C.T. HOME BUILDERS, INC. and HI-TECH HOMES, INC.	*	IN THE CIRCUIT COURT
	*	FOR WORCESTER COUNTY
Plaintiffs	*	STATE OF MARYLAND
v.	*	CASE NO. 23-C-02-000934-PS
STERLING S. WYAND, and CAROLYN W. BYERS	*	
	*	
Defendants		

* * * * *

TRIAL MEMORANDUM

NOW COME Plaintiffs, by and through their undersigned counsel, Bruce F. Bright and Ayres, Jenkins, Gordy & Almand, P.A., and, for set forth herein requests that this Honorable Court enter judgment in Plaintiffs' favor:

STATEMENT OF FACTS

The facts of this case, as presented at trial, are relatively simple, and there are few factual disputes. The parties entered into an "Unimproved Land Agreement of Sale" ("Agreement") on or about June 4, 2002. Under the Agreement, Plaintiff Hi-Tech Homes, Inc. ("Hi-Tech Homes") and its assigns agreed to purchase a piece of unimproved property located in Ocean Pines from Defendants Sterling Wyand ("Wyand") and Carolyn Byers ("Byers"). Plaintiff C.T. Homebuilders, Inc. ("C.T. Homebuilders"), is the assignee of Hi-Tech Home's rights and obligations under the Agreement. Terry Moeller, who testified at trial on Plaintiffs' behalf, is a shareholder and officer of Hi-Tech Homes and CT Homebuilders, and acted on behalf both corporations in connection with the subject transaction. Tr. at p. 42. The agreed-upon purchase price was $51,000.

Under the terms of the Agreement, settlement was originally scheduled for July 19, 2002. The transaction was a "cash deal," meaning that there was no financing contingency in the Agreement, and Plaintiffs did not have to apply for and obtain a mortgage loan in order to finance the purchase of the property.

Sometime prior to July 19th, the parties agreed to an extension of the settlement date to July 30, 2002.[1] A written addendum to the Agreement was eventually signed by Mr. Moeller on July 19, 2002, and by Mr. Wyand and Ms. Byers on July 23, 2002, formally extending the settlement date to July 30, 2002.

On July 27, 2002, Mr. Wyand and Ms. Byers visited Will Esham's office to sign all of the settlement documents (the settlement statement, seller's affidavit, and deed). Mr. Esham permitted them to sign the documents early as an accommodation to their scheduling needs. Tr. at pp. 15-17. On July 29, 2002, Mr. Moeller contacted the offices of T.E.B. Associates, a private

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[1] Mr. Moeller testified at trial that, in late June 2002, he realized that the originally agreed upon settlement date of July 19th would conflict with a family vacation, so he contacted his realtor, Charlie Kurrle, in order to secure an extension of the settlement date. Tr. at pp. 64-66. Mr. Moeller testified that, by late June or early July, he knew that the settlement was not going to occur on July 19, 2002, and that it was re-scheduled for July 30, 2002. A written addendum to that effect was signed by Mr. Moeller on July 19, 2002, and was signed by Mr. Wyand and Ms. Byers on July 23, 2002. Mr. Moeller testified similarly during his deposition that, "at least a couple of weeks" prior to July 19th, he had arranged for the extension through his realtor, Mr. Kurrle. *See* Tr. at pp. 71-72. Mr. Moeller testified further during his deposition that Mr. Kurrle notified him sometime in early July that Mr. Wyand and Ms. Byers had agreed to the extension. Tr. at p. 72. (Those portions of Mr. Moeller's deposition transcript were read into evidence during the trial by Defendants' counsel).

Chuck Leo, the Defendants' real estate agent, testified that he was not contacted about the extension until shortly before July 19th, perhaps as early as July 17th, and that, although the written addendum was not signed until later, the extension was orally agreed to by Mr. Wyand and Ms. Byers as early as July 17th. Tr. at pp. 76-78, 80-82. Mr Wyand testified that he and Ms. Byers orally agreed to the extension on July 18th. Tr. at p. 86. Mr. Kurrle (Plaintiffs' real estate agent) testified that Mr. Moeller notified him sometime shortly before July 19th that he "was going to be out of town" on the originally agreed upon settlement date, and that he immediately took steps to arrange for an extension. Tr. at pp. 87-88.

group of real estate development investors with which Mr. Moeller had a $300,000 line of credit (Tr. at pp. 42-43, 53-54), in order to make arrangements for the wiring of the settlement funds to Mr. Esham's escrow account. Tr. at p. 43.[2] Mr. Moeller left a message with his contact at T.E.B. Associates, Bob Black, who was not available to speak with him at that time. Tr. at p. 43. The next day (July 30, 2002), Mr. Moeller called T.E.B. Associates once again, and he was informed by Mr. Black's secretary that he would be unavailable for several days (at a conference in Pittsburgh, Pennsylvania). Tr. at pp. 43-44.

In order to make arrangements for wire transfers drawn from his line of credit, Mr. Moeller was required to deal directly through Mr. Black. Tr. at p. 43. Accordingly, when he learned on July 30th that Mr. Black would be unavailable for several days, Mr. Moeller contacted Mr. Esham's office, and informed his assistant, Carol, that the wiring of the settlement funds would be delayed for several days. Tr. at pp. 44, 47, 56.

Around noon on July 30, 2002, Mr. Wyand visited Mr. Esham's office to receive the settlement proceeds.[3] Mr. Esham informed Mr. Wyand at that time that Mr. Moeller had not wired the funds, and he asked Mr. Wyand to come back later in the day. *See* Affidavit of W. Esham; Tr. at p. 18. Later that same day, Mr. Wyand came back to Mr. Esham's office, and Mr.

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2 Mr. Moeller had dealt with T.E.B. Associates on at least ten occasions prior to the subject transaction, and he believed, based on his prior experience with T.E.B. Associates, that he could arrange for the wire transfer to be effected on the same day that he contacted Mr. Black. Tr. at pp. 43, 49-50, 67. The subject transaction was the first time that Mr. Moeller had ever experienced any logistical problems with the use of his credit line with T.E.B. Associates. Tr. at p. 67.

3 A formal settlement (at which the parties would all gather together to sign all of the documents) was not necessary in this case, because Defendants had signed the documents on July 27th and, all that Mr. Moeller was required to sign was the settlement statement, which he had arranged to do by facsimile. Tr. at pp. 19-20, 70.

Esham informed him that Mr. Moeller had not yet wired the funds, and that he would send Mr.Moeller a fax on July 31 instructing him to wire the funds. *See* Affidavit of W. Esham; Tr. at p. 19. Mr. Wyand expressed his displeasure at that time, but did not state that he would not go through with the transaction. *See* Affidavit of W. Esham; Tr. at p. 19, 21.

By facsimile letter sent in the morning of July 31, 2002, Mr. Esham informed Mr. Moeller as follows: "Please call me ASAP with the name of your broker - so that I may obtain a tracking number for the wire. The Seller is not happy - I need to provide definite information the money is on the way. Thank you." Affidavit of W. Esham. Later that same day, July 31, 2002, Mr. Moeller called Mr. Esham's office to provide the requested information regarding the source of the settlement funds, and assured him that the money would be wired within a few days. Affidavit of W. Esham. Also on July 31, 2002, Mr. Wyand visited Mr. Esham's office to see once again if he could pick up his check. Affidavit of W. Esham; Tr. at p. 21. When Mr. Esham informed Mr. Wyand that he did not have the check for him because the money had not yet been wired, Mr. Wyand stated that he viewed the contract to be "null and void." Affidavit of W. Esham; Tr. at p. 21.

On August 1, 2002, Mr. Wyand and Ms. Byers met with their realtor, Chuck Leo, and re-activated their listing and increased their asking price by $15,000. Tr. at pp. 21-22; Plaintiff's Trial Exh. 6. They were told by Mr. Leo during that meeting that an offer had recently been made to purchase a neighboring lot for $70,000. Tr. at p. 26. Up to that point in time, Mr. Wyand had not been informed by anyone that Mr. Moeller did not intend to follow through with the purchase. Tr. at p. 24. Indeed, at all relevant times, Mr. Moeller intended to follow-through with the transaction. Tr. at pp. 49-50. From July 31st forward, however, Mr. Wyand and Ms.

Byers considered the Agreement to be "null and void," and they had absolutely no intention of completing the transaction. Tr. at p. 25.

On August 5, 2002, Mr. Moeller's settlement funds ($52,141.43) were wired to Mr. Esham's escrow account. *See* Affidavit of W. Esham. That same day, Mr. Esham spoke with Sterling Wyand and advised him that the settlement funds had been received, and that his check was ready to be picked up. Mr. Wyand told Mr. Esham "too late," and informed him once again that he did not wish to complete the settlement. *See* Affidavit of W. Esham. Mr. Esham also notified Chuck Leo on August 5, 2002, that the settlement funds had been wired, and Mr. Leo, in turn, notified Mr. Wyand of the wire transfer that same day. Tr. at p. 84.

QUESTION PRESENTED

Whether Plaintiffs are entitled to specific performance of the contract, under circumstances where: (i) there was no language in the Agreement making time of the essence; (ii) the six-day delay was not unreasonable; (iii) the delay was not wilful; and (iv) Defendants did not suffer any prejudice as a result of the delay.

ARGUMENT

The law in this State with regard to specific performance of a contract for the sale of real estate is well-settled. "[T]he general rule is that time is not of the essence of the contract of sale and purchase of land unless a contrary purpose is disclosed by its terms or is indicated by the circumstances and object of its execution and the conduct of the parties." *Kasten Co. v. Maple Ridge Co.*, 245 Md. 373, 377 (1966). In other words, in the context of real estate contracts, time is not of the essence unless "it is clear that the parties have expressly so stipulated or their intention is inferable from the circumstances of the transaction, the conduct of the parties, or the

purpose for which the sale was made." *Id*. at 377.

In *Soehnlein v. Pumphrey*, 183 Md. 334 (1944), the Court of Appeal described the general rule as follows:

> The accepted doctrine is that in the ordinary case of contract for the sale of land, even though a certain period of time is stipulated for its consummation, equity treats the provision as formal rather than essential, and permits the purchaser who has suffered the period to elapse to make payments after the prescribed date, and to compel performance by the vendor notwithstanding the delay, unless it appears that time is of the essence of the contract by express stipulation, or by inference from the conduct of the parties, the special purpose for which the sale was made, or other circumstances surrounding the sale.

Id. at 338. The above-stated rule is subject to certain qualifications -- if the delay is wilfully (i.e., intentionally) caused by the buyer, or if the delay results in some prejudice to the seller, then the buyer may not be entitled to specific performance. *Cadem v. Nanna*, 243 Md. 536, 545 (1966); *Soehnlein v. Pumphrey*, 183 Md. at 338. Notably, in *Kasten Co. v. Maple Ridge Co.*, even though the Court of Appeals found that the buyer had been "somewhat neglectful in not paying the balance of the purchase money on the day it was due," it nevertheless affirmed the lower court's decree awarding specific performance. *Kasten Co. v. Maple Ridge Co.*, 245 Md. at 378.

The Court of Appeals has held that, when the contract of sale contains language to the effect that the deposit shall be automatically forfeited to the seller if settlement is not completed within the specified time period, time is implicitly of the essence with regard to such contract. *See Stern v. Shapiro*, 138 Md. 615 (1921). When time is not of the essence, either explicitly or implicitly, and the buyer's payment of the purchase price is delayed beyond the contractually agreed-upon settlement date, "the important question is whether [such delay] was reasonable." *Kasten Co. v. Maple Ridge Co.*, 245 Md. at 379.

In the present case, it is undisputed that there is no language in the original Agreement, or

the addendum extending the settlement date, explicitly making time of the essence. In acknowledging that there was no language in the Agreement or the addendum making time of the essence, Defendants' realtor, Chuck Leo, testified at trial as follows: "Had I known better I definitely would have [inserted the appropriate language]. It's standard in our home contracts to have the time is of the essence clause. Why it's not standard in the land agreements, I don't know." Tr. at p. 80.

Defendants have suggested that the "Default" language in the Agreement implicitly made time of the essence. This is clearly not so. As the Court of Appeals held in *Stern v. Shapiro*, an *automatic forfeiture* clause may give rise to an inference that time is of the essence. In the present case, however, the Agreement does not provide for automatic forfeiture of the deposit in the event of the buyer's failure to settle on the settlement date. Instead, the Agreement provides (in paragraph 16) that: "[i]f the Buyer fails to make full settlement or is in default due to Buyer's failure to comply with the terms, covenants and conditions of this Agreement, *the deposit may be retained by Seller as long as a release of deposit agreement is signed and executed by all parties*, expressing that said deposit may be retained by Seller." (emphasis added).[4]

Neither the conduct of the parties, the purpose(s) for which the sale was made, or any other circumstances surrounding the sale, can properly be regarded as implicitly making time of the essence. Indeed, at no time until July 31, 2002, did Mr. Wyand or Ms. Byers ever indicate or express, either orally or in any written document, that they regarded the settlement date as essential. Mr. Moeller testified emphatically that, at all relevant times, he intended and desired to

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[4] That provision states further that if "the parties do not agree to execute a release of deposit, Buyer and Seller shall have all legal and equitable remedies."

follow through with the transaction (Tr. at p. 50), and his conduct throughout the chronology demonstrated so. There was absolutely nothing about the purpose of the transaction or the surrounding circumstances that implicitly made time of the essence — this was a "garden variety" arms-length sale of an unimproved piece of property. Accordingly, it is Plaintiffs' position, and the record clearly demonstrates, that time was not of the essence, either explicitly or implicitly, with regard to the settlement date or any other aspect of the Agreement.

That being the case, the next part of the analysis is determining whether the delay was "willfully," i.e., deliberately, caused by Mr. Moeller, and whether Defendants suffered any prejudice or harm as a result of the six-day delay.

The record is clear that the delay was not in any way willful on the part of Mr. Moeller. His uncontradicted testimony was that the delay resulted from unforeseen logistical difficulties he encountered with regard to the wiring of the settlement funds. As Mr. Moeller testified, he called T.E.B. Associates on July 29th to make arrangements for the wire transfer. Tr. at p. 57. The individual with whom Mr. Moeller had always dealt at T.E.B. Associates, Bob Black, was out of town at a conference, and the wire transfer could not be effected without Mr. Black's involvement. Tr. at pp. 43-44. At worst, Mr. Moeller might arguably have been guilty of some level of neglect in not confirming Mr. Black's availability and/or arranging for the wire transfer earlier than July 29, 2002, but nothing in the record demonstrates or even suggests that Mr. Moeller willfully delayed the settlement.

As for the issue of prejudice to the Sellers, there is no evidence any where in the record that Mr. Wyand or Ms. Byers suffered any prejudice as a result of the six-day delay. Indeed, although Mr. Wyand testified that he planned to use the proceeds for the sale toward the purchase

of one or more other properties, he conceded that the six-day delay in the wiring of the funds did not prevent or impede his ability to purchase any other properties. Tr. at p. 41.

There was extensive questioning of Mr. Moeller during trial (by the Court and Defendants' counsel) regarding what steps he took, prior to the original settlement date of July 19, 2002, to prepare for settlement. First, according to the testimony elicited at trial, Mr. Moeller was aware at least two (2) days prior to July 19th, and possibly much earlier, that the settlement was not going to occur on July 19th. *See infra* fn. 1. In light of the fact that there was nothing for him to do to "prepare for settlement" other than wire the funds, and he was operating on the reasonable assumption (based on prior experience with T.E.B. Associates) that a wire transfer could be effected with very little advance notice, it should not be surprising that Mr. Moeller did not take any steps to prepare for a July 19th settlement. By all accounts, Mr. Moeller already knew by no later than July 17th (and perhaps much earlier) that the settlement date had been extended.

Secondly, even assuming *arguendo* that Mr. Moeller *willfully* delayed the settlement beyond July 19th (which he clearly did not), that would not provide a valid basis for denying Plaintiffs the remedy they seek herein (specific performance). Because the Agreement was amended by the parties, and the settlement date was thereby extended from July 19, 2002 to July 30, 2002, Defendants forever lost whatever standing or right they may once have had to complain about Plaintiffs' (and Mr. Moeller's) conduct with regard to the July 19th settlement date. In other words, once the settlement date was extended by a written amendment signed by all of the parties to the Agreement, whether and to what extent Mr. Moeller took steps to prepare for settlement on July 19th became completely irrelevant to the issue that is at hand in this case,

Plaintiffs' entitlement to the remedy of specific performance.

Defendants suggested at trial that Plaintiffs somehow breached paragraph 14 of the Agreement (dealing with Buyer's financial ability to consummate the deal), and that they should be denied relief on that basis. Paragraph 14 of the Agreement provides, in pertinent part, that "[i]f Buyer has misrepresented Buyer's ability to consummate the purchase of the Property, . . . then buyer shall be in default and Seller may elect by written notice to Buyer, to terminate this Agreement and/or pursue the remedies set forth under the Default paragraph."

Mr. Moeller never misrepresented Plaintiffs' financial ability to consummate the deal, and there is absolutely no evidence demonstrating or suggesting that he did. At all relevant times, Mr Moeller had a $300,000.00 line of credit at his disposal and available for use in connection with the subject transaction. There was no "application" process or other underwriting review which was a necessary precursor to Mr. Moeller's use of his line of credit; all that was required for him to do was to make contact with Mr. Black and arrange for a wire transfer. Indeed, the record is clear that all necessary settlement funds were, in fact, wired by T.E.B. Associates to Will Esham's escrow account on Monday, August 5, 2002, soon after Mr. Black's return from his conference in Pittsburgh.

Contrary to the apparent belief of Defendants and their counsel, the phrase "cash deal," as it is used in connection with real estate transactions, does not mean or imply that the Buyer must provide all settlement funds out of his own checking or savings account. Rather, it simply means that the buyer's obligation to perform is not contingent upon or subject to his or her obtaining a mortgage loan for the purchase monies. In the present case, Plaintiffs had settlement funds available, in the form of the line of credit with T.E.B. Associates, prior to entering into the

Agreement and at all other relevant times. Plaintiffs were no less financially able to consummate the deal than if $300,000 had been on deposit in one of their bank accounts.

CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that this Honorable Court grant Plaintiffs all of the relief they seek in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this 24th day of September, 2003, a copy of the foregoing Trial Memorandum was served, via first class mail, postage prepaid mail, upon: James C. Hubbard, Esq., 11042 Nicholas Lane, Ste. B-204, Berlin, Maryland, 21811-3299.

Bruce F. Bright