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SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
MONMOUTH COUNTY
DOCKET NO. MON-C-128-23

BRANDON HERON,

Plaintiff,

v.

ALLIED ASSOCIATES & DISTRIBUTING COMPANY OF NEW JERSEY; and ESTATE OF MADELINE HENNESSEY,

Defendants.

OPINION

Decided February 18, 2025.

Maxwell, Tassini & Gardner, LLC (Daniel Jude Maxwell, Esq., appearing), attorneys for plaintiff.

McOmber McOmber & Luber (Stephen J. Caccavale, Esq., appearing), attorneys for defendant.

FISHER, P.J.A.D. (t/a, retired on recall).

Nearly five years ago – on February 27, 2020 – plaintiff Brandon Heron and the late Madeline Hennessey (Sally) executed a document,[1] prepared by Sally without any input from attorneys, labeled "Addendum To My Will." By way of this document, Sally purported to "authoriz[e]" defendant Allied Associates & Distributing Company of New Jersey, a corporation she wholly owned, to sell certain Ocean Township property[2] to plaintiff "[u]pon her death" "for the agreed upon selling price of $600,000." The document, prepared by and authored in Sally's voice,[3] also stated that it "will be attached to my Will and will be in the possession of my attorney," who was identified by name. Sally lastly stipulated in the document that she was "in full possession of [her] faculties and senses."[4]

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[1] The parties stipulated that the document was signed by both – their signatures were also witnessed (and the two attesting witnesses both testified and confirmed the execution of the document) – and that D-8 is an authentic copy of it.

[2] The property was identified in this document as 2513 and 2515 Asbury Avenue, Ocean Township. Testimony described this property as being a bit less than one acre on which sits two single-family homes and a two-car garage. Sally leased the two homes to others and leased to plaintiff the two-car garage from which, since 2001, he has operated his masonry business.

[3] For that reason, "My Will" in the document's title refers to Sally's Will, not plaintiff's or anyone else's.

[4] Sally's capacity to execute such a document and make any such conveyance has not been questioned by any party.

Sally died on February 10, 2022. After waiting an appropriate amount of time following her death, plaintiff inquired about when the closing might occur. Sally's estate eventually expressed its unwillingness to convey the property to him by putting the property on the market, prompting plaintiff to commence this suit in September 2023, asserting a breach of contract, a breach of the implied covenant of good faith and fair dealing, fraud, equitable fraud, and promissory estoppel. Plaintiff has also asserted, by way of an amended complaint allowed after trial commenced, a claim that seeks a judgment enforcing the document as a codicil to Sally's Will.[5]

A two-day trial started on December 17, 2024, and then resumed and concluded on January 22, 2025.[6] Despite the many theories asserted by plaintiff, the chief question concerns whether D-8 constitutes an enforceable contract to sell real property.

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[5] Although, in the interest of liberality, see Printing Mart-Morristown v. Sharp Elec. Corp., 116 N.J. 739, 746 (1989), plaintiff's late request for an amendment of the complaint is hereby granted, the question whether D-8 might be considered a codicil to or part of Sally's Will need not be reached because the elements necessary to grant that relief are more onerous than the question whether D-8 constitutes an enforceable contract, which the court finds.

[6] On those two days, the court heard testimony in this non-jury matter from plaintiff, Keith Ritson, Betsy Moreno, Reem Gomez, for plaintiff, and Mark Hennessey and Elizabeth Lane, for defendants, and received a handful of documents into evidence. The parties provided their written summations on February 7, 2025.

Going back to basics, a contract "arises from offer and acceptance," Weichert Co. Realtors v. Ryan, 128 N.J. 427, 435 (1992); this exchange must be sufficiently definite "that the performance to be rendered by each party can be ascertained with reasonable certainty," West Caldwell v. Caldwell, 26 N.J. 9, 24-25 (1958). The court finds from plaintiff's credible testimony that he and Sally had negotiated about this subject at times prior to the creation of D-8. Sally eventually agreed on the basic terms; in fact, it was she who prepared D-8. Clearly, Sally was a willing seller but, as the testimony also revealed, her accountant suggested tax problems that would arise if the transaction occurred prior to her death. It is that wrinkle that generated the parties' dispute.

Having carefully weighed the evidence and considered the parties' legal arguments, the transaction's essentials are clearly expressed in D-8. The property was identified by reference to its street addresses, and the purchase price was fixed at $600,000. No one has suggested any confusion or ambiguity about the identity of the property to be sold or the price plaintiff was to pay. In addition, there were no contingencies – except for the timing of the transaction – since D-8 unambiguously declared the property to be conveyed would be in "as is" condition.[7] To the extent the time for the transaction could be viewed as

[7] Perhaps there could have been an argument about whether this "as is" provision meant the property at the time of closing was to be in the condition it was when the contract was executed – and not the condition at the time of closing – but no

essential or material, D-8 clearly called for the transaction to occur after Sally's death. To the extent that term might be argued to be indefinite, a court could certainly fill in the gap of when after Sally's death closing would occur and would conclude, by implication, that the parties intended closing would occur within a reasonable time after Sally's death. See Becker v. Sunrise at Elkridge, 226 N.J. Super. 119, 129 (App. Div. 1988); River Dev. Corp. v. Liberty Corp., 45 N.J. Super. 445, 464 (Ch. Div. 1957).[8]

Since D-8 called for a sale of real property, the court must also be assured that it meets the Statute of Frauds' requirements. That is, to be enforced, the contract must contain: a "description of the real estate sufficient to identify it" and a description of "the nature of the interest" conveyed. N.J.S.A. 25:1-11(a). In addition, these essentials must "established in a writing signed by or on behalf of the transferor." Ibid. All these elements have been met. The property is described by way of its address; again, no doubt about the address in D-8 matching up to the property in question has been suggested. The clear tenor of the document leaves no doubt that fee simple was intended to be conveyed. Both

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one has suggested there is any material discrepancy or that it should be the former rather than the latter.

[8] And what is reasonable must "bear a reasonable relation to the time already elapsed." Paradiso v. Mazejy, 3 N.J. 110, 115 (1949).

the transferee (plaintiff) and transferor (Allied) are identified. And there is a "writing signed by or on behalf of the transferor"[9]; no one disputes that Sally signed D-8. As noted earlier, Elizabeth Lane credibly testified that Sally signed the document. There is no doubt that the Statute of Frauds poses no obstacle to the relief plaintiff seeks.

And so, the only colorable issue about D-8's enforcement as a contract focuses on whether there was consideration for the agreement to sell the property. Clearly there was: $600,000. To be sure, the agreement is somewhat

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[9] The court is mindful that the owner of the property and the ultimate transferor isn't Sally; it's Allied. But Sally was the owner of 100% of Allied's stock and expressed in D-8 her desire to authorize the corporation's conveyance of the property to plaintiff. Even if there is no corporate resolution to this effect, Sally's statement as the owner of all the corporate stock is enough to bind Allied; the ultra vires argument that might have been posed would go to its secondary sense (that corporate action was irregularly exercised) not to its primary sense (that corporate action could never be authorized). See Middletown Twp. Policemen's Benevolent Ass'n v. Twp. of Middletown, 162 N.J. 361, 368-69 (2000). Ultra vires action in the secondary sense may be overcome "in the interest of equity and essential justice." Summer Cottagers' Ass'n of Cape May v. City of Cape May, 19 N.J. 493, 505 (1955). So, even though D-8 is signed by Sally without any expressed designation that she signed as a corporate officer, to find that as an impediment to enforcement would exalt form over substance and would be inequitable and unjust because it would only protect the breaching party. Besides, there was then no other Allied stockholder and, thus, the only party injured by an insistence on such strict adherence to the corporate form would be plaintiff; it would be inequitable to deprive the purchaser of the benefit of his bargain simply because the seller failed to cross and dot every "t" and "i." In such a circumstance, only another stockholder ought to be heard to complain and there were no other stockholders when D-8 was executed. Moreover, anyone who obtained an interest in Allied after execution of the contract would take subject to the rights and liabilities imposed by the contract.

unusual in that the parties stipulated the transaction wouldn't occur immediately, that it would have to await Sally's death, but an agreement not to close for a lengthy period of time – here, two years – is hardly abnormal.[10] Moreover, there is no legal or equitable reason to insist that there be an equal or opposite reaction to that particular aspect to the agreement, as seems to be defendants' argument. It is enough that plaintiff wanted to buy, that Sally wanted to sell, that they negotiated and agreed on what was being sold (the Ocean Township property in "as is" condition) and a price ($600,000), and that part of what plaintiff was foregoing was his desire to close sooner rather than later; he was willing to wait, and he did in fact wait. Even if the court were required to look for a specific consideration for the locking in of $600,000 as the purchase price – even if the condition about the timing of the transaction might take years to occur – there was certainly a risk to both in forbearing and that risk constitutes the consideration for both. Plaintiff's risk was that he agreed to purchase the property "as is" and the fair market value of the property might decrease or the condition of the property could deter to a point where $600,000

[10] For example, it is often commonplace that the fixing of a closing date on real estate contracts are made contingent on some other future step or event, e.g.: the purchaser's obtaining of a mortgage, a town's approval of a zoning change, a board's grant of a variance, etc. That the contingency here – Sally's death – is different from other types of future events more commonplace is, in the eyes of a court of equity, a distinction without a difference.

wouldn't seem to be the bargain it might seem to be now, meaning that plaintiff would have remained a tenant and forgone searching for another similar property for nothing if he didn't choose to go ahead with the transaction after Sally's death, or he simply might have passed on other opportunities that, after the passage of time until Sally's death, would have been better deals than that for which he waited. While the fixing of the time for this particular transaction is admittedly unusual, the unspoken but implicit fact was that Allied had a willing buyer committed to the transaction, albeit for a price that might in the fullness of time seem somewhat disadvantageous to Allied; plaintiff had, by executing the agreement, implicitly consented to remaining a tenant and his agreement to wait for Sally's death before obtaining the benefit of his bargain, is sufficient consideration for both to have entered into this contract.

So, while defendants are correct that there must be a "flow of consideration" – that both sides must "'get something' out of the exchange" – that consideration "may take the form of either a detriment incurred by the promisee or a benefit received by the promisor." Continental Bank of Pa. v. Barclay Riding Acad., 93 N.J. 153, 170 (1983); see also Sipko v. Koger, Inc., 214 N.J. 364, 380 (2013); Friedman v. Tappan Dev. Corp., 22 N.J. 523, 533 (1956). "If the consideration requirement is met, there is no additional requirement of gain or benefit to the promisor, loss or detriment to the promisee,

equivalence in the values exchanged, or mutuality of obligation." Shebar v. Sanyo Bus. Sys. Corp., 11 N.J. 276, 289 (1988); see also Martindale v. Sandvik, Inc., 173 N.J. 76, 87 (2002). Clearly, the parties' agreement contains an exchange of promises and, so, the consideration requirement has been met.

In truth, defendants simply argue that the agreement has turned out to be more beneficial to plaintiff than to them – that through the contract plaintiff obtained Allied's promise to convey the property "as is" for $600,000, a transaction that seemed fair and reasonable then but, with the passage of time on which Sally insisted and to which plaintiff deferred, may in hindsight seem like a windfall because the fair market value has increased. That may be true, but courts don't rewrite contracts to make for the parties a contract they didn't make for themselves. Kampf v. Franklin Life Ins. Co., 33 N.J. 36, 43 (1960); see also Cypress Point Condo. Ass'n v. Adria Towers, L.L.C., 226 N.J. 403, 415-16 (2016); Grow Co. v. Chokshi, 403 N.J. Super. 443, 464 (App. Div. 2008). Once establishing the parties' true intentions as revealed by "the express terms of the contract, surrounding circumstances and the underlying purpose of the contract," Manahawkin Convalescent v. O'Neill, 217 N.J. 99, 118 (2014), a court's obligation is to enforce those true intentions.

When asked to provide the equitable remedy of specific performance, the court must consider other circumstances as well, although two of these three

additional considerations have been established in the court's findings about the contract itself. That is, it is well-established that to obtain specific performance, a claimant must demonstrate: first, that "the contract in question is valid and enforceable at law," Marioni v. 94 Broadway, Inc., 374 N.J. Super. 588, 598 (App. Div. 2005); second, that the terms of the contract are "expressed in such fashion that the court can determine, with reasonable certainty, the duties of each party and the conditions under which performance is due," Salvatore v. Trace, 109 N.J. Super. 83, 90 (App. Div. 1969), aff'd o.b., 55 N.J. 362 (1970)[11]; and third, the compelling of performance will not be "harsh or oppressive," Stehr v. Sawyer, 40 N.J. 352, 357 (1963). As previously discussed, the first two requirements have been demonstrated here.

At times, the third requirement can be more involved than the mere interpretation of a contract and the ascertaining of whether its terms are

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[11] Defendants contend that the contract shouldn't be enforced because terms that are typically found in real estate contracts are not contained in D-8. But that doesn't matter so long as all material terms are present, as they are here. As noted, the property to be conveyed is understandably described, the condition in which the property must be conveyed is defined "as is" and, so, not subject to doubt, and the amount to be paid is also expressed, as is the time for closing (sometime after Sally's death). So long as the contract contains essential material terms, a court may "fill the gaps created by the parties' silence by adding terms that accomplish a result that was necessarily involved in the parties' contractual undertaking." Kas Oriental Rugs, Inc. v. Ellman, 394 N.J. Super. 278, 287 (App. Div. 2007) (quoted with approval in Flanzman v. Jenny Craig, Inc., 244 N.J. 119, 136 (2020)); see also Palisades Properties, Inc. v. Brunetti, 44 N.J. 117, 130 (1965).

sufficiently clear to be enforced. The third requirement simply calls for the exercise of equitable discretion. See Marioni, 374 N.J. Super. at 598-601; Pomeroy, Specific Performance of Contracts (3d ed. 1926), § 37 at 115-16. When considering a plaintiff's pursuit of an equitable remedy, a court of equity must "appraise the respective conduct and situation of the parties," Friendship Manor, Inc. v. Greiman, 244 N.J. Super. 104, 113 (App. Div. 1990), and determine whether the party seeking relief "stand[s] in conscientious relation to his adversary; his conduct must have been fair, just and equitable, not sharp or aiming at unfair advantage." Stehr, 40 N.J. at 357; Marioni, 374 N.J. Super. at 600. The court readily concludes here that plaintiff acted fairly, justly, and equitably, and that he did not then and has not now attempted to take unfair advantage; he seeks only to obtain the benefit of the bargain that he and Sally agreed on and that he has waited for. Indeed, it was Sally who largely dictated the terms – particularly the timing of the transaction – to which plaintiff readily acceded. In comparing the equitable positions of the parties, the court finds no impediment to the imposition of a judgment of specific performance.

Plaintiff was lastly required to show that he is "ready, desirous, prompt, and eager to perform the contract on his part." Stamato v. Agamie, 24 N.J. 309, 316 (1957) (quoting Meidling v. Trefz, 48 N.J. Eq. 638, 644 (E. & A. 1891)). The evidence reveals no dispute that, upon Sally's death, and after allowing a

reasonable time for her executor to be in a position to proceed, plaintiff expressed his desire to move forward with the transaction. Defendants disregarded plaintiff and his contractual rights and put the property on the market, prompting plaintiff to commence this action. In his testimony, plaintiff has asserted that he is ready, willing and able to go to closing, and defendants have offered no evidence to suggest otherwise.

In sum, D-8[12] constitutes an enforceable contract between plaintiff and Allied that calls for Allied's conveyance to plaintiff of the property in question in "as is" condition for $600,000. Both law and equity call for a judgment compelling Allied's performance.

For these same reasons, the court rejects plaintiff's claims sounding in fraud or seeking a determination that D-8 is a valid codicil to Sally's Will or anything else beyond his claim of a breach of the contract of sale. The claim that the court should view or enforce D-8 as a codicil to Sally's Will, as explained

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[12] As suggested earlier, the fact that D-8 was labeled "Addendum To My Will" – a reference to Sally's Will – is of no moment. That label contributes nothing to an understanding of the parties' undertaking, only the fact that Sally's drafting of the document was uncounseled and that she might have felt that with a stipulation that the property be conveyed only after her death it was necessary to bind herself and her estate to that course through amendment of her Will. Equity regards the substance of a matter not its labels. See Applestein v. United Board & Carton Corp., 60 N.J. Super. 333, 348-49 (Ch. Div.), aff'd o.b., 33 N.J. 72 (1960); see also Conley v. Guerrero, 443 N.J. Super. 62, 67 (App. Div. 2015); Liberty Mut. Ins. Co. v. Garden State Surgical Ctr., L.L.C., 413 N.J. Super. 513, 523-24 (App. Div. 2010).

earlier, see n.5, above, presents a question the court need not decide because the contract claim has been decided in plaintiff's favor. The same might be said for plaintiff's fraud claim, but the court would add that there is no evidence or suggestion of fraud here. The administrator of Sally's estate made no false representation or otherwise attempted to hoodwink plaintiff; he merely pursued a disposition of the property he felt was necessary to fulfill his duties as administrator and in light of what he reasonably concluded was uncertainty about his late mother's intentions. The unusual way in which Sally expressed her desire and willingness to sell the property to plaintiff after her death raised legitimate questions about how or whether D-8 should be enforced and rendered reasonable the steps taken by the estate's administrator.

And, again for all these reasons, the court finds that plaintiff's claim to an award of ancillary damages, which he claims should be calculated by multiplying his monthly rent for the months that have elapsed since Sally's death, is without merit. Neither plaintiff nor Sally sought out legal advice regarding the memorialization of their agreement and the very nature of what they executed predictably left for another day reasonable questions about its meaning and enforceability. Those questions could have been eliminated by the involvement of professionals back when Sally and plaintiff reached an agreement and when D-8 was signed. That plaintiff did not seek greater clarity

at that time, left his position to the vagaries of litigation and legitimate questions about the manner in which they explained their undertaking and should stand in the way of his assertion that he should be compensated for the administrator's delay in closing the transaction. Until a resolution of those questions, which has only now occurred – almost exactly three years from Sally's death – there is no injustice in plaintiff's relationship to the property remaining in its status quo ante. It should be added that even if it could be concluded that it is equitable to allow plaintiff damages for having to wait to obtain title, the court would not calculate those damages from the date of death. Plaintiff waited nineteen months before seeking relief following Sally's death; plaintiff shouldn't be compensated for the period of his own delay in pursuing his rights. Equity does not reward those who delay in seeking the court's aid. See Stout v. Executors of Seabrook, 30 N.J. Eq. 187, 191 (Ch. 1878) (holding that "[t]he law assists those who are vigilant, not those who sleep upon their rights"), aff'd o.b., 32 N.J. Eq. 826 (E. & A. 1880); see also Brick Plaza v. Humble Oil & Ref. Co., 218 N.J. Super. 101, 104 (App. Div. 1987).

An appropriate judgment has been entered.