a deed to satisfy La Grange's default. The deed Cornell sought was to Lot 206, upon which a model residence with improvements had been constructed by Cornell. Cornell came to learn that La Grange had already drafted a new deed to Lot 206 and had conveyed the model residence to a buyer.

(8) Cornell filed two complaints in the Superior Court,[4] one alleging breach of contract and the other alleging wrongful conveyance of Lot 206 by La Grange. The two complaints were coordinated for trial. La Grange moved for partial summary judgment, arguing that Cornell's failure to sell the single family homes in accordance with the Sales Projection Schedule constituted a breach of the Agreement. The trial court denied La Grange's motion, finding "some ambiguity in the agreement" and determining "that there is need for additional evidence regarding enforcement of the 'time is of the essence' provision."[5] After a trial, the Superior Court found in favor of Cornell on both claims.[6] The trial court found that the Sales Projection Schedule did not create firm deadlines that could be

[4] Cornell first filed a complaint in the Court of Chancery, seeking mandatory injunctive relief and specific performance on the Agreement. When expedited discovery revealed a possibility that La Grange did not have the resources to perform on the Agreement, Cornell made a motion, which was granted, to transfer the case to Superior Court for the purpose of pursuing monetary damages.

[5] *Cornell Glasgow, LLC* v. *La Grange Properties, LLC,* C.A. Nos. N11C-05-016; N11C-07-160 (Del. Super. Sept. 19, 2012) (TRANSCRIPT).

[6] *Cornell Glasgoc, LLC v. La Grange Properties*, 2012 WL 6840625 (Del. Super. Dec. 7, 2012).

enforced under the time is of the essence" provision.[7] The trial court found also, "As made evident throughout the trial, the parties were focused on pace and profitability, with profitability being the most critical element of the endeavor."[8] Accordingly, the court found the Time provision could not be applied to the Sales Projection Schedule, as the latter was not intended to set periodic deadlines but rather a timeline that, if followed, would make the venture profitable. The trial court concluded that Cornell did not violate the Time provision with its lagging single-family home sales.

(9) On the first claim the court awarded Cornell compensatory damages for reimbursement of costs and expectation damages for the lost future management fees under the Agreement. On the second claim the court found Cornell failed to prove the Lot 206 conveyance by La Grange was actionable under the contract. But the court found Cornell was entitled to be reimbursed for the improvements it made to Lot 206 and awarded Cornell compensatory damages based on construction and loan costs. This appeal followed.

(10) On appeal, La Grange first claims that as Cornell breached the agreement by failing to sell single-family homes on schedule and therefore the trial court should have granted its motion for summary judgment. This Court reviews the trial court's denial of summary judgment *de novo* "to determine whether,

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[7] *Id*. at *12.
[8] *Id*. at *2.

viewing the facts in the light most favorable to the nonmoving party, the moving party has demonstrated that there are no material issues of fact in dispute and that the moving party is entitled to judgment as a matter of law."[9] "In an appeal from the entry of a civil judgment following a Superior Court bench trial, this Court will uphold the judge's factual findings if they are sufficiently supported by the record and not clearly erroneous . . . ."[10] This Court reviews contract interpretation *de novo*.[11]

(11) Summary judgment is awarded and upheld in "contract disputes where the language at issue is clear and unambiguous."[12] Summary judgment is improper "where reasonable minds could differ as to the contract's meaning," because the result is "a factual dispute [where] the fact-finder must consider admissible extrinsic evidence."[13] In contract interpretation, this Court "give[s] priority to the parties' intentions as reflected in the four corners of the agreement."[14] This Court "construe[s] the agreement as a whole, giving effect to all provisions therein."[15] "The meaning inferred from a particular provision cannot control the meaning of

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[9] *State Farm Mut. Auto. Ins. Co. v. Patterson*, 7 A.3d 454, 456 (Del. 2010) (*quoting Brown v. United Water Delaware, Inc.*, 3 A.3d 272, 275 (Del. 2010)).
[10] *Lorenzetti v. Hodges*, 62 A.3d 1224, 2013 WL 592923, at *3 (Del. 2013) (*citing Homestore, Inc. v. Tafeen*, 888 A.2d 204, 217 (Del. 2005)).
[11] *GMG Capital Invs., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 779 (Del. 2012) (*citing Paul v. Deloitte & Touche, LLP*, 974 A.2d 140, 145 (Del. 2009)).
[12] *Riverbend Community, LLC v. Green Stone Engineering, LLC*, 55 A.3d 330, 334 (Del. 2012) (citation omitted).
[13] *GMG Capital*, 36 A.3d at 783 (*citing Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997)).
[14] *Id.* at 779 (*citing Paul*, 974 A.2d at 145).
[15] *E.I. du Pont de Nemours & Co. v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del. 1985).

the entire agreement if such an inference conflicts with the agreement's overall scheme or plan."[16] This Court "will interpret clear and unambiguous terms according to their ordinary meaning."[17] This Court will find ambiguity exists "[w]hen the provisions in controversy are fairly susceptible of different interpretations or may have two or more different meanings."[18] Where the contract is ambiguous, "the interpreting court must look beyond the language of the contract to ascertain the parties' intentions."[19]

(12) First, we consider whether the trial court was correct in finding that the Agreement was ambiguous and denying La Grange's partial motion for summary judgment. La Grange argues the Sales Projection Schedule unambiguously created firm deadlines for Cornell to meet or be found in breach of the Agreement. The court denied summary judgment, as it found the Agreement to be ambiguous because while the Time provision viewed in isolation is clear, the Sales Projection Schedule is open to interpretation. "[R]easonable minds could differ"[20] as to whether the purpose of the Sales Projection Schedule was to ensure profitability versus sales pace, or whether the meaning of "projection" established a firm deadline versus an aspirational guideline for Cornell to follow. Accordingly, the trial court appropriately denied summary judgment and continued with trial to

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[16] *GMG Capital*, 36 A.3d at 779 (*citing Shell Oil*, 498 A.2d at 1113).
[17] *Id.* at 780 (*citing Paul*, 974 A.2d at 145).
[18] *Eagle Indus.*, 702 A.2d at 1232.
[19] *Id.*(citations omitted).
[20] *GMG Capital*, 36 A.3d at 783 (Del. 2012) (citation omitted).

consider extrinsic evidence on the parties' intentions in forming the Agreement.

(13) The trial court appropriately considered extrinsic evidence to resolve the ambiguity. The trial court considered Cornell's customary use of Lot Purchase Agreements, not Sale Projection Schedules, to set firm deadlines. The court also considered testimony from Cornell management that the company would not have entered into an agreement with firm sales pace deadlines in a deeply depressed real estate market. Further, the court took note that La Grange failed to amend the Sales Projection Schedule during negotiations for the Amendment, which indicates that both parties made an informed choice by using a "projection" in the contract, indicating a focus on total profitability over a required sales pace.

(14) La Grange argues the trial court erred by adopting the wrong definition of "projection." The court used the ninth definition of "projection" listed on the Merriam-Webster website: "an estimate of future possibilities based on a current trend." The trial court also looked to *In re Oracle*,[21] which equates "projection" to a market estimate. While we question the applicability of *Oracle* due to its distinct facts, we find no reversible error in the trial court's determination that the Sales Projection Schedule did not set a firm deadline, but rather established sales benchmarks which would, if followed, ensure a profitable venture.

(15) After construing the terms of the contract in light of the extrinsic

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[21] *In re Oracle*, 867 A.2d 904, at 940-41 (Del. Ch. 2004) ("[A] projection is, at best, a good faith estimate of how a company might perform in the future; it is by no means a warranty that can be blindly relied upon.").

evidence, the trial court found that the parties intended the Time provision to apply only to deadlines and strict dates, not projections like the Sales Projection Schedule.[22] As the trial court found:

> [A] clear and unambiguous "time is of the essence" provision cannot simply be ignored. The Court must presume that the parties included the provision for a reason. Standing alone, a time is of the essence provision is too broad to be the basis of an actionable breach claim; but the provision coupled with a proven deviation from a firm contractual time deadline will support a breach claim.[23]

The Agreement had dates and deadlines in other provisions subject to the Time provision. The trial court "read [the] contract as a whole,"[24] and made a reasonable distinction between these firm deadlines and the less defined Sale Projection Schedule that was consistent with "the agreement's overall scheme or plan."[25]

(16) La Grange next claims that Cornell is judicially estopped from contesting that the Sales Projection Schedule establishes firm deadlines because Cornell successfully argued, in relation to another issue that the Sales Projection Schedule set a clear timeframe for performance. "The determination of judicial estoppel is a question of law and is reviewed *de novo*."[26]

(17) Judicial estoppel is intended to preclude a party from arguing a position

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[22] *Cornell*, 2012 WL 6840625, at *11-12.
[23] *Id.* at *11.
[24] *Cornell*, 2012 WL 6840625, at *11, n. 133 (*quoting Estate of Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010)).
[25] *Id.* (*citing Shell Oil*, 498 A.2d at 1113).
[26] *Motorola Inc. v. Amkor Technology, Inc.*, 958 A.2d 852, 859 (Del. 2008) (*citing B.F. Rich & Co. v. Gray*, 933 A.2d 1231, 1241 (Del. 2007)).

that is inconsistent with a position taken in the same or earlier related legal proceeding.[27] The purpose of the doctrine is to protect the integrity of the judicial proceedings.[28] The two requirements of judicial estoppel are that a litigant advances "an argument that contradicts a position previously taken by that same litigant, and that the Court was persuaded to accept as the basis for its ruling."[29]

(18) In Cornell's wrongful conveyance action against La Grange concerning the conveyance of Lot 206 (the "Lot 206 proceeding"), La Grange argued the automatic conveyance of an escrowed deed to Cornell upon a La Grange default was an interest that violated the rule against perpetuities (the "Rule"). The Rule provides that "[n]o interest is good unless it vests, if at all, not later than twenty-one years after some life in being at the creation of the interest."[30] If there is any possibility the interest will vest beyond this period, then the interest is void.[31] La Grange argued that the interest in the deed could conceivably not vest to Cornell until after 21 years after all lives in being, and thus it was void under the Rule. Cornell argued the Rule did not apply, because the Sales Projection Schedule provided that all houses would be sold within eleven quarters (2 ¾ years).

(19) La Grange argues now that Cornell is precluded from arguing the Sales

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[27] *Id.*
[28] *Id.* (*citing State v. Chao*, 2006 WL 2788180, at *9 (Del. Super. Sept. 25, 2006)).
[29] *Siegman v. Palomar Med. Techs., Inc.*, 1998 WL 409352, at *3 (Del. Ch. Jul. 13, 1998) (citation omitted).
[30] *Stuart Kingston, Inc. v. Robinson*, 596 A.2d 1378, 1383 (Del. 1991) (citation omitted).
[31] *Id.* (citation omitted).

Projection Schedule in the Agreement is not a firm deadline because that would be inconsistent with its position in the Lot 206 proceeding. La Grange argues that the trial court found the Agreement stated lots must be sold by eleven quarters or that Cornell would be subject to default under the Agreement. La Grange contends Cornell successfully argued for a strict deadline interpretation of the agreement and that the court relied on that position in its decision.

(20) Cornell's argument that the Sales Projection Schedule required all homes to be sold within eleven quarters is not inconsistent with Cornell's prior position. Cornell does not argue that the Sale Projection Schedule was unenforceable in any way, only that it did not establish firm periodic deadlines. As Cornell's position is not inconsistent,[32] judicial estoppel is not applicable.

(21) NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

/s/ Henry duPont Ridgely
Justice

[32] *Motorola,* 958 A.2d at 859-60.