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VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 21st day of April, 2016.

Holtzman Oil Corp., et al., Appellants,

against Record No. 141863
Circuit Court No. CL83809

Green Project, LLC, et al., Appellees.

Upon an appeal from a judgment rendered by the Circuit Court of Loudoun County.

Upon consideration of the record, briefs, and argument of counsel, the Court is of the opinion that there is no reversible error in the judgment of the circuit court.

I. Background

Holtzman Oil Corp. seeks specific performance of the Contract of Sale entered into with New Dominion Investments, LLC, on March 22, 2002, for the purchase of a 2-acre lot within a 30.3-acre tract of land owned by New Dominion.[1] New Dominion conveyed the 30.3-acre tract to Green Project, LLC, in 2005, subject to the contract with Holtzman Oil. In 2011, Holtzman Oil filed its first complaint ("Holtzman I") seeking specific performance of the contract. Holtzman Oil nonsuited its first action in 2013 and filed the present action against Green Project and other defendants.[2] The present complaint seeks specific performance of the contract, including various declarations, determinations, and orders to effectuate conveyance of a 2-acre

[1] Gateway Farm, LC, is also named as a plaintiff. The complaint alleges that Holtzman Oil has an "understanding" with Gateway Farm in which Holtzman Oil will convey the lot to Gateway Farm. The plaintiffs are collectively referred to as Holtzman Oil in this Order.

[2] The complaint also names the Piedmont Environmental Council, Christopher G. Miller, E. Scott Kasprowicz, and Jason McIntosh as defendants. The complaint alleges that the Piedmont Environmental Council is the beneficiary of a credit line deed of trust secured by the 30.3-acre tract and that Miller is trustee. The complaint alleges that Kasprowicz is a manager of Green Project and that McIntosh is a lessee of all or part of the 30.3-acre tract.

lot.[3] Holtzman Oil requests that the circuit court ultimately approve selection of a 2-acre lot designated by Holtzman Oil on a 2013 plat as "subsequently modified, supplemented and/or amended, from time to time;" that the circuit court "appoint a special commissioner for the purpose of executing any documents on behalf of Green Project;" and, that the matter remain on the active docket of the circuit court until a "closing has occurred," until "Holtzman Oil terminates the Contract upon deciding that the contingencies cannot be met," or until "midnight, March 21, 2023."

The circuit court sustained the defendants' demurrers and pleas in bar to the complaint and dismissed the complaint with prejudice, concluding that the remedy of specific performance was not available due to the "lack of clarity" regarding the lot to be conveyed. The circuit court also awarded Green Project and Kasprowicz attorneys' fees and costs incurred in the present action, including such fees and costs incurred in connection with the discovery conducted in Holtzman I that was incorporated into and utilized by the parties in the present action.

II. Contract of Sale

The Contract of Sale, attached as an exhibit to the complaint, provides in Section 1 that the lot shall be comprised of 2 acres and "shall be chosen at the discretion of [Holtzman Oil] upon the development and submission of a master plan for [the 30.3-acre tract] to the appropriate governing body for approval. The master plan to be submitted must be approved by [Holtzman Oil], which approval shall not be unreasonably withheld."[4]

Under Section 8, the contract is contingent upon Green Project determining that "[t]here exists reasonable access to public water and sewer sources adequate to meet the commercial needs of [Holtzman Oil]," or in the absence of public water and sewer sources: 1) determining that the 2-acre lot can support an aerobic sewer system and obtaining the permits required to install such system adequate to meet the commercial needs of Holtzman Oil; and 2) determining

[3] Specifically, Holtzman Oil's demands are contained on pages 42 through 53 of its complaint within 41 numbered paragraphs, many of which include multiple subparts.

[4] The purchase price for the lot is $1,000,000. When the contract was executed in 2002, New Dominion acknowledged receipt from Holtzman Oil of a deposit in the sum of $600,000 secured by a second deed of trust on the 30.3-acre tract, certain guarantees, and a third deed of trust on an adjoining tract. In connection with New Dominion's conveyance of the 30.3-acre tract to Green Project in 2005, the $600,000 deposit was returned to Holtzman Oil to secure the release of the deed of trust.

an adequate source of water exists on the 2-acre lot and obtaining the permits required to install a well adequate to meet the commercial needs of Holtzman Oil.

Additionally, Section 8 provides that the contract is contingent upon Green Project obtaining all permits necessary, including "all zoning approvals (special use permit), to build and operate a combination convenience store and gasoline sales facility based upon plans to be provided by [Holtzman Oil]." Section 8 requires that Green Project "diligently and in good faith pursue such zoning approval" and permits Holtzman Oil, upon notice, to "take over any pending application" if it determines that Green Project is not diligently pursuing such approval.

The contract gives Green Project "an initial period of five (5) years" to satisfy the contingencies. If the contingencies have not been satisfied within that period, Holtzman Oil, "at its sole discretion," has the option to extend the period until it determines Green Project will not be able to satisfy the contingencies. Upon such determination, the deposit plus accrued interest is to be returned to Holtzman Oil.

III. Analysis

A. Dismissal of Complaint

We disagree with Holtzman Oil that the circuit court erred in ruling that the contract was too indefinite to be specifically enforced.[5]

"It is an elementary principle that a court of equity will not specifically enforce a contract unless it be complete and certain. All the essential terms of the contract must be finally and definitely settled. None must be left to be determined by future negotiations." Duke v. Tobin, 198 Va. 758, 759, 96 S.E.2d 758, 760 (1957); see also Roles v. Mason, 202 Va. 690, 692, 119 S.E.2d 238, 240 (1961) (holding specific performance unavailable to enforce an agreement to agree).

> "A greater amount or degree of certainty is required in the terms of an agreement, which is to be specifically executed in equity, than is necessary

[5] In Holtzman Oil's second assignment of error, it asserts that the circuit court erroneously ruled that the contract was too indefinite to be specifically enforced "because metes and bounds of 2-acre fee simple parcel would likely change over approval process." While we disagree with Holtzman Oil that the circuit court's ruling was so limited, it is not necessary for us to parse the circuit court's explanation for its ruling. The allegations of the complaint, together with the exhibits to the complaint and argument of counsel, compel the conclusion that the contract was too indefinite to be specifically enforced due to the uncertainty regarding the lot to be conveyed.

> in a contract which is to be the basis of an action at law for damages. An action at law is founded upon the mere non-performance by the defendant, and this negative conclusion can often be established without determining all the terms of the agreement with exactness. The suit in equity is wholly an affirmative proceeding. The mere fact of nonperformance is not enough; its object is to procure a performance by the defendant, and this demands a clear, definite and precise understanding of all the terms; they must be exactly ascertained before their performance can be enforced."

Grayson Lumber Co. v. Young, 118 Va. 122, 125-26, 86 S.E. 826, 827 (1915) (quoting John N. Pomeroy, Pomeroy on Specific Performance of Contracts § 159, at 223-24 (2d ed. 1897)).

As the circuit court ruled, the contract is too indefinite with regard to the lot to be conveyed to enable the circuit court to specifically enforce the contract. According to Section 1 of the contract, the lot is to be comprised of 2 acres selected by Holtzman Oil from a master plan of the 30.3-acre tract developed by Green Project. Regardless of what the term "master plan" means,[6] the contract clearly envisions discussions and further negotiations between Holtzman Oil and Green Project with regard to the master plan because it provides that the master plan must be approved by Holtzman Oil. Indeed, Holtzman Oil contends that it has the right to require what is on this plan as a condition of its approval of the plan so long as it acts in good faith and is not irrational or capricious.[7] Thus, the selection of the 2-acre lot is contingent and dependent on master plan negotiations.[8]

The uncertainty over the lot to be conveyed was a predominant and reoccurring subject of discussion at the hearing on the demurrers and pleas in bar. The circuit court repeatedly asked

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[6] Holtzman Oil argues that "master plan" refers to a site plan that must be prepared and submitted under the applicable rules and regulations of Loudoun County.

[7] Attached to the complaint as exhibits are documents reflecting discussions between Holtzman Oil and Green Project regarding plans for the 30.3 acre tract, referred to by the parties as "the Gilbert's Corner parcel." For example, in 2007, legal counsel for Holtzman Oil memorialized a conversation with Peter Schwartz, a member of Green Project, regarding Green Project's plans for the Gilbert's Corner parcel, including a location for potential development of the gas station. Counsel for Holtzman Oil subsequently sent a letter to Schwartz confirming the conversation and intention to resume "discussions for the concept plan, subdivision and development of [the] Gilbert's Corner parcel."

[8] Although Holtzman Oil claims to have selected a 2-acre lot, it was not selected from a master plan developed by Green Project. In 2013, while Holtzman I was pending, Holtzman Oil forwarded to Green Project a plat of a 2-acre lot attached as exhibit 18 to its present complaint. It subsequently sent an amended plat attached as exhibit 21 to its present complaint.

how it could enter an order specifically enforcing the contract without a description of the property. Holtzman Oil admitted that while the lot has been "preliminarily identified," that identification is "probably not going to be what it ends up being in terms of after the county looks at their ordinances and exercises their discretion."[9] Holtzman Oil suggested that the circuit court could "order [Green Project] to sign such documents as we present to them in terms of moving forward to get all of the approvals so that ultimately a building permit would be issued in favor of Holtzman Oil based on plans presented by Holtzman Oil." With regard to a description of the lot, Holtzman Oil responded that "the realty that [Green Project] would be ordered to convey would be the ultimate two-acre parcel together with such appurtenant easements that are necessary to satisfy all of the requirements of Loudoun County to get the approvals that was ultimately approved on the site plan." In fact, Holtzman Oil conceded that by the date of trial, the most the circuit court could order with reference to a description of the property is a "declaration that Holtzman Oil acted in good faith in showing the two acres where they say they want it."

As recognized by the circuit court, the contingencies described in Section 8 of the contract also contribute to the lack of clarity regarding the property to be conveyed. Not only is the location of the lot affected by these contingencies, but performance of the contract itself is contingent on a determination by Green Project that the lot can support an aerobic sewer system and that an adequate source of water exists. Noting these contingencies, the circuit court asked, for example, how it could "order [Green Project] to determine there exists reasonable access to public water, sewer? That involves [Green Project determining] which two acres can fit the needs of that" and "gives [Green Project] the power to determine the two acres that meet all the contingencies." Holtzman Oil agreed with the circuit court, but with the qualification that Green Project had "to act in good faith."[10]

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[9] The lot "preliminarily identified" by Holtzman Oil is the 2-acre lot selected independent of a master plan and depicted on the plats attached as exhibits 18 and 21 to the complaint.

[10] There is a dispute over the breadth of easements Holtzman Oil claims entitlement to and the nature of "everything" Green Project is obligated to do under Section 8 of the contract. Resolution of these disputes is unnecessary because it is undisputed that the contingencies affect the location of the 2-acre lot and, therefore, the ability of the circuit court to specifically enforce the contract.

In addition to the lack of clarity regarding the lot to be conveyed, the impracticality of specific performance supports the circuit court's ruling. Specific performance "may be denied if it is impossible for the court to precisely define the specific actions to be performed.'" Perel v. Brannan, 267 Va. 691, 701, 594 S.E.2d 899, 905 (2004) (quoting Pomeroy, supra, § 307, at 393). As reflected in the allegations of the complaint and argument at hearing, Holtzman Oil is asking the circuit court to oversee every step of performance of the contract, including the development of a master plan, selection of the lot, and the administrative process of approvals for the various permits. In other words, as noted by the circuit court, Holtzman Oil seeks decrees of "general performance" of a supervisory nature. It would be impossible for the circuit court to precisely define the specific actions to be performed and any such relief would necessarily consist of a series of successive decrees over a period of years.[11]

For these reasons, we hold that the circuit court did not err in dismissing Holtzman Oil's complaint on the grounds that the contract was too indefinite to be specifically enforced.[12]

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[11] Holtzman Oil argues that the circuit court improperly considered evidence outside the complaint. Holtzman Oil's complaint, comprising 53 pages, consists of 119 numbered allegations, many of which include subparts, and 41 additional demands, many of which also include subparts. The complaint incorporates 21 exhibits, comprising 100 pages, which include not only the contract but correspondence between the parties and other documents referred to in the complaint. In ruling on the demurrers, the circuit court was entitled to consider not only the allegations of the complaint but also the exhibits to the complaint. EMAC, L.L.C. v. County of Hanover, 291 Va. 13, 21, 781 S.E.2d 181, 185 (2016); TC MidAtlantic Dev., Inc. v. Commonwealth, 280 Va. 204, 210, 695 S.E.2d 543, 547 (2010); CaterCorp, Inc. v. Catering Concepts, Inc., 246 Va. 22, 24, 431 S.E.2d 277, 279 (1993). Most of the documents considered by the circuit court were exhibits to the complaint. Furthermore, the circuit court was entitled to consider other evidence in connection with hearing the arguments in support of the pleas in bar. Nevertheless, the allegations in the complaint and the exhibits thereto, without consideration of other evidence, support the conclusion of the circuit court.

[12] Our holding that the circuit court did not err in dismissing the complaint renders it unnecessary to address Holtzman Oil's first assignment of error in which it asserts that the circuit court erred in denying its motion for summary judgment. It is also unnecessary for us to address the third and fourth assignments of error asserting that the circuit court erred in ruling, "if it did so rule," on various grounds raised by the demurrers and pleas in bar and recited in the circuit court's order ruling on the demurrers and pleas in bar. Likewise, we need not address the seventh assignment of error asserting that the circuit court erred in dismissing Kasprowicz, in his capacity as manager of Green Project. All of these issues are mooted by the dismissal of the complaint.

B. Denial of Holtzman Oil's Motion to Amend Complaint

In its fifth assignment of error, Holtzman Oil argues that the circuit court erred in denying its motion to amend the complaint.

After the circuit court sustained the demurrers and pleas in bar, Holtzman Oil moved for leave to file an amended complaint that would add new paragraphs 10(b) through 10(e) to its complaint and a new request for relief (¶ 20(b)) within the 41 numbered demand paragraphs. The new allegations in paragraph 10 asserted that various approvals would have to be obtained from Loudoun County before the actual metes and bounds of the 2-acre parcel could be finally determined since the location would change through the application process for the special exception approval, subdivision approval, and a building permit. The circuit court denied the motion for leave to file an amended complaint since the new paragraphs did not add any allegations that would affect its ruling, but instead confirmed its conclusion that the description of the property was too indefinite for the contract to be specifically enforced. We agree with the circuit court that it would have been futile to grant the amendment and conclude that the circuit court did not abuse its discretion in denying the motion to amend. See Hechler Chevrolet, Inc. v. General Motors Corp., 230 Va. 396, 403, 337 S.E.2d 744, 748-49 (1985) (while leave to amend is to be liberally granted under Rule 1:8, the circuit court "retains discretion to deny a motion for leave to amend when it is apparent that such an amendment would accomplish nothing more than provide opportunity for reargument of the question already decided").

C. Defendants' Amendment to Responsive Pleadings

In its fifth assignment of error, Holtzman Oil contends that the circuit court erred in allowing Green Project and Kasprowicz to amend their responsive pleadings by making reference to the contract as the basis for their claim for attorneys' fees.

Section 9 of the contract provides that in the event of "any litigation" involving the contract, "the prevailing party shall be entitled to recovery of the cost of such litigation including without limitation, reasonable attorney's fees." Although all parties, including Holtzman Oil, requested attorneys' fees in their pleadings, none of the parties referenced the contract as the basis for recovery. Rule 3:25(b) requires a party to state in its responsive pleading the basis on which it relies for recovery of attorneys' fees. The claim is waived unless leave to file an amended pleading is granted. Rule 3:25(c). After the circuit court sustained the demurrers and

pleas in bar, Green Project and Kasprowicz filed a motion for attorneys' fees and costs (already requested in responsive pleadings) and referenced the language of section 9 of the contract. In response to Holtzman Oil's contention that the claim for attorneys' fees was waived because the basis was not stated in the responsive pleadings, Green Project and Kasprowicz moved for leave to amend their responsive pleadings to state the basis for the request as being the contract.

The decision of the circuit court to allow an amendment to the claim for attorneys' fees is a determination within the sound discretion of the circuit court. Online Res. Corp. v. Lawlor, 285 Va. 40, 61, 736 S.E.2d 886, 898 (2013). We conclude the circuit court did not abuse its discretion in allowing the amendment to the responsive pleadings. The subject matter of the entire litigation was the March 22, 2002 contract, and Holtzman Oil was well aware of the request for attorneys' fees and the basis for the request by all parties, even moving to bifurcate the issue of attorneys' fees "as provided in ¶ 9 of the March 22, 2002 contract." The amendment to the responsive pleadings was made before the circuit court heard the merits of the attorneys' fees claim at a subsequent hearing. Therefore, the amendment did not prejudice Holtzman Oil.[13] Having found that the circuit court did not abuse its discretion in allowing the amendment, we also reject Holtzman Oil's assertion in its sixth assignment of error that the circuit court erred in failing to sustain Holtzman Oil's plea of waiver as to the claim for attorneys' fees.

D. Award of Attorneys' Fees and Costs

Finally, we find no error in the circuit court's award of attorneys' fees and costs to Green Project and Kasprowicz.

In its sixth assignment of error, Holtzman Oil argues that the circuit court erred in awarding the attorneys' fees and costs that were incurred in conducting discovery in Holtzman I because Section 9 of the contract only permits recovery of such fees and costs by the "prevailing party." The circuit court reasoned that because the discovery was incorporated into the present

[13] Holtzman Oil also asserts in its fifth assignment of error that the circuit court abused its discretion in denying its motions that the court "specifically state the basis" for granting the demurrers and pleas in bar and delete from the September 23 order references to thirty-seven paragraphs as grounds for sustaining the demurrers and pleas in bar. It also asserts that the circuit court erred in denying its motion to correct the September 23 order regarding the use of the word "brief" instead of "authorities" as it relates to the May 1 hearing. Our ruling that the circuit court did not err in dismissing the complaint renders it unnecessary for us to address these remaining assertions of the fifth assignment of error.

action and was, in fact, used by the parties in the present action, the fees and costs incurred in connection with such discovery should be included in the award of fees and costs to Green Project and Kasprowicz as the prevailing parties in the present action. However, the circuit court refused to award to Green Project and Kasprowicz the balance of attorneys' fees and costs incurred in Holtzman I since there was no prevailing party in Holtzman I. See Sheets v. Castle, 263 Va. 407, 414, 559 S.E.2d 616, 620 (2002) ("[T]here is no 'prevailing party' when a nonsuit is awarded."). We agree with the reasoning of the circuit court, and therefore, conclude the circuit court did not err in its award of attorneys' fees and costs.[14]

For the foregoing reasons, we affirm the judgment of the circuit court. The appellants shall pay to the appellees two hundred and fifty dollars damages.

Justices Goodwyn and Mims took no part in the consideration of this case.

This order shall be certified to the said circuit court.

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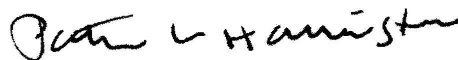

Clerk

[14] Consistent with our ruling that the circuit court did not err in its award of attorneys' fees and costs, we reject the contention of Green Project and Kasprowicz in its cross-error that the circuit court erred in denying their request for the balance of the attorneys' fees and costs incurred in Holtzman I.