

COPY

UNREPORTED

IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 916

September Term, 2006

JOHN M. ZUPANCIC, III, ET AL.

v.

PAUL ABBOTT, ET AL.

Krauser,
Meredith,
Moylan, Jr., Charles E.,
(Retired, specially assigned),

JJ.

Opinion by Krauser, J.

Filed: October 18, 2007

There are few circumstances involving the purchase of real estate that are more likely to generate litigation than when there are two purchase agreements for the same piece of property, a primary agreement and a back-up contract, and the back-up agreement contains a substantially higher purchase price than the primary agreement. And that is what occurred here.

Appellant Catherine Bartos ("Mrs. Bartos") entered into a contract to sell her property in St. Mary's County, which was improved by a cottage, to appellees, Dr. Elaine Barker and Paul Abbott ("the purchasers"). She later entered into a "back-up contract" with co-appellants Cheryl Gordon and John M. Zupancic (the "back-up buyers"), agreeing to sell them the same property at a higher price if her contract with the purchasers lapsed or was otherwise declared void. Thus, the seeds of this controversy were sowed.

They sprouted when, on the day of settlement, the purchasers were notified of the threat of lis pendens action, potentially encumbering title to the property they wished to purchase. The purchasers, understandably, requested a short delay in the settlement so that they and Mrs. Bartos could take certain actions to ensure that they received good title, as required by the contract. Mrs. Bartos denied their request on the grounds that it was an attempt to unilaterally amend the contract, and the settlement fell apart. Predictably, a flurry of litigation ensued.

The purchasers filed suit against Mrs. Bartos in the Circuit Court for St. Mary's County, demanding specific performance of their contract. Then both sides to that suit brought separate actions against the back-up buyers, but seeking the same relief: a declaration that the back-up contract was unenforceable. Both actions were met with counterclaims requesting specific performance of the back-up contract and that the purchasers' contract be declared unenforceable. After a bench trial, the court granted the purchasers' request for specific performance and declared the back-up buyers' contract with Mrs. Bartos "null and void."

Challenging that decision, Mrs. Bartos and the back-up buyers noted this appeal, presenting several issues for our review. Restated and reordered to provide a more coherent and cohesive review by this Court, they are:

- I. Whether the circuit court erred both in finding that the purchasers were "ready, willing and able" to perform under their contract at the scheduled time of settlement and in finding that they were "under all of the circumstances 'ready, desirous, prompt and eager'" to perform their duties under that contract.
- II. Whether the circuit court erred in granting specific performance when the contract purportedly violated the Rule Against Perpetuities.

For the reasons set forth below, we affirm the judgment of the circuit court.

FACTS

On May 26, 2003 ("Memorial Day"), the purchasers visited a

local beach in Scotland, Maryland. Because they could not reach the water from where their car was parked, they asked Mrs. Bartos's permission to pass through her property at 13945 Cornfield Harbor Road ("the Property"). On their way back, the purchasers "stopped in to thank" Mrs. Bartos and she invited them into her cottage for a drink. At that time, the purchasers asked whether Mrs. Bartos would be interested in selling the Property. She indicated that she might be.

Over the July 4th weekend that followed, the purchasers returned to the cottage. When Mrs. Bartos told them that she was now considering selling it, the parties exchanged phone numbers and, a few weeks later, Mrs. Bartos agreed to sell the Property to the purchasers for \$180,000.

The next month, the purchasers sent a draft of a purchase agreement to Mrs. Bartos, but she did not sign it. A month later, in September 2003, Hurricane Isabel struck the Maryland coast, causing substantial damage to the cottage as well as thousands of other properties.

As the cottage was no longer habitable, the purchasers sent Mrs. Bartos a letter, rescinding their offer of \$180,000 and replacing it with an offer of "\$60,000 for the land." On October 2, 2003, they sent her a draft of an amended sales contract, renewing their proposal to buy the land for \$60,000. That agreement was also never executed.

Still, over the next few months, the purchasers remained in contact with Mrs. Bartos. She confided to them that she was "dealing with a lot of . . . issues" with the Federal Emergency Management Agency ("FEMA") and her insurance company, concerning how much she could expect to recover for the damage to her Property, as well a series of "personal issues," and, thus, was "not quite ready to make a decision about selling the Property."

In early Spring 2004, although no deal had yet been struck with Mrs. Bartos, the purchasers consulted with St. Mary's County officials about rebuilding property destroyed by Hurricane Isabelle. They were interested in converting the damaged cottage into a weekend home.

In April 2004, Mrs. Bartos told the purchasers that she was ready to sell the Property to them. Although they initially agreed on a purchase price of \$80,000, Mrs. Bartos reduced the price to \$75,000 when the purchasers agreed to take responsibility for tearing down the cottage in accordance with FEMA guidelines. Later that month, the purchasers met with Mrs. Bartos in a Wheaton restaurant, where they and Mrs. Bartos signed a contract in which Mrs. Bartos agreed to sell the Property to the purchasers for that price. At that meeting, the parties inserted a handwritten provision into the purchase agreement stating that the Property was to be "sold as-is."

The contract signed by the parties required, among other things, that Mrs. Bartos "furnish and convey the Property with a General Warranty Deed" and ensure that its well and septic systems met all health and environmental requirements.' It further provided that the sale of the Property would only take place if the purchasers obtained an approved building permit for the house that was to replace the storm-ravaged cottage.

After signing the contract, the purchasers gave Mrs. Bartos a \$3,000 deposit, as required by the agreement. Settlement, the parties agreed, was to occur within 120 days of contract execution. Unfortunately, the purchasers experienced numerous difficulties and unanticipated problems in obtaining a building permit. Consequently, they asked Mrs. Bartos to postpone the settlement, which she agreed to do.

Two months after signing the purchase agreement, the parties executed an addendum to the contract, setting a new deadline for settlement. It was now to occur "7 months from the date" that the addendum was executed or as soon as purchasers [we]re able to obtain a building permit" from St. Mary's County.

The "Back-Up Contract"

Less than two weeks after signing the addendum, in early July, 2004, Mrs. Bartos received a letter from Cheryl Gordon and her fiancé, John M. Zupancic, III (the "back-up buyers"), expressing an interest in buying the Property she had contracted to sell to the

purchasers. In their letter, the back-up buyers stressed that they were willing to acquire the Property "as is" and were "prepared [to] negotiat[e] a fair and suitable price."

Four months later, on October 22, 2004, unbeknownst to the purchasers, Mrs. Bartos entered into a "back-up contract" with Zupancic and Gordon. They agreed to pay \$100,000 for the property in cash at settlement, which was \$25,000 more than the purchasers had offered, and gave Mrs. Bartos a \$5,000 deposit. The back-up contract provided that settlement on the Property would occur "forty five (45 days)" after notice was given to the purchasers that the purchasers' "Primary Contract ... ha[d] been voided or released, or Forty Five (45) Days after January 24, 2005, when the Primary Contract [had] lapsed and a release ha[d] been obtained."

Purchasers' Efforts to Obtain a Building Permit

In the meantime, the purchasers had contacted a local surveying firm about obtaining a location survey for the home they planned to build to replace the cottage. They also spoke with various county departments about obtaining a building permit.

But their attempts to quickly obtain a permit were unavailing. Inundated with demands for property inspections and assessments in the months following Hurricane Isabel, county agencies were unable to promptly respond to the purchasers' request. Their progress was further stymied, they maintained, by Mrs. Bartos's failure to

respond to their "requests for information [and] documents" they needed to provide the County with to secure the building permit.

In late October, 2004, the purchasers learned that, to obtain a building permit, their permit application would have to be approved by the county's Board of Appeals during one of its upcoming critical area hearings, but, in no event, would that occur before the Board's January meeting. When they informed Mrs. Bartos of this, she "suggest[ed]," according to the purchasers, "that they just withdraw from the contract." They "assured her they would not."

On October 26, 2004, the purchasers received a letter from a "Jerry P. Blackburn, Esq." Identifying himself as the president of the "Friends of Cornfield Harbor, LLC," Blackburn objected to the purchasers' plans to build on the Property, claiming that it was within an "endangered habitat region" of the Chesapeake Bay Watershed.

A few weeks later, after the purchasers were alerted by a County official that a spot had opened up on the Board of Appeals' "critical variance hearing" agenda, they succeeded in obtaining a hearing date on November 18, 2004. But, before that hearing could take place, they were informed by the county's health department that the Property's septic system was "illegal," forcing them to forego their plans to proceed with their application at the November 18th hearing. After advising Mrs. Bartos of the need to

resolve the Property's "septic compliance issues," they requested that settlement be postponed until after January 24, 2005, explaining that the Board of Appeals' January docket was now filled and, consequently, the earliest that their application could be heard by the Board was at its February meeting.

Mrs. Bartos responded that she would not agree to the extension because, in her words, she "had a [back-up] contract which would kick in if this contract didn't settle." She claimed that she had promised the back-up buyers that they could purchase the Property if she did not settle on it with the purchasers by January 24, 2005. Fearing that they were in danger of losing the Property to the back-up buyers, the purchasers agreed to go through with settlement, although they had not yet obtained a building permit.

Settlement Talks

On January 13, 2005, the purchasers sent a faxed request to schedule settlement to F. Michael Harris, Esquire, a settlement attorney with the law firm of Harris & Capristo. Complying with that request, Harris arranged for settlement to take place on Friday, January 21, 2005 at 4 p.m. at Harris & Capristo's office in California, Maryland. A letter was then sent by the purchasers to Mrs. Bartos, confirming the time, date, and location of the settlement.

On January 20, 2005, a second letter written by "Jerry P. Blackburn, Esq.," on behalf of the "Friends of Cornfield Harbor, LLC," was faxed to Harris & Capristo's office. Addressed to Harris's partner, "Mr. Capristo," the letter stated:

It has been discovered that a title search has been initiated to settle the purchase of 13945 Cornfield Harbor Drive. Further investigation revealed the settlement has been arranged to occur within your office on January 21, 2005.

In regards to a settlement of the above-listed Property, please be advised of the following:

- **A *lis pendens* was recently filed due to the nefarious nature of the Abbott/Barker development plans for the property.** Both Abbott and Barker were duly notified of this action, though they have not provided the requested response. Rather, they orchestrated a settlement of this Friday to rapidly transfer the property before the illegitimacies associated with their unsound development plans can be resolved and a transfer can be halted. More specifically, the building permits office within the Office of Land Use & Growth Management of St. Mary's County reveals a severely flawed site survey document in which illegal encroachments onto the adjacent properties (that of Hall Pond Refuge, LLC, and Robert Harnden) are contained therein.
- The contentious nature of that, neighborhood outcry and numerous other problems associated with the Abbott/Barker development plans propelled the withdrawal of a request for a variance from St. Mary's County on November 18, 2005 (please consult Susan Mahoney of the Office of Land Use & Growth Management, referencing application VAAP no. 04-2595). Record of the withdrawal and other ill-fated components of the Abbott/Barker application to build may also be viewed via the St. Mary's County website (<http://www.co.saint-marys.md.us/permits-inseptions/index.asp>).
- Regarding neighbors whom[sic] have expressed opposition to a variance for 13945 Cornfield Harbor Drive, the group includes neighbors whom[sic] have seen their property encroached upon with the

haphazard and poorly executed site survey for the property, but also neighbors whom[sic] have been perturbed by the inhospitable nature of the Abbott/Barker partnership. Additionally, there are issues of neighborhood access to the beach fronting Hall Pond, which can only be accessed through 13945 Cornfield Harbor Drive. For several years access has been unrestricted, via an implied easement. As Abbott and Barker have vocalized their plans to banish public right-of-way, recourse must, obviously, be pursued.

- Moreover, Abbott and Barker were notified of these concerns in addition to that of the inappropriately massive and environmentally-unsound structure for which they've submitted a building permit to St. Mary's County. The existing structure is 776 square feet, whereas the Abbott/Barker project is slated for 2151 square feet (3 times or 277% larger than the current cottage).
- Should they receive the unlikely go-ahead to pursue such a structure, the environmental effects will be tremendous and disastrous. Cornfield Harbor is identified as "an endangered habitat region" related to the poor state of the Chesapeake Bay and losses will occur with any building in the region. To be more specific, the compromised Maryland Terrapin has staked refuge on the beach fronting 13945 Cornfield Harbor Drive because of the restrictive bulkheads that create an embankment along most of the shoreline in the region. Abbott and Barker were notified of this in October of 2004. Not only did they not respond to achieve any amicable resolve, they more aggressively pursued acquiring building permits for the property and regrettable confrontations with concerned neighbors.
- Thus, an inquiry of the partnership with greater depth was pursued. The unethical track-record under which Abbott and Barker gain possession of real estate at the expense of the seller and the greater community at large was then discovered. In fact, Abbott and Barker have a past of squandering the elderly out of precious parcels of land for well-under value, illegally acquiring building permits, building unsound flimsy structures, which they quickly sell, and damaging the environment and the community all along the way.

In closing, please let this serve as disclosure of the complications related to a settlement of 13945 Cornfield Harbor Drive with Abbott and Barker.

Should you feel it appropriate to proceed with a closure in light of the aforementioned information, please be informed that any deleterious effect(s), which the community and environment may suffer, may engender possible unfavorable consequences - liability to determined through a court of law, referral of this situation to the appropriate ethics arms of St. Mary's County Bar Association and Maryland State Bar Association and notification of the county government. Of course, it is hopeful to avoid any such possible castigatory outcomes and amicable resolution is certainly preferential, all things considered. I hope you agree and look forward to hearing from you at your earliest in regards to this matter. (Emphasis added)

C/o Jerry P. Blackburn, President

Because the letter was faxed on January 20th, a federal holiday¹, Harris did not receive it until the morning of January 21st, the date of settlement. To Harris, the letter was "a red flag" that a lawsuit might have been filed involving the Property or would soon be. He therefore instructed his staff to check the courthouse records to see if any claims had been filed. The ensuing record review disclosed that, as of January 21st, no lawsuit had been filed against Mrs. Bartos or the purchasers with respect to the Property.

Shortly after 3 p.m. that afternoon, Harris met with the purchasers in his office and informed them that the "Friends of Cornfield Harbor" letter presented a "serious issue." He told them

¹ January 20, 2005, was Inauguration Day.

that if they settled on the Property at 4 p.m., as scheduled, it would be too late to run a final check on the Property's title before concluding settlement. That meant, Harris explained, they would have no way of knowing whether a lawsuit was pending at the time they closed on the Property. He further cautioned them that if "their money was paid and . . . this lawsuit was there, they would be stuck with it and would have to defend it . . . "

He therefore advised the purchasers to sign the settlement documents and give him the purchase funds, which he would place in escrow until the following Monday, January 24th; at which time, he would run a final check to see if any lawsuit had been filed. If, by that time, no such action had been taken, he assured them that he would record the documents and disburse the funds to Mrs. Bartos. The purchasers agreed to this arrangement.

Approximately a half hour later, at about 3:45 p.m., Mrs. Bartos appeared for settlement at Harris & Capristo's office. She met with Harris and the firm's settlement coordinator, Denise Raley. Harris showed Mrs. Bartos the January 20th "Friends of Cornfield Harbor" letter. He advised Mrs. Bartos that, because of the letter, he would have to run a final title check on the Property to assure that no actions were pending. But that title check would have to wait, he observed, until Monday, when the clerk's office reopened. If, by that time, no action had been

filed, he would record the deed and pay Mrs. Bartos the full purchase price for the Property.

Harris then presented Mrs. Bartos with a settlement sheet, which was erroneously dated "February 21, 2005," instead of "January 21, 2005." The settlement sheet that had been prepared by Ms. Raley was inadvertently misdated. Although Mrs. Bartos noticed that the date was wrong at the time Harris showed the settlement papers to her, she did not mention anything about it to him or Ms. Raley. Ms. Raley later testified at trial, as did Harris, that, had Mrs. Bartos brought the "typographical error" to someone's attention, the error would have been promptly corrected. Instead, Mrs. Bartos flatly informed Harris and Raley that she would not sign anything unless she received payment for her Property that day.

Harris responded that he could not meet her demand. "[I]t was her responsibility," he explained "as well as [his] to deliver good title to [the purchasers] concerning this real estate transaction." Given "the threatened lawsuit" and the detailed nature of the "Friends of Cornfield Harbor" letter, "the best approach," he counseled, was to wait until Monday "to verify that a lawsuit had not been filed."

He presented Mrs. Bartos with what he believed were two reasonable alternative ways of handling this matter. He said that, if Mrs. Bartos would "sign the papers" before she left that

afternoon, he would "wire transfer . . . [to] her [the] proceeds on Monday [January 24th] after [he] went to record" the deed. Alternatively, "if she wasn't comfortable with that," he offered to "overnight deliver a . . . proceeds check to her" and she "would receive it on Tuesday."

Unwilling to agree to either course of action, Mrs. Bartos demanded that Harris give her a written statement of his intention "to escrow the funds and not disburse them." Harris complied with that request. He prepared a handwritten letter, stating that

[he] ha[d] advised [Mrs. Bartos] that because of a letter . . . that threatens a lis pendens action that may affect the title to [the Property] that disbursement of the settlement proceeds . . . will be made on January 24, 2005 after recording the deed of conveyance for the above-referenced Property and verifying that no "lis pendens" action has been filed in the Circuit Court for St. Mary's County, Maryland that would affect the title to the above-referenced Property.

After receiving the letter from Harris, Mrs. Bartos left his office.

"The Ship Has Left The Dock"

After Mrs. Bartos' departure, Harris told the purchasers that he felt that "the status of the settlement [was] on life support." Still hopeful that a settlement could be reached, the purchasers responded that they "would very much appreciate if [Harris] would try again on Monday to have Mrs. Bartos sign [the settlement] papers." They then signed the settlement documents and gave Harris

two checks for the amount of money necessary to conclude the transaction: One check was for \$74,484.33, and the other for \$262.50. They also gave Harris an account balance sheet dated January 21, 2005, from Dr. Barker's checking account, showing that the balance of that account more than covered the checks².

Harris testified that he planned to deposit the purchasers' checks in his real estate escrow account and then write a check to Mrs. Bartos from that account for the purchase price after checking the title and recording the deed on Monday. After assuring the purchasers that he "would do everything that [he] could to facilitate the transaction" with Mrs. Bartos on Monday, he discussed with them "what their options were if Mrs. Bartos would not come back to settle on January 24th." Those options included sending the settlement documents and disbursement funds to her by courier, seeing whether she would "accept a wire" transfer of funds, and, as a last resort, "filing a lawsuit" against her.

On the morning of January 24th, Ms. Raley contacted Mrs. Bartos with an offer to "resurrect the settlement." Ms. Raley assured Mrs. Bartos that if she went to the St. Mary's County Courthouse and signed the deed, the proceeds of the sale would be disbursed to her that day, after the deed was recorded. Flatly rejecting this

² Catalina Racu, the officer at the United Bank branch in Arlington, Va., where Dr. Barker had her account, testified at trial that, on January 21, 2005, her account had a balance of "eighty three thousand, fifty one dollars and eight cents," enough to cover the funds for settlement.

proposal, Mrs. Bartos told Raley that "the ship ha[d] left the dock" and that she was "an old lady and she ha[d] a back[-]up contract and she [was]n't going to be pushed around anymore."

The Litigation Begins

On the afternoon of January 24, 2005, after Mrs. Bartos had rejected their request to postpone the settlement, the purchasers filed a three-count complaint in the Circuit Court for St. Mary's County against her. In count I of that complaint, the purchasers requested declaratory judgment that they "[were] not required to settle on the . . . property before the issuance of the building permit." In count II, they sought specific performance by Mrs. Bartos of the terms of their contract. And, in count III, they demanded damages from Mrs. Bartos in the amount of \$100,000 as well as attorneys' fees³.

On November 30, 2005, Mrs. Bartos filed a declaratory judgment action against the back-up buyers, Zupancic and Gordon, requesting a judicial declaration that she had "the right to engage in settlement negotiations and, if fruitful, a settlement agreement to sell [her] property to [the purchasers] without incurring any liability to the [back-up buyers]." Thereafter, the purchasers filed a complaint for declaratory judgment against the back-up buyers, naming Mrs. Bartos as a co-plaintiff. In turn, the back-up

³ The purchasers subsequently filed a line dismissing their claim for money damages.

buyers filed a counterclaim against Mrs. Bartos seeking a declaratory judgment that their contract to buy her Property was "valid and enforceable" and demanding specific performance of their contract. They also filed a counterclaim against the purchasers, requesting that their contract with Mrs. Bartos be declared "null and void." All claims were consolidated for trial.

Following a bench trial, the circuit court concluded that the purchasers were "ready, willing and able" to perform the contract, notwithstanding their request that certain actions be taken at settlement to confirm that they would receive good title, as promised by Mrs. Bartos. It explained that the purchasers

had a right to check to find out whether there was a *lis pendens*, whether in fact there was a title problem. They didn't have an obligation to assume from the language of [the "Friends of Cornfield Harbor"] letter that they were good and everything was fine . . .

Nor did the purchasers' request that recordation of the deed precede payment constitute a "new condition," the court found. It reasoned:

[S]ince good title was required, and the only way to know was to check the land records and then quickly record before an actual *lis pendens* could be put on . . . and since there was time to do it . . . under these circumstances, with the spector [sic] of the potential title issue being raised . . . [recordation] was an appropriate measure to take.

And, finally, the court found that, not only were the

purchasers "ready, willing and able" to settle under the contract, but that it was Mrs. Bartos who had prevented that from happening:

[The purchasers] did nothing wrong. They did everything they were suppose [sic] to do. They were there ready, able and willing to settle. They had their money ready to pay. They had a right to have their attorney check the title to determine whether there was a cloud on it or not. They did not even have to go past the date of the settlement within the contract, within the addendum of the contract to do so. . . .

Mrs. Bartos made up her mind to demand her check in spite of the title issues, and to not come back, not to sign anything and put it in escrow and not to come back on Monday. And basically . . . the sale didn't go through because of Mrs. Bartos' [sic] behavior.

Hence, the circuit court granted the purchasers' request for specific performance and ordered Mrs. Bartos "to sign all documents necessary to effectuate the sale of the Property."

DISCUSSION

I.

The circuit court erred, Mrs. Bartos and the back-up buyers claim, in finding that the purchasers were "ready, willing and able" to perform under their contract at the scheduled time of settlement. And it further erred, they claim, in granting the purchasers specific performance when the purchasers failed to make the required showing that they were "under all of the circumstances 'ready, desirous, prompt and eager'" to perform their duties under

the contract. We find neither argument persuasive.

At first blush, the phrases "ready, willing and able" and "ready, desirous, prompt and eager" appear to be interchangeable. But, on closer inspection, we find that these two standards vary in substance and temporal breadth.

The "ready, willing and able" standard is essentially concerned with the desire and capability of a party seeking specific performance to fulfill his contract obligations at two discrete junctures: at the time of settlement and at the time specific performance is demanded. In *Shoreham Developers, Inc. v. Randolph Hills, Inc.*, 248 Md. 267 (1967), for example, the Court of Appeals affirmed the trial court's order granting specific performance of a contract for the sale of land after observing that "the record reveal[ed] uncontradicted evidence that [the purchasers] were 'ready, willing and able' to perform on ... the date originally set for settlement within the purview of the contract terms." *Id.* at 273 (quoted in *Canaras v. Lift Truck Services, Inc.*, 272 Md. 337, 360 (1974)). On the other hand, in *Evelyn v. Raven Realty, Inc.*, 215 Md. 467, 471-473, (1958), the Court reversed a trial court's order decreeing specific performance to a land buyer because "there was no evidence as to whether the buyer could have performed the contract" within the time period the parties had agreed upon for settlement.

But being "ready, willing and able" at the time of settlement

is not enough if the party requesting specific performance is not in that state when he formally requests such relief. In that event, he will normally be left to his remedies at law.⁴ *Brooks v. Towson Realty, Inc.*, 223 Md. 61, 73-74 (1961) (citing *Willard v. Tayloe*, 8 Wall. 557, 567) (1869)).

In contrast, the "ready, desirous, prompt and eager" standard focuses on the efforts made by a party demanding specific performance to consummate the contract "under all of the circumstances." *Robertson v. Coad*, 249 Md. 252, 259 (1968). In applying this standard, a court of equity may look beyond the scheduled date of settlement and consider the party's conduct from the inception of the agreement to the demand for specific

⁴ We note that our appellate courts have, in a few instances, held that buyers of land were entitled to specific performance even though they were unable to pay the purchase price at trial. But those rulings were contingent on the buyers' demonstrated capability to subsequently tender payment in a timely fashion. For example, in *Leet v. Totah*, 329 Md. 645, 665 (1993), the Court of Appeals held that the fact that a purchaser's financing arrangement expired while his action for specific performance was pending did not bar him from obtaining such relief when he showed that he was capable of securing alternative financing within a reasonable period of time. It reasoned that, in "fashioning a decree of specific performance in favor of a purchaser who was ready, willing, and able to settle at the time of settlement, a court, while encouraging the arrangement of prompt financing, may provide a reasonable time for the purchaser to satisfy the conditions of existing financing commitments, as they may have been affected by the litigation, or to arrange substitute financing." *Id.*

Similarly, in *Commercial & Indus. Properties, Inc. v. Anello*, 36 Md.App. 191 (1977), this Court reversed a trial court's order dismissing a buyers' complaint for specific performance of a land contract on the grounds that the buyers failed, at the time of trial, to provide proof of their immediate ability to pay the purchase price. We held that, where the buyers showed that they were entitled to an additional 30 days after trial in which to consummate their part of the agreement, a decree of specific performance should have been granted, providing for "settlement of the purchase and sale" to take place "within a very limited time" such that the "vendors would be assured of receiving the purchase price at settlement or of knowing that the agreement no longer binds them." *Id.* at 194-95.

performance. See *Robertson*, 249 Md. at 259; *Joppa Sand and Gravel Corp. v. Epstein*, 39 Md.App. 34, 42 (1978). In so doing, it may consider the history, consistency and the extent of a complainant's efforts, both in performing his part of the contract and in enforcing his rights against the party who has repudiated the agreement.

This standard typically comes into play when the party seeking specific performance is accused by the side opposing that remedy of failing to exercise due diligence in performing his or her obligations under the contract or laches.⁵ Applying this standard in *Boyd v. Mercantile-Safe Deposit & Trust Co.*, 28 Md. App. 18 (1975), this Court declared that a party "who himself fails promptly to perform with respect to a material requirement of the agreement, ordinarily is guilty of a lack of due diligence and is deprived of the right to specific performance." 28 Md. App. at 26. And in *Tarses v. Miller Fruit & Produce Co.*, 155 Md. 448, 142 A. 522 (1928), the Court of Appeals opined that a party's delay in performing his part of the contract or in "prosecuting his right to the interference of the court by the institution of an action, or in ... diligently prosecuting his action when instituted, may constitute such laches as will disentitle him to the aid of the court, and so amount, for the purpose of specific performance, to an abandonment on his part of the contract.'" 142 A. at 524. (quoting *Miller's Equity*, § 661). See, also, *Doering v. Fields*,

⁵ "Laches" is defined as an "[u]nreasonable delay or negligence in pursuing a right or claim - almost always an equitable one - in a way that prejudices the party against whom relief is sought." (Black's Law Dictionary).

187 Md. 484 (1947) ("The complainant must seek relief promptly and ... 'cannot call upon a Court of Equity for a specific performance, unless he has shown himself ready, desirous, prompt and eager.'" *Id.* at 488 (quoting *Milward v. Thanet*, 5 Ves. 720 (1801))).

In other words, a court of equity will not order specific performance when the proponent of that relief has been dilatory in seeking performance and "'slumber[ed] on [his] rights'" *Soehnlein v. Pumphrey*, 183 Md. 334, 339 (1944) (quoting *King v. Hamilton*, 4 Pet. 311, 7 L.Ed. 869, 875; 49 Am.Jur., Specific Performance, sec. 73).

In sum, a party must show that he is "ready, willing and able" to fulfill his contract obligations at the time of settlement and when requesting specific performance to be eligible for such relief. *Shoreham Developers*, 248 Md. at 273. And when the party requesting specific performance is accused of exhibiting unreasonable delay in performing his contract obligations, or of failing to act promptly to enforce his rights under the contract, he must show, to the court's satisfaction, that, from the time that contract was executed, he was "under all of the circumstances 'ready, desirous, prompt and eager.'" *Robertson*, 249 Md. at 259.

That is not to suggest that any delay by the complainant is lethal to his or her demand for specific performance. On the contrary, a party who delays in performing some aspect of the contract may nonetheless qualify as both "ready, willing and able" and "ready, desirous, prompt and eager" provided that that delay is

"reasonable." *Kasten Const. Co. v. Maple Ridge Const. Co.*, 245 Md. 373, 379 (1967) ("[w]hen there has been a delay, as there was in this case, the important question is whether it was reasonable") (Cf. *Scheffres v. Columbia Realty Co.*, 244 Md. 270, 223 A.2d 619 (1966) (other citations omitted)).

For example, in *Shoreham Developers*, the Court of Appeals ruled that a party seeking specific performance was "ready, willing and able" to perform on the scheduled date of settlement, notwithstanding the fact that he ultimately refused to settle on that date because of the other party's "failure to perform the conditions precedent," as set forth in the contract. 248 Md. at 273. The Court of Appeals explained that, even though the contract specified that "time [was] of the essence" for performing, the complainant's delay was reasonable because it had been caused by the conduct of the other party. 248 Md. at 275 (quoting 2 Corbin, *Contracts* 310, p. 112 (1950)) ("'[I]f the plaintiff has been caused to delay his performance beyond the specified time by the request or agreement or other conduct of the defendant, the plaintiff can enforce the contract in spite of his delay.'")

Similarly, in *Chapman v. Thomas*, 211 Md. 102, 108 (1956), the Court of Appeals upheld an order awarding specific performance to purchasers of land because the purchasers were "under all of the circumstances 'ready, desirous, prompt and eager,'" notwithstanding their failure to settle within thirty days, as provided in their

contract. The purchasers' delay was reasonable, the Court of Appeals explained, because "in the ordinary case of contract for the sale of land, even though a certain period of time is stipulated for its consummation, equity treats the provision as formal rather than essential, and permits the purchaser who has suffered the period to elapse to make payment after the prescribed date, and to compel performance by the vendor notwithstanding the delay.'" *Id.* (quoting *Soehnlein*, 183 Md. at 338). It added that "where the purchaser has not been grossly negligent and invokes the aid of equity in good faith and with reasonable diligence, and the situation of the parties has not changed, the court will not refuse to decree specific performance merely because he was unable to comply strictly with the terms of the contract.'" *Id.*

Indeed, our appellate courts have on numerous occasions upheld awards of specific performance to parties that have delayed, where it was concluded that the delay neither resulted from the parties' own willful conduct nor caused injury to the side opposing such relief. See, e.g., *Kasten Const. Co. v. Maple Ridge Const. Co.*, 245 Md. 373, 379 (1967); *Chapman v. Thomas*, 211 Md.102, 108 (1956); *Azat v. Farruggio*, 162 Md.App. 539, 555 (2005).

"Ready, Willing and Able"

In evaluating appellant's contention that the circuit court erred in concluding that the purchasers were "ready, willing and able" to perform under the contract, we apply a "clearly erroneous" standard of review. That standard requires us to determine

whether, after viewing the evidence in a light most favorable to the prevailing party - in this instance, the purchasers - the circuit court's finding that the purchasers were "ready, willing and able" to perform under the contract was "supported by 'substantial evidence'" *GMC v. Schmitz*, 362 Md. 229, 234, 764 A.2d 838 (2001) (quoting *Ryan*, 347 A.2d at 835-36 (1975)). We conclude that it was.

Appellants cite three instances where the purchasers allegedly showed that they were not "ready, willing and able" by departing from the terms of their contract at settlement: The first instance occurred when the purchasers purportedly imposed an "extra condition" on Mrs. Bartos at settlement by requesting that settlement be postponed until the next business day so that the courthouse records could be checked for a *lis pendens* action and the deed recorded. The second happened when the purchasers' settlement checks were not thereafter deposited in the settlement attorney's escrow account. And the third occurred when Mrs. Bartos was presented with a mis-dated settlement sheet by the settlement attorney's office. None of these purported departures from the terms of the contract rendered the purchasers, as we shall see, anything less than "ready, willing and able" to perform at the expected time.

With respect to the first contractual deviation - the purchasers' request that disbursement of the funds be deferred

until Monday, when the courthouse records could be checked and the deed recorded - Mrs. Bartos and the back-up buyers claim that that request constituted an "extra condition," which, notwithstanding the possible pendency of a *lis pendens* action, Mrs. Bartos was under no obligation to accept. In fact, they submit that Mrs. Bartos "was well within her rights to insist on . . . contemporaneous payment with no contingencies."

To explain why the court below did not err in finding, despite the purchasers' request, that they were "ready, willing and able" to perform at settlement, we must consider the nature of the *lis pendens* action, which the "Friends of Cornfield Harbor" letter stated had been filed, and its potential effect on the title to the property being conveyed, and, finally, the "reasonableness" of the defendant's request. *Kasten Const.*, 245 Md. at 379.

In Maryland, the doctrine of *lis pendens* applies "exclusively to proceedings involving real property." *Weston Builders & Developers, Inc. v. McBerry, LLC*, 167 Md. App. 24, 33 (2006), citing *DeShields v. Broadwater*, 338 Md. 422, 435 (1995). "Under th[is] doctrine, an interest in property acquired while litigation affecting title to that property is pending is taken subject to the results of that pending litigation." *DeShields v. Broadwater*, 338 Md. 422, 433 (1995), citing *Applegarth v. Russel*, 25 Md. 317, 320 (1866) (internal citations omitted). Specifically, a notice of *lis pendens* "provides constructive notice of the equity claimed" by a third party in a property. *Broadwater*, 338 Md. at 436. As such,

it "is intended to, and does, create a cloud on title to property." *Greenpoint Mortg. Funding, Inc. v. Schlossberg*, 390 Md. 211, 229 (2005). Consequently, "a person purchasing an estate after notice of a [*lis pendens* action] is a *mala fide* ["bad faith"] purchaser who cannot defeat the prior equitable interest by obtaining legal title." *Broadwater*, 338 Md. at 443.

As the Court of Appeals also declared in *Broadwater*: under the doctrine of equitable conversion,⁶ "a *lis pendens* filed after the execution of the sales contract does not affect the interest of the contract purchaser," *Broadwater*, 338 Md. at 442-443 (internal citations omitted). On the one hand, this holding suggests that the purchasers' interest in the Property may have been unaffected by a *lis pendens* action because they were not notified of such an action until January 21st, 2005, months after they signed their purchase contract and the subsequent contract addendum and gave Mrs. Bartos a \$3,000 deposit. In so doing, the purchasers "executed" their contract and "acquire[d] an equitable interest"⁷ in the Property. Thus, any subsequent action filed against Mrs. Bartos would not have affected their Property interest. *Id.* See also *Black's Law Dictionary* (defining "executed contract" as a

⁶ The adage "that equity treats that as being done which should be done," is the basis of the [doctrine] of equitable conversion." *Broadwater*, 339 Md. at 437. It provides that, when a purchaser contracts to buy land from a seller, though legal title has not yet passed, the purchaser becomes the owner of the land and acquires an equitable interest in it, with the seller holding the legal title in trust for the purchaser. *Id.*

⁷ "Equitable title" is defined as a "title that indicates a beneficial interest in property and that gives the holder the right to acquire formal legal title." *Black's Law Dictionary*. A buyer of property takes "equitable title" upon the execution of a purchase contract, but, pursuant to Rule 3-101, does not obtain "formal legal title" until he records the deed to the property.

"signed contract.")

But, on the other hand, it is far from clear that such an action, if filed, would have been directed against Mrs. Bartos. The precise nature of the alleged suit, and who would be sued, was left, perhaps intentionally, ambiguous in the "Friends of Cornfield Harbor" letter. Indeed, that letter mentioned the purchasers by name, leaving open the possibility that they might be sued instead of, or in addition to, Mrs. Bartos. And, although it was highly questionable that a *lis pendens* action filed after the purchase contract had been executed would have affected the purchasers' interest in the Property, their caution, given the number and the gravity of the accusations contained in the "Friends of Cornfield Harbor" letter, was not misplaced.

That, of course, is not the view of Mrs. Bartos and the back-up buyers. They insist that, even if the "Friends of Cornfield Harbor" had filed a *lis pendens* action, it would, "at most," have "alleged a zoning violation." And such a violation, they maintain, would not have "constitute[d] a breach of warranty or an encumbrance on property" sufficient to warrant the purchasers' request that the courthouse records could be checked and the deed recorded. But the "Friends of Cornfield Harbor" letter arguably threatened more than an action based solely on zoning violations. It implied that the suit filed by the "Friends of Cornfield Harbor" included other claims, warning, as it did, that the purchasers' "liability" for an assortment of unethical and illegal acts would be "determined through a court of law."

Given the claims, charges and verbal ferocity of the letter, the purchasers understandably, chose not to ignore it. Heeding the advice of the settlement attorney, they requested that settlement be postponed until Monday, the first day on which the courthouse records could be examined for a *lis pendens* suit, and that the purchase price be paid that day after the deed had been recorded. This short delay in settlement was simply to ensure that the "Friends of Cornfield Harbor" had not filed a *lis pendens* action, potentially "creat[ing] a cloud on title to property." *Schlossberg*, 390 Md. at 229. As such, it qualified as a "reasonable" delay, which, as we previously observed, is not a bar to specific performance. *Kasten Const. Co.*, 245 Md. at 379 (internal citations omitted). Indeed, specific performance remained a viable remedy as long as the delay did not result from their own willful conduct or cause injury to Mrs. Bartos. *Id.* There is no indication that it did. And, in any event, the delay did not violate the terms of the parties' contract: Settlement was still to occur within the contract period for settlement, the last day of which was January 24, 2005.

Moreover, as we noted earlier, Mrs. Bartos promised, under the terms of her contract with the purchasers, to convey "good title," in other words, "clear title" or "marketable title." See *Black's Law Dictionary* (defining "good title" as "clear title" and "marketable title.") The Court of Appeals has defined "marketable title" as "a title without encumbrances and free from reasonable doubt as to any question of law or fact that may call it in

question in the future and subject the purchaser to the hazard of litigation." *Garner v. Union Trust Co. of Md.*, 185 Md. 386, 389 (1945). Thus, by promising to provide the purchasers with "good title," Mrs. Bartos effectively agreed to ensure that title to the Property was "without encumbrances and free from reasonable doubt as to any question of law or fact" that might in the future "subject the purchaser[s] to the hazard of litigation." *Id.*

That she did not do. In fact, at the time she attempted to transfer title to the purchasers, she was informed that a *lis pendens* action had purportedly been filed. As we noted earlier, the only way to ensure good title under those circumstances was to conduct a final check of the Property's title records to determine whether a suit had been filed and then promptly record the deed. And that could only be done by delaying settlement until the following business day. Hence, the purchasers' request did not, as Mrs. Bartos and the back-up purchasers claim, impose an "extra condition" on the parties' original purchase agreement. Rather, it was merely a request that Mrs. Bartos do what she was contractually obligated to do: fulfill the terms of the contract. We thus conclude that the circuit court was not clearly erroneous in holding that the purchasers' request to delay settlement until the Property title could be checked and the deed recorded did not render them any less "ready, willing and able" to settle under the contract.

Appellants also claim, as noted much earlier in this opinion,

that the purchasers were not "ready, willing and able" because their "settlement process checks were never deposited by the [s]ettlement [o]ffice." But it was not, as the purchasers point out, necessary for them to deposit the funds as a prerequisite for requesting specific performance. On the contrary, "a tender before trial is not necessary" for specific performance to be granted "where the seller has expressed his intention not to perform." *Darneille v. Geraci*, 237 Md. 51, 57 (1964) followed by *Nusbaum v. Saffell*, 271 Md. 31, 39 (1974). And that is what the seller, Mrs. Bartos, did here.

In *Darneille*, the trial court granted a buyer's request for specific performance of a contract for the sale of land in Prince George's County, only to reverse that decision after a rehearing. The buyer appealed, arguing, as the purchasers do here, that he was "at all times able, ready and willing to perform" under the contract. But, according to the seller, the buyer's offer to tender \$245,000 to complete the purchase of the Property "came too late" because that offer was made only after he had brought suit for specific performance and the dispute had gone to trial. 237 Md. at 57. In reversing the trial court's denial of specific performance, the Court of Appeals declared that "a tender is not necessary when it would have been futile" in light of the seller's stated intent not to perform. *Id.*

Similarly, in the instant case, "it would have been futile"

for the settlement attorney to deposit the purchase funds after Mrs. Bartos unequivocally informed him that, "unless she got a check [immediately] that she could take to the bank and cash, she was not closing." Ironically, the settlement attorney then offered to do what appellants now claim needed to be done to justify specific performance, that is, deposit the purchase funds in the settlement escrow account. But Mrs. Bartos, before leaving his office, made it clear that she was not interested in any arrangement other than the immediate disbursement of the funds to her.

As we noted earlier, the purchasers' request to delay disbursement of the funds "until the next business day" was reasonable in light of the threatened *lis pendens* action. Nonetheless, Mrs. Bartos refused to consider this possibility and declared that the deal was off, or, as she later put it, "the ship ha[d] left the dock." There was no reason, at that point, for the purchasers to tender payment of the funds. Therefore, their decision not to do so did not render them any less "ready, willing and able" to settle under the terms of contract.

As a last ground for claiming that the purchasers were not "ready, willing and able" to settle, Mrs. Bartos and the back-up buyers invoke the settlement sheet prepared the settlement attorney's office. That sheet, they point out, was "dated well beyond the deadline for settlement." But the circuit court found, and we concur, that the misdating of the settlement sheet was no

more than "a typographical error," and that that error did not indicate that the purchasers were less than "ready, willing and able" to perform under the contract. In fact, the purchasers themselves had nothing to do with this error. The settlement coordinator testified that the date on the settlement sheet - February 21, 2005 - was mistakenly entered by her. Given that Mrs. Bartos had spotted that mistake and did not bring it to anyone's attention, her reliance on this error now borders on the disingenuous. In any event, had she brought the error to the attention of the settlement attorney or Ms. Raley, they would have, in the attorney's words, "happily changed it."

Furthermore, as pointed out by appellant's expert witness, a settlement sheet is not required to conclude settlement and, thus, any error it contained in this matter would not have affected the validity of the settlement. In sum, there is no basis for concluding that the circuit court erred, as appellants maintain, in concluding that the purchasers were "ready, willing, and able" to go to settlement.

"Ready, Desirous, Prompt and Eager"

Mrs. Bartos and the back-up buyers claim that the purchasers' earlier requests to postpone the settlement demonstrated that they were not "under all of the circumstances 'ready, desirous, prompt and eager'" to consummate the contract.

As we noted earlier, "ready, desirous, prompt and eager" is

the standard that a party must meet before a court grants him specific performance in a situation where he is accused of failing to perform his contract obligations with due diligence at all times under that agreement or of "'slumber[ing] on [his] rights'" in enforcing the agreement. *Soehnlein*, 183 Md. at 339 (1944) (internal citations omitted).

In determining whether the purchasers failed to perform their contract obligations with due diligence, we examine their conduct from the time of contract execution leading up to their request for specific performance. See *Joppa Sand and Gravel Corp. v. Epstein*, 39 Md.App. 34, 42 (1978) (quoting Miller, *Equity Procedure*, supra, s 661; *Boyd v. Mercantile-Safe Deposit and Trust Co.*, 28 Md.App. 18, 344 A.2d 148 (1975)) (Where party seeking specific performance delayed "in total disregard of the provisions of the contract with respect to time," that delay "constituted an abnegation of its responsibility as a seeker of specific performance, whether or not time was of the essence, to show that it was 'ready and desirous, prompt and eager' to obtain performance") Any delays in their performance must be explained and accounted for. *Doering*, 187 Md. at 489. ("In order that a default may not defeat a party's remedy, the delay which occasioned it must be explained and accounted for.")

Here, the purchasers did indeed show themselves "ready, desirous, prompt and eager" to purchase the Property from Mrs. Bartos. *Id.* And they did so "under all of the circumstances,"

id., from the inception of their contract: After agreeing on a purchase price and signing a contract that was conditioned on the purchasers obtaining an "approved building permit," the purchasers gave Mrs. Bartos a \$3,000 deposit, as required by the contract, and worked with officials in St. Mary's County to acquire such a permit. Then, despite numerous problems, including Mrs. Bartos's repeated failure to provide information and documents requested by the purchasers so that they could obtain a building permit, the purchasers pressed on. When it became clear that the Board of Appeals would not rule on their request for a building permit by the end of January 2005, the purchasers, faced with Mrs. Bartos's refusal to postpone the settlement date, acquiesced in her demand that settlement proceed, despite the fact that they had not obtained the permit.

Even after being notified of a possible *lis pendens* action, the purchasers pursued consummation of the contract. They asked only that Mrs. Bartos postpone settlement until the next business day to permit a final check of the courthouse records for any claims that might have been filed and to record the deed before the sale was completed, thereby ensuring that they would receive "good title," as Mrs. Bartos had promised to convey. Moreover, this delay not only fell within the contractual deadline for settlement, but did not prejudice Mrs. Bartos, nor does she claim that it did. As we noted earlier, where there was no willful conduct creating a delay, and no injury caused by it, the party responsible for that

delay is not barred from the relief of specific performance. *Chapman v. Thomas*, 211 Md. at 108 (1956). Indeed, as the Court of Appeals observed more than half a century ago: "'where the purchaser has not been grossly negligent and invokes the aid of equity in good faith and with reasonable diligence, and the situation of the parties has not changed, the court will not refuse to decree specific performance merely because he was unable to comply strictly with the terms of the contract.'" *Soehnlein*, 183 Md. at 339, (internal citations omitted.)

Moreover, it is undisputed that the purchasers did not "slumber[] on [their] rights" in enforcing their contract with Mrs. Bartos. *Id.* On the contrary, as soon as she informed them that "the ship ha[d] left the dock" and she was not going through with the contract, they filed a claim against her for specific performance.

In short, there is no basis for concluding that the circuit court abused its discretion in finding that the purchasers were "at all times 'ready, desirous, prompt and eager'" to perform their part of the contract and, thus, were entitled to the remedy of specific performance.

II.

Finally, appellants contend that the purchasers' contract, as written, "violate[d] the Rule Against Perpetuities" and, therefore, was invalid. They point to the addendum to the contract, which provided that the "[s]ettlement date [was to] be 7 months from the

date of th[e] signed agreement or as soon as the Purchasers [were] able to obtain a building permit." Because "'it [was] uncertain when, if ever'" the purchasers would obtain the building permit, it was, they maintain, conceivable that that might occur after a life in being plus 21 years. *Dorado L.P. v. Broadneck Development Corp.*, 317 Md. 148, 152 (1989). As this issue⁸ was not raised or decided below, we need not consider it now. See Maryland Rule 8-131(a) ("the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court.")

**JUDGMENT AFFIRMED. COSTS
TO BE PAID BY APPELLANTS.**

⁸ We feel compelled, nonetheless, to point out that, after this appeal was filed, §11-102 and §11-102.1 of the Maryland Code, Estates and Trusts Article, were amended to provide that the common-law Rule Against Perpetuities no longer applies to sales contracts for land.