IN THE

COURT OF SPECIAL APPEALS OF MARYLAND

September Term 2006
No. 2718

YOUTH DEVELOPMENT FOUNDATION, INC.

Appellant

vs.

SELBY COMMUNITY ASSOCIATION, INC.

Appellee

Appeal from the Circuit Court for Anne Arundel County
(The Honorable Paul Garvey Goetzke, Judge)

APPELLEE'S BRIEF

Matthew A. Egeli
Hartman and Egeli, LLP
116 Defense Highway, Suite 300
Annapolis, Maryland 21401-7047
(410) 266-3232
Attorneys for Appellee

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STATEMENT OF FACTS

A. Facts established through summary judgment[1]

Selby Community Association, Inc. ("Selby") is a non-profit community association, formed under the laws of the State of Maryland, and is the community association for the residential community of Selby-on-the-Bay, located in Edgewater, Maryland. As the community association for the Selby-on-the-Bay community, Selby's purposes include organizing the homeowners of the Selby-on-the-Bay community, administering the special tax district created by Anne Arundel County, and improving, supervising, repairing and maintaining the community beach, clubhouse, athletic fields and park.

For over sixty years Selby has occupied and used the community beach, clubhouse and park for the benefit of the residents of the Selby-on-the-Bay community, and has conducted athletic events, community association meetings, community fairs, celebrations and other community activities during this time period. Selby's right to use the community beach and park was confirmed by the Circuit Court for Anne Arundel County in the case of Howard R. Robey and

[1] The facts under this section were established through summary judgment as set forth in Judge Paul Garvey Goetzke's October 11, 2006 Order partially granting Selby's Motion for Summary Judgment. (E 282-83) See also Judge Goetzke's June 6, 2006 Memorandum Opinion and Order, which adopts the facts as set forth in Selby's Motion for Summary Judgment and Response to YDF's Motion for Summary Judgment. (E. 209-214) That Memorandum Opinion and Order was withdrawn by consent of the parties so as to afford YDF and opportunity for a hearing, but constitutes the basis for Judge Goetzke's conclusions. Selby's Motion for Summary Judgment, Memorandum in Support, and exhibits, appear at E.48-199. Selby's Response to YDF's Motion for Summary Judgment, Memorandum in Support, and exhibits, appear at Apx. 1-93.

Frances Robey, his wife v. Williams Realty Co., Case Number 7457, Equity, in which the court, in the Opinion of Court and Order of Court dated March 31, 1938, determined that each lot holder in the Selby community had an easement in the community beach and park:

> [F]or all ordinary Beach and Park purposes. . . . to the exclusion of the general public or strangers, for as to such persons the rights of the owners of the easement itself, in any manner consistent with the rights of the dominant tenement; but any use, of a character adverse to that of the owner of the easement is actionable without proof of special damages.
>
> [T]he Defendant, its successors and assigns be and they are hereby perpetually enjoined from placing any restraint upon the use by Howard R. Robey and Frances S. Robey, and all other lot owners in Selby-on-the-Bay similarly situation, to the free and unobstructed use of the "Community Beach and Park" and the easement therein . . . . the Defendant, the Williams Realty Company, Inc., a body corporate, its successors and assigns be and they are hereby perpetually enjoined from using any portion of the land . . . as a commercialized public bathing beach . . . and they are hereby perpetually enjoined from selling, free of said easement of servitude, any property located within the boundaries as aforesaid.

The Circuit Court's decision in favor of the Selby residents was affirmed by the Court of Appeals of Maryland in Williams Realty Company, Inc. v. Howard R. Robey, et ux., 175 Md. 532, 2 A.2d 683 (1938).

From the dates of the court decisions in the Williams Realty litigation and until 1998, Selby and the residents of the Selby-on-the-Bay community enjoyed the use of the community beach, clubhouse and park.

Youth Development Foundation, Inc. ("YDF") is a Virginia non-stock corporation which, as the result of a gift deed dated December 26, 1996, and

recorded among the Land Records of Anne Arundel County at Liber 7729, folio 244, became the holder of fee simple title to the property that includes the Selby-on-the-Bay community beach, clubhouse and park. During early 1998, YDF replaced the locks on the doors to the Selby clubhouse, removed the building's security system, and placed "No Trespassing" signs on the building, with the intent to deny the residents of the Selby-on-the-Bay community the use of the community clubhouse.

Selby and certain individual residents of the Selby-on-the-Bay community, believing that the actions of YDF were in direct conflict with the decisions in the Williams Realty litigation, filed suit in the Circuit Court for Anne Arundel County seeking injunctive relief against YDF in the case entitled Selby Community Association, Inc., et al. v. James Herrington and Youth Development Foundation, Inc., Case No. C-98-44166. The Circuit Court, in an order entered on May 10, 2001, concluded that Selby and the other plaintiffs were "entitled to summary judgment as a matter of law [on Count IV of their Complaint] and [YDF is] enjoined from placing any restraint upon the free and unobstructed use of the clubhouse." The Circuit Court's decision in favor of Selby was affirmed by the Court of Special Appeals of Maryland in the unreported decision entitled Youth Development Foundation, Inc. v. Selby Community Association, Inc., et al., No. 768, September Term, 2001, and the case was remanded back to the Circuit Court to resolve the remaining issues in the case.

Upon that case being remanded back to the Circuit Court, Selby and YDF, through their counsel, continued with the litigation, but also made a concerted effort to resolve their issues and disputes through an agreement that involved having Selby purchase YDF's title to the community beach, clubhouse and park. The settlement discussions between Selby and YDF reached a successful conclusion during the pretrial settlement conference that took place at the Circuit Court for Anne Arundel County on November 12, 2003. Present during the pretrial conference, which was scheduled before Judge Ronald A. Silkworth, were members of the Selby Board of Directors, as well as Harrison Wetherill and Matthew Egeli (the attorneys for Selby), Mary Facella (an officer and authorized agent of YDF), Kimberly N. Tarver (the attorney for YDF), and William M. Simmons (the court-appointed mediator).

The pretrial settlement conference culminated in all of the parties signing the Agreement and Contract of Sale for Real Property (hereinafter "Agreement"), in which Selby and YDF entered into a binding agreement for the purchase and sale of the Clubhouse Property,[2] as the property is defined in Section 2 of the Agreement. The Clubhouse Property is described in the Agreement as follows:

> The Clubhouse lot, Lot 31 Block H and Lot 132 in Block K, as shown on a Plat of Selby on the Bay recorded among the plat records of Anne Arundel County as Plat 554, Book 10, folio 16, and as more

[2] The clubhouse building burned to the ground on September 16, 2007. Section 7 of the Agreement provides that, "[i]n the event of loss or damage [to the Clubhouse Property] prior to settlement and closing, this Agreement shall not be affected . . . ."

particularly described in deeds recorded in Book 7729, page 244 and book 8901, page 725.

Mary Facella signed the Agreement on behalf of YDF. Selby paid YDF the $15,000.00 deposit that is set forth in Section 4 of the Agreement. The deposit monies were held by Kimberly N. Tarver, YDF's attorney at the time the Agreement was reached.

The method by which the purchase price for the Clubhouse Property would be established is set forth in Section 3 of the Agreement. The basic valuation formula began with Selby and YDF each selecting an appraiser to determine the fair market value of YDF's fee simple interest in the Clubhouse Property and, if the purchase price was not established in the meantime, culminated in having William M. Simmons select a third appraiser from a list of not more than two (2) nominees each submitted by Selby and YDF.

The appraiser selected by Selby assigned a fair market value of $125,000.00 to YDF's fee simple interest in the Clubhouse Property. The appraiser selected by YDF assigned a fair market value of $445,000.00 to YDF's fee simple interest in the Clubhouse Property. Pursuant to the terms of Section 3 of the Agreement, Selby and YDF exchanged appraisals. Since the difference between the higher appraisal and the lower appraisal was greater than twenty percent (20%), Section 3 of the Agreement contemplated the selection of a third appraiser to establish the purchase price. Pursuant to the terms of Section 3 of the Agreement, Selby initiated steps to have the third appraiser selected by the

original two appraisers or by the parties' respective attorneys. These efforts were unsuccessful for various reasons, including notification from Kimberly Tarver, in a letter to counsel for Selby dated June 14, 2004, that she was no longer acting as YDF's attorney.

As indicated above, Section 3 of the Agreement provided, if other methods did not work, that William M. Simmons would select the third appraiser from nominees submitted by Selby and by YDF. Selby submitted its two third appraiser nominees to Mr. Simmons. YDF submitted its two third appraiser nominees to Mr. Simmons in a letter dated August 4, 2004. The nominees submitted by YDF included Mr. Terry Dunkin, an appraiser at Colliers Pinkard in Baltimore. Mr. Simmons initially selected one of Selby's nominees as the third appraiser, but the individual selected declined to provide the service. Thereafter, Mr. Simmons selected Mr. Dunkin, as noted above one of YDF's nominees, as the third appraiser to establish the purchase price of the Clubhouse Property.

On October 18, 2004, Mr. O'Callaghan sent a certified letter to Mary Facella (at YDF's address of record) informing her of the selection of Mr. Dunkin and the required retainer. Ms. Facella never claimed the letter and Selby moved forward with efforts to have Mr. Dunkin proceed with the appraisal process. To that end, Mr. Dunkin visited the Clubhouse Property on at least one occasion during December 2004. Mr. Dunkin overnight mailed copies of his appraisal report to both Selby and YDF on May 8, 2005. In his appraisal report, Mr. Dunkin concluded that the fair market value of YDF's fee simple interest in the Clubhouse

Property was $165,000.00. In accordance with the terms of the Agreement that Selby and YDF agreed to on November 12, 2003, $165,000.00 was the purchase price for the Clubhouse Property.

In a letter dated May 11, 2005, counsel for Selby wrote a letter to YDF, in which counsel asked YDF to facilitate the scheduling of settlement on the Clubhouse Property in accordance with the terms of the Agreement. YDF did not respond to counsel's letter. YDF did, however, send a letter to Mr. Dunkin on June 14, 2005, in which YDF raised various questions regarding Mr. Dunkin's appraisal. Mr. Dunkin responded to YDF's questions in a letter dated June 17, 2005. Mr. Dunkin concluded that the $165,000.00 valuation for the Clubhouse Property was unchanged. Mr. Dunkin did send a copy of his letter to Selby, which is how Selby first learned that YDF was questioning the appraisal.

In a letter dated July 11, 2005, counsel for Selby wrote a letter to YDF in which counsel noted that YDF's additional questions had been resolved and in which counsel informed YDF that settlement on the Clubhouse Property had been scheduled for Friday, August 19, 2005, at 2:00 p.m., at the Law Offices of William Simmons, 20 West Street, Annapolis, MD 21401.

In a letter to Selby's counsel dated July 25, 2005, a mere 38 days after Mr. Dunkin answered YDF's questions about the appraisal, YDF informed Selby, in complete disregard of the terms of the Agreement and for the first time, that YDF did not consider the Agreement binding and stated in positive and unconditional language that the Clubhouse Property was no longer for sale. In a letter to Selby's

counsel dated August 17, 2005, Mario Facella restated YDF's position that the Property was no longer for sale.

YDF did not attend the scheduled settlement.

Section 10.B of the Agreement provides: "If the purchase of the Clubhouse Property is not consummated because of Seller's default or breach of any condition or term [of] this Agreement. . . . Buyer shall have the right to return of the Deposit, or, in the alternative, to pursue an action for enforcement of this Agreement and/or damages."

Section 10.C of the Agreement provides: "In the event of default by either party, the defaulting party shall be liable for all costs and expenses of litigation, including reasonable attorney's fees, in connection with enforcement of the Agreement."

B. Facts established at trial

Pursuant to the Circuit Court's October 11, 2006 Order, the case proceeded to trial on the on the following three issues:

> 1. Whether Defendant's duty to proceed to settlement was voidable, terminable or otherwise avoidable as a result of not having received the final appraisal of the property at issue within the 60 days provided by the parties' contract;
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> 2. If so: (a.) whether Defendant satisfied any conditions required to void, terminate or otherwise avoid its duty to proceed to settlement and transfer title of the property to Plaintiff; and/or (b.) whether Defendant waived or otherwise lost its right to void, terminate or otherwise avoid that duty; and
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> 3. Plaintiff's claim for attorney's fee.

The case proceeded to a one-day bench trial before Judge Paul Garvey Goetzke on December 11, 2006 and testimony was provided by five witnesses.

Mr. Terry Dunkin, the third appraiser, was called by Selby. Through his testimony Selby established that Mr. Dunkin was selected to perform the third appraisal, and that he requested a $2,000 retainer, learned that YDF would not pay their portion, and was subsequently paid the entire retainer by Selby because "they wanted to proceed with the valuation." (E. 298-301) Mr. Dunkin further testified that the first step in his appraisal process was to communicate with the parties and to coordinate an inspection of the Property with all parties present, and that he was unable to reach YDF for several weeks, thus causing a delay in the process. (E. 304) He also testified that no one from YDF told him at the beginning of the process that it was taking too long. Mr. Dunkin also said that during the 30-day period after the inspection within which he looked for comparables, YDF never contacted him regarding the status, and that he never received any communications from YDF regarding the status of the appraisal prior to submitting his final appraisal in early May. (E. 306-310) Additionally, Mr. Dunkin testified that YDF never paid for any portion of the appraisal fee, that Mr. Facella of YDF sent him a letter on June 14, 2005 asking him to reevaluate his appraisal, and that Mr. Facella never took the position that the appraisal took too long to complete. (E. 312-314) Lastly, Mr. Dunkin testified that the appraisal took longer than 60 days due to the difficulty in scheduling the inspection and in

finding comparable properties, i.e. unbuildable waterfront land in Anne Arundel County. (E. 335)

Martin O'Callaghan was the second witness to take the stand on behalf of Selby and he began by stating that he was the primary contact person for Selby regarding the Clubhouse Property and that he was present during the November 12, 2003 settlement conference that took place at the courthouse. (E. 339) He also testified that Selby paid the $15,000.00 deposit to YDF for the purchase of the clubhouse property. (E. 341)

Mr. O'Callaghan then testified about the many delays caused or contributed to by YDF, including: 1. YDF's first appraiser did not complete his appraisal within the time specified in the Agreement. (E. 342) 2. YDF's counsel requested a delay in the process so that YDF's appraiser could provide an analysis[3] of the appraisal done by Selby's appraiser. (E. 348-349) 3. The analysis being conducted by YDF's appraiser was delayed. (E. 349-50) 4. YDF's first appraiser had been instructed by YDF to not communicate with Selby's first appraiser for purposes of selecting a third appraiser as outlined by the Agreement. (Apx. 51) 5. YDF did not submit its two nominees for the third appraiser within the time provided for in the Agreement. (E. 356) 6. That upon the selection of Mr. Dunkin as the third appraiser he personally sent a certified letter to YDF regarding the selection. (E. 359 and Apx. 132-134) 7. At no point from September 1, 2004 on did anyone at

[3] This analysis was not provided for in the Agreement and was therefore an additional step in the process unilaterally added by YDF.

YDF ever contact Selby regarding the selection of the third appraiser. (E. 385) 8. YDF never communicated with Selby regarding setting the settlement date on the purchase. (E. 365)

Mr. O'Callaghan further testified that at no point prior to July 25, 2005 did YDF ever inform anyone at Selby that the Agreement was no longer valid due to the passage of time. (E. 366) Lastly, Mr. O'Callaghan testified that Selby obtained financing for the purchase of the Clubhouse Property, attended settlement on August 19, 2005, and was ready, willing and able to buy the Property, and that no one from YDF showed up for the settlement. (E. 366-367)

The third witness to take the stand during Selby's case was Matthew Egeli, Selby's counsel, to testify regarding the amount of Selby's claim for attorney's fees. Mr. Egeli testified as to his experience as an attorney and that he charged Selby a reduced hourly rate of $180.00 for his services. (E. 390-391) After being instructed by the court to not testify as to each individual entry on the itemized bill for fees, he testified that the total amount due as of the Friday before trial was $37,477.50. (E. 392-393). Mr. Egeli further testified that as attorney for Selby he was representing the hundreds of people who lived in the community and that the lawsuit to enforce the Agreement and make Selby the owner of the Clubhouse Property required the best effort possible. (E. 394) Lastly, he testified that the amount of the bills was fair and reasonable, and that the hourly rates charged were within the norms charged by lawyers in that community. (E. 394) Mr. Egeli's

itemized and detailed bill for the attorney's fees, a copy of which is in the Record Extract at E. 525 through 542, was admitted into evidence without objection.

YDF offered the testimony of two witnesses in its defense. The first witness, Mr. Mario Facella, testified that he is the President of YDF and was involved in the negotiation of the Agreement. (E. 401) He further testified that his attorney, Ms. Tarver,[4] drafted the Agreement. (E. 407) Mr. Facella also testified that Mr. Dunkin, the third appraiser, was proposed by YDF. (E. 427) He then testified that YDF never bothered to inform anyone that it was proceeding without an attorney, that he believed that the Agreement was invalid as early as May 11, 2005, and that the first time he ever told anyone that he believed the Agreement was not valid due to the passage of time was August of 2005. (E. 431-442)

YDF's second witness was Mary Facella. She confirmed that as of April of 2004 YDF was delaying in selecting a third appraiser while they waited for their appraiser's analysis of the Selby appraisal. (E. 449) Ms. Facella also testified that she believed the Agreement was no longer valid as early as April of 2005 and that she did not tell anyone that she thought the Agreement was invalid prior to July 25, 2005, the date she sent the letter to Selby which stated that YDF did not consider itself bound by the Agreement. (E. 463-466)

[4] The transcript refers to YDF's former counsel as Ms. Tarber. Her name is actually Kimberly N. Tarver.

C. The trial court's findings of fact

At the conclusion of the trial, the lower court made the following findings of fact:

1. That the Agreement did not provide that either party was entitled to walk away from the contract if the appraisal was not completed and delivered in a timely fashion. (E. 488)

2. That YDF's lawyer was the primary drafter of the Agreement. (E. 489)

3. That Mr. Dunkin, as he was selected by the mediator, was no more Selby's appraiser than he was YDF's. (E. 489)

4. That YDF nominated Mr. Dunkin to do the appraisal. (E. 489)

5. That YDF was not without blame in the appraiser's failure to meet its deadline. (E. 489)

6. That YDF did not communicate back with the appraiser and make itself available for the appraisal. (E. 489)

7. That the Agreement did not provide that time was of the essence. (E. 490)

8. That YDF's conduct suggested that it did not consider time to be of the essence and that its letter critiquing Mr. Dunkin's appraiser showed that YDF considered the contract to remain in play. (E. 490)

9. That both parties were missing deadlines in the Agreement showing that neither party considered time to be of the essence. (E. 491)

10. That the appraiser's delay was reasonable in completing the third appraisal due to his difficulty in getting in contact with YDF and in getting all of the information he needed. (E. 491-492)

11. That Selby's requested attorney's fees were reasonable except for the costs appearing on the attorney's bill. (E. 493)

ARGUMENT

I. Standard of Review

This matter involves the lower court's entry of partial summary judgment in favor of Selby on most issues in the case, as well as a bench trial as to the remaining issues. "The question of whether the trial court properly granted summary judgment is a question of law and subject to de novo review on appeal." Standard Fire Ins. Co. v. Berrett, 395 Md. 439, 450, 910 A.2d 1072, 1079 (2006). An appellate court applies the clearly erroneous standard to a trial court's findings of fact, and "[t]he clearly erroneous standard requires an appellate court to consider the evidence produced at trial in the light most favorable to the prevailing party." Brown v. Contemporary OB/GYN Associates, 143 Md.App. 199, 239, 794 A.2d 669, 692 (2002).

II. YDF's arguments about time and delays are nothing more than a smokescreen to disguise the fact that it is displeased with the purchase price reached through the valuation process it created.

YDF's Brief goes on for pages and pages about time and delays when, in reality, the only reason that YDF refused to honor the Agreement is because it disagreed with the valuation reached by Mr. Dunkin, the appraiser that YDF nominated to value the Clubhouse Property. Despite the length of time that it took to complete the process and schedule settlement, most of which was due to sloth on the part of YDF, Mario Facella of YDF, on June 14, 2005, sent Mr. Dunkin a

letter asking him to "reevaluate" the value he placed on the property. (E. 516) Essentially, after all the time that YDF is now claiming was too much, YDF asked Mr. Dunkin to take even more time.

In the three-page letter, Mr. Facella painstakingly criticized Mr. Dunkin's report, but no where in that letter does Mr. Facella so much as mention the word time, let alone state that the parties' settlement agreement had expired. (E. 516-518) At the bottom of the first page of that letter, Mr. Facella even writes about Selby still purchasing the property. (E. 516) Mr. Facella's conduct is demonstrative of the audacity with which YDF ignored the terms of the settlement agreement. Here, Mr. Facella went to great lengths to criticize Mr. Dunkin's report after having nominated Mr. Dunkin for the job, after having failed to communicate with him and attend the inspection of the property, and after having never paid Mr. Dunkin one cent for his work. And, as Mr. Facella admitted at trial, by this point he believed the Agreement was no longer enforceable. The audacity with which Mr. Facella and YDF pursued a revaluation of the Property is a perfect example of the clear bad faith exhibited by YDF throughout the settlement and valuation process.

It is clear that YDF had no intention of honoring any valuation that did not return <u>its</u> price, and YDF's position is summed up by the last sentence of that letter, where Mr. Facella says, "In its current state, we are not in agreement of your value conclusion." (E. 518)

It was not until YDF's July 25, 2005 letter that YDF informed Selby that "[f]ar more than a reasonable time has passed since November 12, 2003" and that the Agreement reached at the courthouse was no longer valid. This was the first time that YDF told Selby, or anyone else, that it believed the passage of time had somehow caused the Agreement to become unenforceable. When questioned at trial, Mr. Facella testified that despite sending the June 14, 2005 letter requesting a reevaluation of the appraisal, and despite the fact that he never informed anyone that he believed the deal was off, in his mind the deal was off prior to May 11, 2005. (E. 442) Mary Facella testified that she didn't believe YDF was bound by the Agreement as early as April of 2005 and in her opinion "the burden shifted to Selby, you know, to close the contract." (E. 463)

The record clearly shows that time was not of the essence of this Agreement, and that neither party strictly adhered to any of the time deadlines. YDF repeatedly missed deadlines, ignored correspondence from Selby, ignored Mr. Dunkin, and even refused to pay its portion of Mr. Dunkin's fee. At no point during the process did YDF complain that it was taking too long. The only thing that YDF cared about was the purchase price.[5]

[5] It is worth noting that while YDF was displeased with the $165,000 value reached by Mr. Dunkin as it applied to Selby's right to buy the Clubhouse Property, it appears that YDF used that very same appraisal to have the Anne Arundel County reassess the property for tax purposes. After the trial, YDF's attempt to stay the judgment was denied until YDF paid past due property taxes in the amount of $5,499.00. (Apx. 151) The property tax amount was subsequently reduced as a result of a reassessment that valued the property at $165,000.00, the exact value reached in Mr. Dunkin's appraisal. See Maryland State Department of

III. The trial court properly determined that the Agreement did not violate the Rule Against Perpetuities.

As a result of the October 10, 2006 summary judgment hearing, the trial court determined as a matter of law that the Agreement, drafted primarily by YDF's lawyer and signed at the courthouse, did not violate the Rule Against Perpetuities. YDF contends that this was error and that "the agreement violated the Rule Against Perpetuities because it relied on too many contingencies to be performed by third parties beyond the control of the parties, without deadlines or ramifications." (Appellant's Br. at 17-18.)

In Dorado Ltd. P'ship v. Broadneck Dev. Corp., 317 Md. 148, 562 A.2d 757 (1989), the Court of Appeals invalidated an option for violating the Rule Against Perpetuities. Part of that option provided that "Buyer agrees to purchase and settle on all remaining lots covered by the Contract of Sale by payment of the purchase price in cash not later than ninety (90) days after the Seller has delivered to Buyer evidence of sewer allocations for such lots." Dorado, 317 Md. at 150, 562 A.2d at 758. At the time of the contract, there was a county moratorium on sewer allocations, therefore making it impossible for the seller to obtain the allocations. Id. at 151, 562 A.2d at 758. The Court, in refusing to enforce the option, concluded that "where the occurrence of the condition precedent to conveyance is beyond the control of the parties, a reasonable time for

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Assessments and Taxation website at http://sdatcert3.resiusa.org/rp_rewrite/details.aspx?County=02&SearchType=ACCT&District=01&AccountNumber=90096667&subDiv=747. (Apx. 153)

performance, less than the perpetuities period, cannot be implied." Id. at 158, 562 A.2d at 762. As settlement was dependent upon the action of a third party, namely Anne Arundel County, no reasonable time period would be implied. Id. at 159, 562 A.2d at 762.

Important to the Court's reasoning in Dorado was the recognition that "some courts have held that a contract for the sale of land, which did not expressly provide a time for performance, did not violate the Rule Against Perpetuities because the court construed the contract so as to imply a reasonable time for performance and found that a reasonable time would be less than the perpetuities period." Id. at 157, 562 A.2d at 761-62. The practice of implying a reasonable period of time into a contract of sale to avoid violating the Rule has been explored in a number of cases in this Court, and making such an implication has been approved by the Court of Appeals.

For example, in Stewart v. Tuli, 82 Md.App. 726, 573 A.2d 109 (1990), this Court gleaned from *Dorado* that implication of a reasonable period of time was permissible so as to construe a contract of sale as not violating the Rule Against Perpetuities. In Stewart, a seller, after having one sales contract fall through, entered into a contract with another party that provided that if the previous purchaser attempted to keep his contract alive, then the new purchasers did not have to go to settlement until such time as clear title could be granted. Id. at 729, 573 A.2d at 110. Stewart distinguished Dorado because "the court based its decision on the fact that the contract settlement was dependent not on

performance by one of the parties, but on the action of a third party, Anne Arundel County. Thus, the occurrence of the condition precedent was beyond the control of the parties." Id. at 734, 573 A.2d at 112. In upholding the contract, the Stewart Court concluded that the lack of a specific time for performance was not fatal, that a reasonable period of time would be implied, and that "[i]t would be ridiculous to suggest that a reasonable period of time would exceed a life in being and 21 years." Id. at 736, 573 A.2d at 113.

One year later in Hays v. Coe, 88 Md.App. 491, 595 A.2d 484 (1991), *vacated on other grounds,* 328, Md. 350, 614 A.2d 576 (1992), this Court again addressed the implication of a reasonable period of time to avoid application of the Rule Against Perpetuities. In Hays, the contract at issue included an addendum that provided that "[b]ecause a title problem has arisen and a complete survey is necessary, we hereby extend this contract until a good and marketable title can be transferred." Id. at 504, 595 A.2d at 490. The Court applied the rationale it used in Stewart and likewise concluded that "[i]t would be ridiculous to suggest that a reasonable period of time would exceed a life in being and 21 years." Id.

Although the Court of Appeals vacated Hays, it did so on other grounds and specifically approved the lower court's implication of a reasonable time period when the Court stated: "The Court of Special Appeals construed the reference to a cloud on title as a ruling that the Rule Against Perpetuities had been violated. It correctly rejected that as a viable holding." Coe v. Hays, 328 Md. 350, 362, 614 A.2d 576, 582 (1992).

In 1998, this Court decided another case whereby it implied a reasonable time period in order to avoid application of the Rule in Brown v. Parran, 120 Md.App. 653, 708 A.2d 12 (1998). In *Brown*, the contract at issue provided that the sale was subject to "percolation tests 21 bldg. site & permits approval." Id. at 656, 708 A.2d at 13. The Court addressed the Dorado, Stewart and Coe cases and definitively stated, "[i]f a contract is capable of being specifically enforced after the lapse of a reasonable time period, performance within a reasonable time period becomes an enforceable term of the contract." Id. at 663, 708 A.2d at 17. The Court further stated that "just as it would be ridiculous to presume that title clearing litigation might take 21 years to complete, it would be ridiculous to presume that it might take Calvert County 21 years to act on appellant's application for permits." Id.

In light of these several cases and the realization that the Rule Against Perpetuities, although good for law school text books and examinations, adds nothing to commercial transactions, the Maryland General Assembly recently added several statutory exceptions to the Rule Against Perpetuities by amending MD CODE ANN. EST. & TRUSTS §§ 11-102 and 11-102.1 (Effective October 1, 2007). Section 11-102(b)(11) provides that the Rule Against Perpetuities does not apply to a "nondonative property interest" as defined by §11-102.1. That section provides the following definitions:

(a)(3) "Nondonative" means given for consideration other than nominal consideration; and

(a)(4)(i) "Property interest" means a contract, lease, option, right of first offer, right of first refusal, right of first negotiation, or similar preemptive right relating to the right to the use, possession, transfer, or ownership of real or personal property or an interest in or appurtenant to real or personal property."

Although the statutory exceptions adopted by the General Assembly are not binding on the Agreement in this case, the legislature's action in narrowing the Rule Against Perpetuities' is worth considering because the legislature has recognized, as this Court did in the Stewart, Hays and Brown line of cases cited above, that the Rule was not intended to be used as a tool to avoid enforcement of otherwise valid real estate contracts. In essence, the Rule Against Perpetuities now applies only to estates and trusts, which is probably why the General Assembly put the statutory exceptions in the Estates and Trusts Article.

As correctly found by the lower court, the Rule Against Perpetuities is not a valid defense to enforcement of the Agreement that YDF and Selby reached at the courthouse.

First, William Simmons, the court-appointed mediator whose limited role under the Agreement was to appoint the third appraiser, and whose involvement YDF now claims violates the Rule Against Perpetuities, was not a mere third party. Mr. Simmons was the court appointed mediator who was present at the courthouse on the day the Agreement was reached. His task under the Agreement was limited and very straightforward—to pick the third appraiser from lists

provided by Selby and YDF, respectively. He even acknowledged that he had a limited role under the Agreement. (E. 563)

Second, as made clear in the many cases decided by this Court, the involvement of a third party in the implementation of a real estate contract does not mean the Rule Against Perpetuities is violated. This Court has already stated that it would be ridiculous to presume that completing percolation tests, surveys, or even title clearing litigation would violate the Rule. It would be similarly ridiculous to presume that a court appointed mediator would fail to act under his appointment for a life in being plus 21 years. Valid real estate contracts are often filled with contingencies that are dependent upon the efforts of third parties, including surveyors, appraisers, title examiners, home inspectors, settlement companies and banks. As indicated above, all Mr. Simmons had to do was pick a third appraiser from the lists submitted to him by the parties. The simple task of picking the third appraiser was much less involved than the third party duties performed by surveyors, appraisers, title examiners, home inspectors, settlement companies and banks.

Thirdly, the amendments to the Maryland Code discussed above show that the Rule Against Perpetuities should not apply to commercial transactions involving actual consideration, but should be left instead to the world of estates and trusts, and perhaps to torment law students.

YDF sums up its Rule Against Perpetuities argument on page 18 of its Brief when it states “YDF asserts that if Mr. Simmons had taken a lengthy

vacation or decided to live abroad, they may still be waiting on the selection of the third-appraiser." (Appellant's Br. at 18.) The notion that Mr. Simmons would take a vacation for 21 years plus a life in being is completely and utterly ridiculous. Furthermore, even if this Court wants play along with YDF and contemplate the fictional possibility of Mr. Simmons touring Europe or sailing in the Caribbean on an endless vacation, it is obvious that he could have picked the name of the third appraiser from anywhere in the world.

Additionally, despite YDF's assertion to the contrary on page 26 of its Brief, the Agreement was not contingent upon any governmental action. Although it is true that Selby is a special taxing district of Anne Arundel County and that legislation was required to raise the taxes to repay the financing, there was no contingency in the contract for this to happen. Rather, the contract specifically refers to this eventuality and afforded Selby 45 additional days for settlement in order to obtain approval from the County, thus removing any possible entanglement with the Rule Against Perpetuities.

Finally, it must be remembered that this case does not involve an ordinary contract of sale. It involves a settlement agreement reached at the courthouse with the aid of a court-appointed mediator to resolve prior litigation between Selby and YDF that had gone on for years. The Agreement that resolved the prior litigation and that gave Selby the right to buy YDF's interest in the Clubhouse Property was even drafted by YDF's counsel. YDF's argument that this settlement agreement violated the Rule Against Perpetuities is, quite simply, ridiculous. Simply put, the

argument shows how desperate YDF is to try anything to avoid its legal obligation under the Agreement to sell the Clubhouse Property to Selby for the established purchase price of $165,000.00.

IV. The trial court properly determined that time was not of the essence of the Agreement and that YDF was obligated to go to settlement despite any slight delays in the procedure.

YDF makes two arguments under this issue. First, YDF argues that the scheduled settlement date was a breach of the Agreement because it was "well after June 23, 2005." Second, YDF argues that the timing of the third appraisal excused its performance under the Agreement. The trial court carefully considered these arguments, made factual findings based upon the evidence presented at trial and then ruled against YDF. The trial court's detailed factual findings, which are set forth at E. 487-493, cannot be disturbed by this Court unless clearly erroneous. In making the same arguments to this Court, YDF largely ignores the presumption in favor of the trial court's factual findings. Instead, YDF disregards most of the lower court's findings and instead relies upon a scant and largely fictional reading of the facts.

A. YDF anticipatorily breached the Agreement prior to the time allotted for settlement.

First, YDF asserts that the Agreement was breached by Selby for failing to schedule settlement prior to June 23, 2005. YDF's argument ignores the 45 additional days provided under the Agreement so that Selby could obtain financing for the Clubhouse Property. The additional time would have made the

settlement date, at the earliest, July 28, 2005. And, as stated above, on July 25, 2005 YDF notified Selby that the property was "no longer for sale." (Apx. 146)

Secondly, YDF completely ignores Mario Facella's letter to Mr. Dunkin dated June 14, 2005, in which Mr. Facella asked Mr. Dunkin to reevaluate his appraisal. Given YDF's reevaluation request, Mr. Dunkin's appraisal did not become final until June 17, 2005, the date of Mr. Dunkin's letter in response. Under Section 9.A of the Agreement, Selby had an initial time period of forty-five (45) days to go to settlement. It was established at trial that Selby is a special taxing district of Anne Arundel County. Therefore, and also under Section 9.A of the Agreement, Selby was entitled to an additional 45 days for settlement so that the financing for the purchase could be approved by the County. Accordingly, under the Agreement, Selby had a total of 90 days from Mr. Dunkin's June 17, 2005 letter to go to settlement. The date that is 90 days from June 17, 2005 is September 15, 2005. On July 25, 2005, a mere 38 days after Mr. Dunkin sent out his letter reaffirming the appraisal, YDF sent the letter informing Selby that it considered the Agreement invalid and that the Clubhouse Property was no longer for sale.

B. The date of settlement was a direct result of YDF's actions in requesting a revised appraisal and failing to respond to attempts by Selby to schedule settlement.

The obligation to go to settlement under the Agreement was mutual, and there is absolutely no provision in the Agreement requiring Selby to unilaterally schedule settlement. That said, given YDF's inaction and inattentiveness

throughout the process, Selby's counsel wrote to Ms. Mary Facella of YDF on May 11, 2005, two days after Selby received Mr. Dunkin's report, in an attempt to schedule settlement. YDF never responded to that letter.

On June 14, 2005, however, Mario Facella of YDF did write to Mr. Dunkin and requested that Mr. Dunkin reevaluate the $165,000.00 value he reached in his report. Obviously, YDF's attempt to establish a new value for the Property had a direct effect on Selby's ability to move forward with settlement and obtain financing. It was not until Mr. Dunkin responded to Mr. Facella on June 17, 2005 that Selby was able to do so. On July 11, 2005, after Selby had learned of Mr. Facella's letter and Mr. Dunkin's response, Selby notified YDF that settlement was being scheduled for August 19, 2005. That date was well within the 90 days allotted for settlement if the time period started to run on June 17, 2005.

Additionally, it cannot be forgotten that YDF took absolutely no action to schedule settlement. YDF made no requests that settlement take place within a certain time. YDF never responded to counsel's attempt to coordinate settlement. And YDF tried to have the appraisal changed during the time within which it is now arguing that Selby should have gone to settlement. The first communication that Selby received from YDF regarding settlement was Mary Facella's letter dated July 25, 2005, in which she said the Agreement was invalid and the Clubhouse Property no longer for sale.

C. Any delay in obtaining the final appraisal was a direct result of YDF's failure to participate in the process, make information available to the appraiser, or to even pay its share of the appraiser's retainer.

YDF's second argument is that the lateness of the appraisal excuses it from its performance under the Agreement. YDF's argument again ignores that it was mutually obligated to perform under the Agreement. The trial court properly recognized that Mr. Dunkin's "having not completed his appraisal within 60 days is no more chargeable to Selby that it is chargeable to Youth Development." (E. 489) The trial court's finding on this point is supported by the evidence and is not clearly erroneous.

First, even though YDF nominated Mr. Dunkin, it pretended that he was not the third appraiser for almost two months because it allegedly "never got formal notification."[6] (E. 467-468) As stated above, Mr. Dunkin had great difficulty communicating with YDF and eventually had to schedule the Clubhouse Property inspection without anyone from YDF in attendance. Then, after Mr. Dunkin sent his appraisal out on May 8, 2005, YDF ignored the letter from Selby's counsel calling for settlement. Instead of responding to that letter, YDF asked Mr. Dunkin to reevaluate his appraisal, without letting Selby know of the reevaluation request. The record clearly shows that YDF delayed the process from the outset and that YDF had no intention of honoring the Agreement if did not like the purchase price established by the appraisal process.

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[6] YDF also used this same excuse in an attempt to justify not paying Mr. Dunkin for his appraisal.

V. The trial court properly awarded Selby its attorney's fees for YDF's failure to go to settlement.

The trial court awarded Selby $37,477.50 in attorney's fees due to YDF's failure to go to settlement pursuant to Section 10.C of the Agreement. On page 29 of its Brief, YDF challenges the award by stating that "the fee award in this case is not reasonable for administrative work and a summary judgment motions hearing." YDF's assertion is a gross misrepresentation of the evidence that was presented at trial.

Where a contract provides for the award of attorney's fees upon default, "the court retains the discretion to determine the amount to be awarded as reasonable attorney's fees, costs, or interest, but the court may not alter the terms of the contract agreed to by the parties by denying either party the benefit of the agreement." Noyes Air Conditioning Contractors, Inc. v. Wilson, 122 Md.App. 283, 292, 712 A.2d 126, 130 (1998). Furthermore, "[w]hen an award of attorney's fees is based on a contractual right, the losing party is entitled to have the amount of fees and ordinary expenses proven with certainty and under the standards ordinarily applicable for proof of contract damages." Holzman v. Fiola Blum, Inc., 125 Md.App. 602, 637-38, 726 A.2d 818, 835 (1999) (citations omitted).

Competent evidence must be presented by the moving party to justify an award of attorney's fees under contract law:

> (a) the party seeking the fees, whether for him/herself or on behalf of a client, always bears the burden of presenting evidence sufficient for a trial court to render a judgment as to their reasonableness; (b) an appropriate fee is always reasonable charges for the services

> rendered; (c) a fee is not justified by a mere compilation of hours multiplied by fixed hourly rates or bills issued to the client; (d) a request for fees must specify the services performed, by whom they were performed, the time expended thereon, and the hourly rates charged; (e) it is incumbent upon the party seeking recovery to present detailed records that contain the relevant facts and computations undergirding the computation of charges; (f) without such records, the reasonableness, vel non, of the fees can be determined only by conjecture or opinion of the attorney seeking the fees and would therefore not be supported by competent evidence.

Rauch v. McCall, 134 Md.App. 624, 639, 761 A.2d 76, 84-85 (2000).

First, Selby met its burden of presenting evidence sufficient for the trial court to render a judgment as to the reasonableness of the fees claimed. Selby's attorney, Matthew Egeli, took the stand and testified that "the amount of fees billed are fair and reasonable" and that "the hourly rates charged, including [his] reduced hourly rate on this case, are within the norms charged by lawyers in this community." (E 394) Counsel presented the trial court with an 18-page bill (E. 525-42) and was prepared to testify about each individual entry until instructed by the court that it was not necessary and that the bill could speak for itself. The bill shows the date of the service provided, the initials of the individual doing the work, a detailed description of the work performed, the amount of time spent that day in tenths of an hour, the rate applicable to that individual, and the total amount of fees charged. The descriptions of the work performed are in such detail that they even identify the precise issues involved in individual legal research assignments to counsel's associate.

Counsel's bill is not simply a statement of hours multiplied by a fixed hourly rate, but a detailed and itemized statement of the work of each individual staff member assigned to the case. As required by Rauch, the bill specified the services performed, the identity of the individual performing the service, the time expended by that individual, and that individual's hourly rate. In addition, Mr. Egeli testified that the hourly rate he charged Selby was below his normal hourly rate.

Not only was the evidence presented sufficient for the trial court to make its ruling, the bill was most definitely reasonable and YDF's assertion that the work was merely administrative and for one hearing is a gross misrepresentation of the facts. The bill reflects all of counsel's time drafting the Complaint, amending the Complaint, drafting requests for admissions, drafting discovery requests, legal research, drafting a motion for summary judgment, contacting witnesses and preparing affidavits in support of the motion for summary judgment, modifying the scheduling order due to YDF's delay in answering the complaint, drafting a response to YDF's motion for summary judgment, reviewing discovery, reviewing documents, responding to YDF's motion for reconsideration, attending the summary judgment hearing, and coordinating a continuance of the summary judgment hearing at YDF's request.

Furthermore, contrary to YDF's contention on page 29 of its Brief, the bill reflects all of counsel's preparation for the one-day trial. The bill includes all the time spent by counsel from the date of entry of partial summary judgment,

October 17, 2006, up until the day of trial, December 12, 2006. Those entries dealt with research questions related to the trial, preparation of trial exhibits, preparation of motions in limine, preparation of trial subpoenas, meeting/communicating with witnesses and preparing them for trial, the drafting of a trial memorandum, and trial counsel's preparation for trial.

Additionally, YDF made no effort to cross-examine Mr. Egeli regarding the bill during trial and presented absolutely no contrary testimony. Accordingly, any objection to the legal sufficiency and reasonableness of the individual billing entries was waived and is not before this Court.

YDF's assertion that the bill was for "administrative work and a summary judgment motions hearing" ignores the fact that this case took almost a year and a half to resolve and the number of motions required to resolve it. Simply put, all of Selby's attorney's fees were a direct result of YDF's failure to honor the settlement agreement reached at the courthouse in November of 2003 and YDF cannot now claim that the fees it caused are unreasonable. The trial court did not abuse its discretion in awarding the fees.

CONCLUSION

The facts established by Selby's summary judgment motion and the applicable law show that the lower court correctly determined that the Agreement reached by Selby and YDF did not violate the Rule Against Perpetuities, and that the delays in establishing the Clubhouse Property purchase price did not give YDF the right to walk away from the deal. It was ridiculous for YDF to argue to the

trial court that it could take the parties more than the perpetuities period to carry out the terms of the Agreement. The argument is equally ridiculous when made to this Court. The time period within which the Agreement was carried out was reasonable under the circumstances.

Furthermore, the trial court correctly determined that time was not of the essence of the Agreement and that YDF was obligated to go to settlement despite delays that were often attributable to YDF because of its failure to communicate. The trial court's findings of fact were supported by the evidence presented at trial and were not clearly erroneous.

Finally, the trial court's award of attorney's fees to Selby was proper and was not an abuse of discretion. Selby's right to recover attorney's fees is established by the Agreement. The claim for attorney's fees was fully documented and was supported by legally sufficient evidence. At trial, YDF made little effort to dispute the fees, all of which resulted from YDF's failure to honor the parties' Agreement.

Wherefore, Selby respectfully requests that this Honorable Court affirm the judgment entered by the Circuit Court for Anne Arundel County.

STATEMENT OF FONT AND TYPE SIZE

Times New Roman, 13-point type; double line spacing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two (2) copies of the Appellee's Brief were hand-delivered this 9th day of October, 2007, to:

L. Teri Spradlin-Dahn, Esquire
69 Franklin Street
Annapolis, Maryland 21401

_____
Matthew A. Egeli