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The Dilution of Specific Performance

Is undue hardship judicial code-speak for sympathy?

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In December of 2004, a published opinion from the Chancery Division denied summary judgment to plaintiffs, written contract purchasers of residential real property, seeking to compel defendants, contract sellers and fee owners, to convey title. No appeal was taken. *Kilarjian v. Vastola*, 379 N.J. Super. 277 (Ch. Div. 2004).

Factually, the *Kilarjian* case was not unique. What is of interest to attorneys who practice in chancery is the fact that *Kilarjian* has not been cited in any published opinion nor debated in legal circles. In reading the *Kilarjian* decision, one also might query whether the sympathy factor — laymen's term for undue hardship — is undervalued or underutilized by those seeking to skirt the maxim: equity follows the law. The potential demise or dilution of specific performance, a historical equitable remedy, surely warrants spirited analysis.

The facts in *Kilarjian* were simple and undisputed. Plaintiffs were written contract purchasers for a single family home in Somerville. Defendants were the contract sellers. The instrument contained a finite closing date. One day prior to the contract closing date, the defendants notified the plaintiffs that they would not convey title; an anticipatory material breach of contract. Plaintiffs' counsel skillfully responded by issuing a "time of the essence" notification. Defendants failed to close. The contract was devoid of instruction as to remedies upon default, limitations thereof, or the like. Plaintiffs instituted formal proceedings via order to show cause application with request for summary disposition via R. 4:67-1 (b), seeking an order compelling the sale, arguing the uniqueness of the real property.

Defendants' conceded their breach of the contract, but offered a well documented, uncontested explanation, accepted by the trial court: one of the sellers had an acute, debilitating and fatal neurological disease called spinal muscular atrophy (SMA). Defendants presented evidence that a forced closing and eviction would accelerate the seller's demise and exasperate her suffering. Distilled to its core, defendants' argument was one of mercy.

Plaintiffs countered that a deal is a deal, real property is unique and specific performance is the appropriate and only remedy available to dispense justice. The trial court acknowledged plaintiffs' clean hands. The decision also acknowledged the defendants were aware of the extent of the disease when originally contracting for the sale of the property.

Under New Jersey law, parties are generally free to contract as they desire and, absent mistake, fraud, duress, unconscionability or illegality, parties are bound by the unambiguous terms of their contract. As a general matter, courts should enforce contracts as made by the parties. Armed with such traditional jurisprudence, the *Kilarjian* plaintiffs should have felt secure at inception.

Ordinarily, the rights and duties of contracting parties are created by and arise solely from the contract itself. Courts are not at liberty to judicially create or impose contractual obliga-

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tions simply because those obligations might be viewed as socially desirable, and competing public policy considerations cannot serve as a basis for circumventing contract language. The stability of contract obligations cannot be undermined by judicial sympathy, and courts should not interfere between parties where the terms of the parties' contract are clear. Mindful that the *Kilarjian* defendants failed to produce or persuade the trial court as to the plaintiffs' nonperformance or lack of clean hands, New Jersey authority removes sympathy as an analysis component in adjudicating the issuance of an appropriate remedy. Ironically, our chancery courts have historically been cited as a forum that is blind to sympathetic argument, taking disputes of complexity and emotionally charged out of the hands of a jury, the latter traditionally being thought to be easy prey to compassion driven decisions.

Contract language "must be accorded a rational meaning in keeping with the expressed general purpose" of the agreement. *Tessmar v. Grosner*, 23 N.J. 193, 201 (1957). The court cannot make a better contract for either party than what has been agreed upon between the parties. When the terms of a contract are clear, "it is a Court's duty to enforce the contract as written so as to fulfill the objectively reasonable expectations of the parties to the contract." *State, Dep't of Envtl. Prot. v. Signo Trading Intern, Inc.*, 235 N.J. Super. 321, 332 (App. Div. 1989), aff'd, 130 N.J. 51 (1992). The language of the *Kilarjian* opinion does not indicate that ambiguity was in play, requiring an analysis of the intent of the parties. The contract and intent of the parties was clear.

Specific performance is a discretionary remedy "resting on equitable principles and requiring the Court to appraise the respective conduct and the situation of the parties." *Friendship Manor, Inc. v Greiman*, 224 N.J. Super 104, 113 (App. Div. 1990), certif. denied, 126 N.J. 321 (1991). It is, as a general matter, invoked when the remedy at law is inadequate. Because of the uniqueness of real property, courts of equity have traditionally concluded that specific performance is the appropriate remedy for the seller's breach of the contract to convey. In ascertaining the adequacy of a legal remedy, a court of equity may act if the legal remedy is illusory under the specific circumstances of a specific case. The mere fact that that the relief ultimately sought by the movant may be equated with money damages does not necessarily mean that a court will withhold its equitable powers. Examination is not confined to simply terming relief as money damages; those money damages must be "adequate" under the given circumstances.

Implicit in any claim for specific performance is the seller's breach of an actual contract between the parties. For the court to award specific performance, the terms of the contract, "must be definite and certain so that the Court may decree with some precision what the defendant must do." *Barry M. Dechtman, Inc. v. Sidpaul Corp.*, 89 N.J. 547, 552 (1982). Therefore, not only must there be a contract, but its terms must be clear. Specifically, as stated by Judge Fisher in *Jackson v. Manasquan Savings Bank*, "[s]pecific performance, quite obviously, is not available in the absence of an enforceable contract containing a promise, the performance of which the plaintiff would have the court compel." 271 N.J. Super. 136, 146 (Law Div. 1993). As such, the *Kilarjian* case appears one in which the only remedy available to make the plaintiffs whole was specific performance.

The considerable discretion a court has to apply equitable principles and mold the relief it provides a litigant has been described as follows:

> The Court must exercise its inherent equitable jurisdiction and decide the case based upon equitable considerations. Applying principles of fairness and justice, a judge sitting in a Court of Equity has a broad range of discretion to fashion the appropriate remedy in order to vindicate a wrong consistent with the principles of fairness, justice and the law. *Kingsdorf v. Kingsdorf*, 351 N.J. Super. 144, 157 (App. Div. 2002).

Nor should a court of equity slavishly adhere to a "rigid principle of law" to the exclusion of the factual circumstances of a particular matter. In determining whether the doctrine should be applied, the court must examine the effect of any inequitable conduct on the transaction at issue. A court is "not wont to enforce contracts where enforcement will be attendant with great hardship or manifest injustice to the defendant." *Brower v. Glen Wild Lake Co.*, 86 N.J. Super. 341, 350 (App. Div.), *certif. denied* 44 N.J. 399 (1965). "A party asking the aid of the court must stand in conscientious relation to his adversary; his conduct in the matter must have been fair, just and equitable, not sharp or aiming at unfair advantage." Id. These equitable concepts appear somewhat contradictory. If so, does the maxim that equity follows the law truly survive analysis?

The *Kilarjian* plaintiffs: (1) performed under the contract; (2) did not breach, materially or otherwise; (3) sought relief with clean hands; (4) requested the appropriate relief; and, (5) presented a clear and bargained for agreement. The seller defendants: (1) stipulated to the numerical indicia above; (2) did not contest their own fault as it relates to their precontract knowledge and appreciation of the debilitating adverse consequences of SMA; and, (3) offered evidence only of hardship as it related to present contract enforcement. Query: is harmonization of undue hardship analysis and deafness to sympathetic circumstances judicially achievable? Left unexplained is, at the very least, why would not the *Kilarjian* court enforce the contract by tolling the closing date

until the seller defendants' death? Surely, argument could be made that such delayed performance more closely achieves an equitable balance by granting reprieve to the selling defendants during their time of need, while simultaneously ensuring the *Kilarjian* plaintiffs the benefit of the bargain by conveyance of title.

If the hardship encountered by a breaching party to a contract, under circumstances where the party seeking contract enforcement is free of improper conduct, permits discretionary voiding of contractual obligation, does not the inquiry focus on the level of hardship? Could argument be made for the extension of the *Kilarjian* decision to hardships such as a stressful divorce, the loss of a pet, a kid's soccer game, or tickets to the Superbowl?

While callosity avoidance in the dispensation of justice surely is an admirable goal, acknowledgment of the *Kilarjian's* Court's acceptance of the sympathy factor begs the ultimate question: Is specific performance a doctrine destined for demise — or is a chancellor's discretion unrestrained and available at will in such a fashion that "sympathy" and "hardship" are definitions without common denominator in our courts of equity? Said more direct, is it simply just good to be the King or Queen? ■