

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

FROG HOLLOW, L.L.C., :
 :
 Plaintiff, :
 :
 vs. : Civil Action
 : No. 15666
 FRANK COLE WHITTINGTON, II, :
 :
 Defendant. :

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Chancery Courtroom No. 106
Daniel L. Herrmann Courthouse
Wilmington, Delaware
Friday, November 5, 1999
9:00 a.m.

- - -
BEFORE: HON. LEO E. STRINE, JR., Vice Chancellor.

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RULING OF THE COURT FOLLOWING TRIAL
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CHANCERY COURT REPORTERS
135 Daniel L. Herrmann Courthouse
Wilmington, Delaware 19801
(302) 577-2447

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APPEARANCES:

JEFFREY M. WEINER, ESQ.
for the Plaintiff

GAIL E. AHRENS, ESQ.
for the Defendant

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1 * * *

2 THE COURT: There are a lot of parts
3 of my job that I like. There is not much about the
4 role I play on this case that I like. It's sad to
5 see brother against brother, and it's regrettable.
6 It's -- it's regrettable in human terms. But the
7 case before me has, as a legal matter -- has little
8 to do with the strained relationships between
9 Mr. Frank Whittington and Mr. Tom Whittington and the
10 other Whittingtons. This is a breach of contract
11 case. And it's not that complex when it's distilled
12 down to its essence and looked at as a breach of
13 contract case.

14 It's important to put in the context
15 that there were two agreements of sale in this case.
16 The first agreement was dated October 16th, 1995.
17 That contract obligated Frog Hollow to purchase the
18 7.8 acres from Mr. Frank Whittington for a total of
19 \$26,164. The contract gave Mr. Whittington the right
20 to demand that closing take place in calendar year
21 1995. Mr. Frank Whittington apparently never
22 demanded that closing take place then.

23 In the spring of 1996, I credit the
24 testimony that says Mr. Frank Whittington was told

1 that Frog Hollow would go to settlement, and would
2 pay him, would fulfill the October 16th, 1995
3 contract. I also credit the testimony that indicates
4 that Mr. Frank Whittington did not want to do that.
5 He wanted a higher price. He wanted a price equal to
6 that which was paid by Mr. Keilkoph. He, himself,
7 said that his family thought it was equitable to do
8 that and gave him that price increase.

9 I also credit the testimony that
10 indicates that his family was willing to let him out
11 of the deal altogether if he wanted to walk away and
12 keep the property. But he chose not to do that. He
13 chose to seek additional consideration, at a higher
14 price, from his family and enter into a binding
15 contract.

16 A lot has been said about time is of
17 the essence. The time-is-of-the-essence provision
18 did not change between the two contracts, as I read
19 them. Paragraph 15 of the original October 1995
20 agreement has a time-of-the-essence provision. The
21 contract, the October 1995 agreement, can be read as
22 giving Mr. Frank Whittington even greater rights to
23 move the contract forward, because it gave him the
24 right to demand a settlement occur within that

1 calendar year. He didn't do it.

2 So we then move forward to -- we move
3 forward to the year of 1995 to 1996. A new contract
4 is entered. I also believe that Mr. Frank
5 Whittington during that time was represented by
6 Mr. Mammarella. There were changes to the document.
7 He says he wasn't represented by counsel. I think he
8 was. I think the evidence is clear that he was. He
9 may have discharged Mr. Mammarella, but he got
10 representation.

11 Mr. Frank Whittington is clearly an
12 articulate man. He understands things. I saw him
13 testify. He is not disabled in any way. He was also
14 aware that he was taking a note. He was a member of
15 the boards of these entities. He was invited to the
16 board meetings. He knew what was going on, and he
17 knew that he was getting a note. He was going to get
18 an up-front payment and a note.

19 We then go to January 6th. Mr. Frank
20 Whittington was ready to close. I think the version
21 of events that was given by Ms. Cunningham rings
22 true. I think Mr. Frank Whittington was aware that
23 he could have -- he could -- that the contract could
24 have gone to settlement that day, and he could have

1 received his check.

2 As a factual matter, I find that it
3 could -- that settlement could have occurred that
4 day. I am convinced that there was sufficient funds
5 available to close the contract on behalf of either
6 entity.

7 The issue about which entity would
8 close the contract I think is not a substantial one.
9 As I understand the evidence, it would have really
10 been to Mr. Frank Whittington's advantage as of
11 January 6th, 1997 to have closed with Frog Hollow,
12 rather than Dove's Nest, given the change in the
13 relationship with the Robinos. If Frog Hollow was
14 the operating entity and it was going to receive
15 funds directly from the developers, then doing a
16 contract with them, it would seem to me, would have
17 allowed him to have a note from the more valuable
18 entity. It seems likely that Dove's Nest -- it was
19 changed to Dove's Nest because of the relationship
20 with Robino, and that Mr. Frank Whittington was
21 entering into a sales contract with his family's
22 company, not with a company that was half-owned by
23 the Robino family.

24 But in any case, had Mr. Frank

1 Whittington been around in the afternoon, these are
2 the sorts of things that can be worked out at a
3 settlement. You were in a law office. There was an
4 experienced real estate paralegal there who could
5 have changed the documents within an hour.

6 I think it's sort of not a nonissue
7 whether Ms. Marna Whittington's check was deposited
8 on the afternoon of January 8th, rather than January
9 6th. Since Mr. Frank Whittington had left and was
10 going to an attorney with the documents, I don't see
11 why anyone at the Whittington & Aulgur firm
12 necessarily felt under any compulsion to rush over
13 and put the checks in the bank to make sure they
14 would clear. They were waiting to hear back from
15 Mr. Frank Whittington. Even more important, there
16 was already funds from the entities on deposit with
17 Whittington & Aulgur. So I am convinced that Dove's
18 Nest or Frog Hollow, either one of them, was prepared
19 to go to settlement that day, on January 6th.

20 Mr. Frank Whittington's right to
21 terminate, declare the contract null and void, only
22 arises if there is a default on the part of the
23 buyer. I don't think there is any such default. The
24 contract does not become null and void at midnight on

1 January 6th. There is a right on Mr. Frank
2 Whittington's part to declare the contract null and
3 void if there has been a default of the buyer. There
4 was no such default.

5 In terms of the actual importance
6 Mr. Frank Whittington placed on the time-of-the-
7 essence clause, I don't think that at the time that
8 these events were happening he was placing any
9 emphasis on it at all. He went to Ms. Ahrens with
10 the closing papers. And what occurred from there was
11 an attempt by Ms. Ahrens, on his behalf, to
12 renegotiate the contract, to make it more favorable
13 to him, to get financial guarantees that he had not
14 secured for himself in the first instance.

15 Yet again, his family said, "Okay,
16 Frank." And his brothers were willing to personally
17 guarantee the payments under the contract, even
18 though they had no legal obligation to do that, since
19 Frank had agreed simply to accept a note from the
20 entity, much like in 1995 they had no obligation to
21 renegotiate a higher contract for the same parcel of
22 land which they could have closed on by compulsion.

23 As of the time Ms. Ahrens sent that
24 letter and Ms. Cunningham replied to the fax, it was

1 very clear Mr. Frank Whittington was still intent on
2 settling. Ms. Ahrens made it clear in her note to
3 the Whittington & Aulgur firm that they would be
4 hearing from Frank. Ms. Cunningham confirmed that in
5 her fax.

6 Mr. Whittington, Mr. Frank
7 Whittington, thus took the ball in his own court. He
8 was the one who was going to have to put it back in
9 play. I credit the testimony of Ms. Cunningham and
10 Mr. Tom Whittington that Frank Whittington went to
11 the firm a week later, again had the opportunity to
12 close, was told that, and refused to close. I also
13 credit the testimony that at the family meeting in
14 January he had the opportunity to close and did not
15 close.

16 The idea that Mr. Frank Whittington
17 refused to close because he wanted to continue this
18 as a buffer zone just simply doesn't ring true in
19 light of these events. More consistent is that
20 Mr. Whittington wanted -- Mr. Frank Whittington
21 wanted to get more out of the deal, which is
22 consistent with what happened in '95, and is
23 consistent with asking for the personal guarantee, or
24 that other possibly deeply emotional issues were

1 going on between him and his family which made it
2 difficult for him as a human being to fulfill his
3 business relationship with the company. I can
4 understand that as a human being, but it is not a
5 legal excuse.

6 So for all those reasons, it's clear
7 to me that there was a breach of the contract by
8 Mr. Frank Whittington by refusing to go to closing.
9 One cannot bootstrap one's own breach of contract
10 into a claim that the other party to the contract is
11 in default. You can't simply run away and hide and
12 disable the other party to a contract from completing
13 the closing and then claim that you have a right to
14 terminate. That's not how the law of contracts
15 works. So there has been a breach, and the breach
16 has been by Mr. Frank Whittington.

17 The remedy: I confess that this is
18 not the most sensible economic situation I've ever
19 seen. It's not the least sensible, either. It
20 appears that the Whittington family at large has
21 taken every opportunity they can to expand on their
22 farm property and to help them build The Legends
23 community, and that for -- since 1995, that expansion
24 has included building -- buying Frank's 7.8 acres.

1 In fact, Frank indicated that he suggested that
2 because he wanted to help the project go along,
3 because he had originally been a proponent of the
4 project, and the family had gone along with that. He
5 wanted to contribute the land.

6 It is true that nobody has really
7 articulated a huge economic benefit from this land.
8 You can't put -- thank the Lord -- another shopping
9 center in New Castle County on it. It's mostly
10 wetlands and woods. It has, according to everyone,
11 aesthetic value. But land is generally considered
12 unique, and this is land abutting a very significant
13 development of the Frog Hollow entity and the Dove's
14 Nest entity. And the possibility that in the future
15 it could be used as a more direct drainage outlet is
16 not a frivolous concern. That seems to me to be a
17 very sensible business concern.

18 The notion that the golf course
19 community would have the opportunity, within
20 environmental guidelines, to make sure that the
21 property was well maintained, that it was
22 aesthetically pleasing, is not a frivolous concern,
23 given it's a golf community. People like to play
24 golf at places which are physically appealing. If

1 there is a possibility that someone might own that
2 and timber it, that could be very detrimental in
3 terms of how the golf course is planned.

4 And in balancing the equities, I
5 think the most important thing here is that Mr. Frank
6 Whittington led his family to believe -- and signed
7 binding contracts -- that this was going to be part
8 and parcel of the overall project. They planned on
9 it. They devoted time and attention to it. They got
10 his properties annexed. They planned -- they had to
11 change their plans because of this change in
12 expectations.

13 I think in the equities, they weigh
14 against Frank in this circumstance, because he could
15 have said, in 1995, when his family told him, "You
16 can walk away," -- he could have said, "I walk away,"
17 and none of this would have ever happened. They
18 never would have banked on this. They would have
19 made alternative plans.

20 For whatever reason, Frank
21 Whittington chose to stay in the deal. He wanted to
22 get the contract done. And if there is an inequity
23 here that's been committed, it's been Mr. Frank
24 Whittington leading his family down the garden path,

1 only to pull out on them, for reasons which are still
2 not clear to me, because to the extent he feared that
3 this would not be a buffer zone, he testified that he
4 didn't really know anything different in January 1997
5 than he knew beforehand. There was nothing different
6 that led him not to settle. There probably were
7 family reasons.

8 So I'm going to order specific
9 performance of the contract. I want to talk a little
10 bit about the remedy. I think what ought to happen
11 is if Mr. Frank Whittington wants specific
12 performance with Dove's Nest, that's what he will
13 get. It's Dove's Nest. I would urge him to think
14 about whether he really wants Dove's Nest or Frog
15 Hollow, whether it matters. If he wants to stick to
16 the letter of the contract, it will be done by the
17 letter of the contract.

18 I am going to award the damages
19 sought by Mr. Weiner. I want he and Ms. Ahrens to
20 work on the map. I had something that came up a
21 little bit different. I'm talking a little bit
22 different by hundreds of dollars. But I would like
23 just the two of you to confer on that. It's going to
24 include the -- actually, no. It's not going to. I'm

1 sorry. Strike that.

2 I'm going to back out the survey. I
3 am not convinced the plaintiff has the burden of
4 proof on that. I'm not convinced that that would not
5 have had to occur otherwise, because the 12 acres
6 were in. I want the 48, 18, 75 backed out.

7 The order I would prefer to enter
8 would simply have the damages as an offset against
9 what would be paid for the land. So whatever the
10 contract price is, all that sort of thing, and --
11 just do that as an offset to limit the transaction
12 costs. I would like counsel to work on that.

13 The plaintiffs have sought attorney's
14 fees. I'm not going to award attorney's fees. It
15 was certainly not a frivolous request to ask for
16 attorney's fees, but I think that there was enough
17 confusion, perhaps, the day of the settlement -- and
18 Mr. Frank Whittington has been in contact with
19 counsel -- that I can't say that it rises to the
20 level of such extraordinary bad faith, in a
21 jurisdiction which follows the American rule, that we
22 should shift the burden of attorney's fees from the
23 plaintiffs to Mr. Frank Whittington. That is going
24 to be denied. That's going to be.

1 What I would like is if the counsel
2 in the case could continue your cooperation and try
3 to work on an order, and have it to me no later than
4 this time next week for entry, that's what I would
5 appreciate.

6 Is there anything else?

7 MR. WEINER: Should the order include
8 a settlement date approximately 31 days after the
9 date of signature?

10 THE COURT: Yeah. If you two could
11 work on that? Obviously, Mr. Whittington and his
12 counsel -- Mr. Frank Whittington and his counsel have
13 to think about their options. But yes, I think we
14 should get a date and a time.

15 MR. T. WHITTINGTON: Yes, Your Honor.

16 THE COURT: No one is allowed to get
17 sick or anything. And I do hope for the family
18 that -- I mean this is not -- this is not an easy
19 thing. I don't like to see brother against brother.
20 This is not what you all enjoy doing, and I don't
21 really enjoy presiding over this sort of matter. I
22 hope that you will think about, in a serious way --
23 because I know you have other disputes pending --
24 figuring out a way to work them out more

1 cooperatively than having another trial in this Court
2 and another trial in the Superior Court. But that's
3 really all in your hands. There is nothing I can do
4 about that.

5 Thank you all. Thank you, counsel.
6 We have a good day.

7 (Recess at 2:28 p.m.)

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CERTIFICATE

I, WILLIAM J. DAWSON, Official Court Reporter of the Chancery Court, State of Delaware, do hereby certify that the foregoing pages numbered 3 through 16 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 30th day of December, 1999.

William J. Dawson
 Official Court Reporter
 of the Chancery Court
 State of Delaware

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