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Supreme Court of Texas.
Roger LAWLER, Appellant,
v.
Nick DIGIUSEPPE d/b/a Southbrook Development Co. and Frisco Master Plan, L.P.,
Appellees.
No. 04-0641.

October 20, 2005

Appearances:
CRAIG T. ENOCH, Winstead Sechrest & Minick P.C., Austin, TX for Petitioner.
JULIA F. PENDERY, Godwin Gruber, LLP, Dallas, TX, for Respondent.

Before:

Chief Justice Wallace B. Jefferson, Harriet O'Neill, Nathan L. Hecht, Dale Wainwright, Scott A. Brister, David Medina, Paul W. green, Phil Johnson, and Don R. Willett.

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CHIEF JUSTICE JEFFERSON: Thank you, be seated please. The Court is ready to hear argument in 04-0641 DiGiuseppe v. Lawler.

ORAL ARGUMENT OF CRAIG T. ENOCH ON BEHALF OF THE PETITIONER

MR. ENOCH: May it please the Court. It's very clear that [inaudible] decision [inaudible] May I please the Court. [inaudible] I'd like to introduce my colleague Ms. [inaudible]. It's an honor to be here today on behalf of Nick DiGiuseppe. Nick DiGiuseppe, through his partnership business entities, contracted to buy real estate at an above market price contingent on his ability to attain zoning acceptable to him. Now in exchange, he paid $100,000 directly to the property owner, Roger Lawler, and agreed to deposit an additional $100,000 into escrow at a designated time, which he did and, as well, agreed to deposit an additional of $400,000 when acceptable zoning was approved. These payments were significant consideration. As this Court knows from the record, Lawler sued DiGiuseppe to get out of his sale agreement and he lost. By counterclaim, DiGiuseppe sought to force Lawler to comply with his contract and the trial court agreed, ordering specific performance. The Court of Appeals erred when it reversed the trial court's judgment for one main reason. We were not required at

trial to have to prove we were ready, willing, and able to perform.

In the alternative, we are at least entitled to return of our earnest money. This case presents to the Court a very important question for all real estate developers. And as urged by the amicus that has been filed in this Court, it gives the Court an opportunity to correct a misdirected evolution in the law on specific performance. We are here today to talk about specific performance. In our brief, we discussed the importance of this remedy to the real estate industry and you're aware that members of that industry would chime in on that issue. Let me repeat. Here, Nick DiGiuseppe offered Roger Lawler above market payment for 750 acres in the Frisco area, North Texas in exchange for Lawler's giving Nick DiGiuseppe the option to get acceptable zoning. Importantly, Roger Lawler agreed that if he breached the contract, Nick DiGiuseppe could seek specific performance.

JUSTICE O'NEILL: It doesn't say he'd be entitled to specific performance. It says he could seek it.

MR. ENOCH: It certainly says he could seek it --

JUSTICE O'NEILL: Which would imply that he would have to prove the elements. Else, it would say entitled to but he didn't stipulate.

MR. ENOCH: I think the argument -- the argument that they make about the difference between seek and entitlement that be made in any respect whether you seek or entitle because specific performance, by its nature, contains the elements necessary for specific performance. So, I think they'd make exactly the same argument whether we have a contract that says your remedy is specific performance or your remedy is to seek specific performance. I think they make exactly the same argument. I think it makes no difference to the outcome of this case just because of the word seek is used as opposed to some other word. The outcome of this -- what we determine or what the Court determines specific performance means.

JUSTICE: Mr. DiGiuseppe moved for a directed verdict on specific performance at trial, didn't he? What happened to that motion?

MR. ENOCH: I don't recall what happened. I think they went to jury -- to the jury on the issues of breach of contract on the directed verdict but ultimately the trial court did grant judgment for directed verdict in separate process, did grant a judgment for specific performance in a separate process to have specific performance.

JUSTICE: Right and I'm aware of that. You don't know what happened with the directed verdict at trial?

MR ENOCH: I believe the directed verdict was overruled and I think they finished the trial with this.

JUSTICE: Was there an order entered or is it from the bench?

MR. ENOCH: That I don't recall. I'm not familiar with that.

JUSTICE: So, there was no finding made by the judge or the jury about the elements of specific performance, but the judgments did say that specific performance was ordered according to procedures of the judgment?

MR. ENOCH: Yes, your Honor.

JUSTICE: How did the trial court get there?

MR. ENOCH: My understanding is the trial court relied on this Court's opinion in Saunder. I'll see if I got that right. It's Burford v. Amber is the name of the case from 1947 where this Court determined that all forms of specific performance is necessary -- is for there to be a request for specific performance and then they leave it out to the judge to impose whatever conditions the judge needs in the judgment to come through with specific performance. The essence of that case really is what we're saying. If you have the ordinary contract flaw where

another party breaches the contract, then the force present is relieved of having to establish they could have otherwise performed the contract and you just move forward and say, "What is the remedy at the end of the contract and between the years, we're seeking to enforce the contract according to its terms. We're not here to seek money damages from the breach of that. And that's the underlying principle of -- back to the case of Burford. And the trial judge, I believe, relied on that, looked on that and said --

JUSTICE: So, if the contract was, "You sell your property and I'll pay you a million dollars," and a trial judge orders specific performance then, at that point, you would find out whether they were ready, willing, and able --?

MR. ENOCH: Yes, your Honor --

JUSTICE: Suppose the judgment would be, "You pay, give them the property, you pay them a million dollars. And then if they can't come up with the million, the trial judge just takes it back," or how does that work?

MR. ENOCH: Your Honor, they would do like the same thing. The judgment can also put in that this has to close within 15 days. You just basically have oversight by the Court. I think amicus does a good job of handling that particular question on the efficiency of the remedy which really is even if the Court were to say, "Okay, I come up to the stand and I testify that I'm ready, willing, and able," and the jury finds you're ready, willing, and able. There will be some period of time that happens --

JUSTICE: Four years later --

MR. ENOCH: Four years later, something happens. You're no longer, what, able to pay. What do you do with the judgment? And I think you need to stand straight, careful. The Court is in a better posture to say, "I'm gonna order specific performance. You all go have a closing in two weeks and if that happens, it happens. If it doesn't happen, it doesn't happen." And that ends the case. But that problem does not go away just because there's now testimony on that. And of course, amicus makes another issue. Why would a person be breached his real estate contract to get more rights in the Court under specific performance than they had under the contract to begin with. As an example, if Nick DiGiuseppe had, to at trial, actually prove [inaudible] make it, what kind of discovery do you have? Where's your bank account? Where's your money? Do these people really have the ability to pay as the amicus makes the point? Well, obviously, in the real estate industry, they'll try to make the decision that 24 hours before closing because the real key is the money has to be delivered at closing, not any other time. And so, the efficiency of that issue is really what speaks loudly about why the Court in Burford v. Amber determined, "Wait a minute, you know, the other side breached the contract. You are no longer the party that you're harmed by it. You longer have an obligation to satisfy the obligations of your part of the contract." We just move forward that there's a breach and then the Court fashions the remedy. In this case, we sought specific performance.

JUSTICE: And, and there needs to be, however, factual support of each of the elements for specific performance. Correct?

MR. ENOCH: The basic question, your Honor. Under Burford v. Amber, all that has to be raised is in the pleadings, "we seek specific performance." We talked about the elements of specific performance and we do think the Court of Appeals here got it wrong by requiring, by requiring evidence of ready, willing, and able. And we say in our brief, "we only have a jury decision if there are disputed facts."

These parties never disputed ready, willing, and able. These parties always disputed who breached the contract. In our case, Mr. Lawler said Nick DiGiuseppe owed us $400,000. He lost on that. He lost on that that -- the contract was still viable. We asserted he breached the contract by not bringing good title to closing because he obligated it to the [inaudible]. We won on that. All that's left is specific performance.

JUSTICE: I'm interested in your position that specific performance should be a decision that's made by the courts. That seems to make some sense to me. I would finally made up my mind. But similarly to -- we don't ask juries to determine in a restrictive covenant case, should this garage be torn down or moved or which it happened to a building that violates a restrictive covenant. I don't think we would ask a jury to make a finding about conduct to be taken by a party asking for a yes or no, or for a date, or for an amount of damages, not what's the remedy here. Here are four lines of blanks. Write in the appropriate remedy. So, it seems to make some sense here but it still needs to be -- have the elements of what you're asking for specific performance. There still needs to be some evidence that those elements occurred and there's a difference between there being some evidence and a jury finding on each element. I think even respondent here acknowledges that there was some evidence. At least your client testified that he was ready, willing, and able to perform under the contract. They may dispute that that was enough evidence but that there was some evidence on that point. So, back to my question a couple of minutes ago. Is there some evidence in the record of each of the elements of specific performance?

MR. ENOCH: Well, to the extent that the court of appeals is correct that whoever seeks specific performance must prove that they're ready, willing, and able when there is some evidence because Nick DiGiuseppe testified he was ready, willing, and able. Our point is if that's a requirement, then there has to be contested issue. There has to be a contest, "No, you're not ready, willing, and able" in the deal and, before even it becomes submitted as a jury question, we didn't cite it in our brief but the Court is well aware of Kelly v. Wilson, what we talk about. The only issues submitted to the jury are disputed fact issues. But I think there is another argument here which is in the remedy -- in the remedy aspect of it. It has to be a disputed fact that the jury has to decide in a case that is relevant to the decision making process. They're talking about an equitable remedy as it's mentioned by the amicus here. If you're talking about alternate remedies, it is personally irrelevant when, at the time of trial, a party who seeks specific performance is capable of doing because, in truth, what they're capable of doing doesn't have to be set until the time for transferring the property occurs. So, it's always gonna happen in the future and the ready, willing, and able under specific performance has to be able to perform at the time the transfer of the property is being called for --

JUSTICE: How do you respond to that? --

MR. ENOCH: And that's the -- and even in the trial court. I'm sorry.

JUSTICE: The respondent says if -- if we had known that the elements of specific performance were in play in this case, we would have submitted evidence and that's for a jury finding that your client didn't have clean hands, for example, and the party seeking specific performance, since that's an equitable remedy, has to have clean hands. So, respondent says, "We didn't know that was going on. If we had, we would have got the jury finding that would have vitiated your right to

specific performance." How do you respond to that?

MR. ENOCH: Well, two things, your Honor. For me, defenses are required to be raised in response to pleadings and not what happened during the middle of the trial. The pleadings clearly say, "We're seeking specific performance." So if they're gonna argue that we want to raise the issue on clean hands, they should have had at the time. But it's also, as we mentioned it, it's ingenuous to argue, "We didn't know specific performance was in play" because that's worse when what the entire case was about. The entire case was saying, "We want a specific performance." They said, "You can't get it because you breached it." We said, "We can get it because Mr. Lawler, you, breached it." We go to the jury. The jury says, "Nick DiGiuseppe, you did not breach the contract. Mr. Lawler, you did." And the judge fashioned the remedy based on the findings of the jury.

JUSTICE: A long time has passed. I suppose, specific performance is still possible?

MR. ENOCH: Well, it took about a year to clean up the title from his transfer-it-over to D.R. Horton but we understand that the real estate is still there. Of course, that's not in the permanent record, but obviously specific performance will require the opportunity to be able to transfer good title or to be ready, willing, and able to pay [inaudible] --

JUSTICE: I suppose since it's an equitable remedy, and if you've remanded back to the trial court, they could take into account subsequent good faith purchases, what've been built on it, things like that.

MR. ENOCH: Yes, your Honor. Then, in fact, the trial judge did set up a mechanism for proceeding through the specific performance enforcement and we assume that he remand the trial judge to then proceed with how you complete the specific performance award.

JUSTICE: So if we, if we agree with you on everything, would we mandate specific performance or remand for the trial court to consider specific performance?

MR. ENOCH: Your Honor, I would say -- I would say the Court would remand this to the trial court with instruction to proceed with specific performance.

JUSTICE: I knew you would say that [laughter] but what happens if, in effect, then, the trial judge can't make an equitable decision because we've told them what they have to do, right?

MR. ENOCH: It poses a problem. I thought about it, but I don't believe that's the problem here. If -- if that property is not still in the title of Mr. Lawler, we would've heard about it. And, of course, I assume that if that's the case. He'll raise it but then again you'll have circumstances of putting the cloud on title which is where this case began in the process and why they end up going to trial.

JUSTICE: The $295,000 in damages, what did that consist of? $100,000 was earnest money, right? What was --

MR. ENOCH: This is what -- this is what is confusing. It was the $195,000 -- the $100,000 was the second payment of -- actually, there was a first payment of $100,000 directly to Mr. Lawler as earnest money to him. There was a second payment of $100,000 in escrow. In the damages section of the case, the first payment of $100,000 went directly to Mr. Lawler plus $195,000 in expenses for obtaining the different zoning was calculated to come up to the $295,000. But there is no dispute that a $100,000 of that $195,000 was part of the escrow obligation and an additional $100,000 still sitting in escrow. Thus the Court of Appeals remanded for. We seek the reversal in rendition for

seeking specific performance.

CHIEF JUSTICE JEFFERSON: Thank you, Counsel. The Court is ready to hear argument from the respondent.

MALE VOICE: May it please the Court. [inaudible].

ORAL ARGUMENT OF JULIA F. PENDERY ON BEHALF OF THE RESPONDENT

MS. PENDERY: Thank you. May it please the Court. I would like to first clear up something that whether specific performance was contested specifically in this case and then discuss why, I believe, the amicus and the opposing Counsel are incorrect on their -- not only telling you what they believe the current law on specific performance is but the remedy they would ask. First of all, specific performance, the elements of it particularly ready, willing, and able but all the elements were extremely in contest. As a matter of fact, though, we don't think it was our burden. We disproved it as a matter of law. Two reasons; Mr. DiGiuseppe admitted that he did not have a firm loan commitment. He didn't have the money to close. He admitted that. Also, he did not controvert Lawler's repeated testimony that after planning and zoning approved the -- I'm sorry -- after the planning and zoning issue. The approval on the zoning and the $400,000 was due under the contract then. At that point, Mr. DiGiuseppe began trying to change the deal and twice at least sent new contracts. It's undisputed that he told Mr. Lawler, "I can't make the economics work unless you loan me back $6 million." And he was sending him this revised contract at that point.

JUSTICE: Let's take those one at a time. My understanding is that's what -- the first one is what most developers do. They get an option contract, an option to buy. Nobody's given them money yet and nobody's gonna give them money until the moment of the closing. So, the fact that he personally doesn't have the money does not mean -- if we say, "You're not ready, willing, and able unless you got the money in your account, we're not gonna have any development in Texas."

MS. PENDERY: No, not asking for that.

JUSTICE: Okay. And then the second one, once you entered the contract and you know, I'm gonna buy it for this, and you're gonna buy for that, I would assume that it's frequently the case that the -- both buyer or seller may come back and say, "Gosh, you know, this deal is terrible. This is gonna kill me. Why don't you give me a better deal?" And again if that is enough to say, "Well, contract's cancelled cause you're not ready, willing, and able. We're again gonna shut down a lot of development in Texas. Because buyers and sellers always complain about my financial situation, then why don't you give me a better deal then we start?" Right?

MS. PENDURY: Sure.

JUSTICE: So why is that some evidence that he was not ready, willing, and able? Certainly, not evidence as a matter of law.

MS. PENDERY: Well, we weren't saying he had to have the money in his bank account. He had to have loan commitments or he had to have somebody saying, "I'll loan that much money." If he was essentially saying, "I can't find that last $6 million. I want you, Lawler, to loan it to me." Sure and actually that --

JUSTICE O'NEILL: Well, he was a bit whipsaw too, wasn't he? I mean, because there was a problem with the title at that point. It had

been transferred or --

MS. PENDERY: No.

JUSTICE: -- There was an issue about who was gonna be able to transfer and nobody's gonna lend him the money as long as that's an issue.

MS. PENDERY: No, that had not come up at all. Lawler did not allow D.R. Horton to come in and do the look-see. It's like all these developers do. "Let me get another contract for ten days and see if I can make it work." He didn't allow that until six weeks after. They just have it and failed to come up with that earnest money upon approval of planning and zoning. And as a matter of fact, this is not a Burford situation at all 'cause Lawler never refused to clear up the title. He was never asked to. Lawler -- in fact tender of the money, would not have been futile as Burford says because Lawler repeatedly testified as well that, "Okay, you couldn't pay the $400,000,"but he started talking about wanting to come to closing and I figured if he would show up with the money, I'd close so I signed this warranty deed. It was a special warranty deed and he said I actually -- he didn't know that his lawyer had done something different. He signed that and he signed a closing statement and left it all with the title company before he went out of town and that's the end of the story. DiGiuseppe doesn't ever say why he would need to make that into a general warranty deed. He doesn't ever say, "I'm terminating. Give me my earnest money back." He doesn't ever say any of that, and none of that -- and none of that problem came up until after Lawler sued for the declaratory judgment to get rid of both of these developers that were just filing memorandums of contract in the deep records to hold the value.

So -- and that leads to why -- what they were proposing that this Court do is to give a legal mechanism to real estate speculators to sue first then find the money later. Get it under contract, and in this one, make an illusory promise because DiGiuseppe also admitted at trial that he knew that why he would have done this special hand worded -- handwritten contract to be interpreted that if he make even the slightest change in the original zoning application, he'd never have to put up the $400,000. He knew that. So, does this Court really wanna give the mechanism to these folks to basically ride the float and obviously always have the money two, three, four years down the road when specific performance is to create? They're always gonna be able to flip the land and thus be ready, willing, able to bring cash to closing. That, that -- and as a matter of fact, that actually applies on the flip side, too. If you have a seller who is doing the same thing because he had a declining real estate market value, it's gonna apply as well. But, of course, in this case, it is much more likely what's going to happen. Excuse me. I believe that -- actually, I understand now, I think, why the Court granted the case because the jurisprudence on specific performance is pretty darn murky.

JUSTICE: Let's talk about that.

MS. PENDERY: Okay.

JUSTICE: You believe that there must be a jury finding. There must have been a jury finding in this case for specific performance to be properly awarded.

MS. PENDERY: I believe there has to be a fact finding on all those elements and you're not -- you shouldn't be allowed to beg the jury, which is what they did, or to cherry-pick what facts you ask the jury and what you ask the judge because in this case, they decide not to ask for specific performance elements in the jury, charged very, very possibly cause they know the jury is not gonna take Mr. Lawler's farm

away from him given what all went down. So, you ask the jury, "Did Lawler fail to comply?" And they say, "yeah" and the jury there knows that they can -- the remedy for that the next question is how much money can they give him back what DiGiuseppe testified he had in the deal which granted he specifically waived in the contract his right to many damages; but okay -- but you tell the jury "If you find Lawler breached, here's what you give him." And then suddenly you turn around to the court and you say, "Look, we want you to just sort of impliedly find," then "Oh yeah, he could have had the money and oh yeah, it was a contract free from misrepresentation surprise, mistake, misunderstanding," or implied that "I had clean hands," or as a matter of fact, the trial court would have even had to imply that DiGiuseppe complied with all the terms of their contract. That's the first and foremost --

JUSTICE: So, you agree, then, it sounds like that we don't give the jury an exam booklet and say, "Write in the appropriate remedy in this case." We have the jury make specific, fairly well-defined determinations with appropriate guidance. Specific perhaps, a novel equitable remedy should be left to the judge. You agree with this?

MS. PENDERY: No, but sure. And it's extraordinarily -- It's equitable.

JUSTICE: But you think it did --

MS. PENDERY: It's not so --

JUSTICE: So, you don't dispute that there's evidence submitted on both sides of each of the elements of specific performance. Sounds like you're saying, "The jury didn't get the chance to say, "We believe you on this, but we don't believe you on that. Therefore, we gonna find no clean hands" and decide which of these elements that they believe your opponent versus your client. The jury didn't get the chance to make that choice --

MS. PENDERY: Correct but I wouldn't take it as far as he cited it in the particular case that evidence on DiGiuseppe side is simply him saying, "Oh, yeah, well, now I'm short of money and no I didn't have firm commitments but I could've gotten the money." That's the evidence of ready, willing, and able and that's --

JUSTICE: That's what the law will always be, though, right?

MS. PENDERY: No. No. It needs to be a little something more. It certainly needs to his burden to prove as opposed to the fact that we sustained a burden to disprove. He never controverted that he wouldn't -- he didn't have $6,000,000 of it. He was short $6 million.

JUSTICE: Right, but all -- developers never put up much of their own money.

MS. PENDERY: He has probably never put a dime. [laughter]

JUSTICE: And that's how you get rich.

MS. PENDERY: Sure.

JUSTICE: You don't get rich spending your own money. So, I mean, what -- if that's not enough we're not ever gonna have -- I mean -- if they have to prove that they've got the money before closing, and this is a deal that fell apart by definition cause you only get to this if the seller who had prior material breach, how would they -- so they're gonna have the deal fall apart then go to investors that they have closing and say, "I need to have the money, something signed by you." What?

MS. PENDERY: The deal really didn't fall apart but aside from those facts, right.

JUSTICE: But it will, I mean, that's gonna be the --

MS. PENDERY: No, if you have a -- you're gonna have financing of -

- I'll give you $6 million of that and $10 million of that assuming you close the deal. And obviously, if you get to closing and you ask him to give you a general warranty deed instead of that special deed

JUSTICE: Right.

MS. PENDERY: And he can't do it.

JUSTICE: And that makes it easy --

MS. PENDERY: Sure.

JUSTICE: But that if in the case that's gonna be a specific performance, there was a prior material breach by the seller. Otherwise, we don't get to the specific performance question which means, in many cases, the prior material breach by the seller, we don't end up going to closing because the seller sold to somebody else or the seller's cancelled. Send a letter canceling the deed. How other than the buyer saying, "I would've had financing." How are you gonna prove that?

MS. PENDERY: We don't have a prior material breach here? It doesn't happen. It doesn't happen.

JUSTICE: That's what the jury --

MS. PENDERY: No.

JUSTICE: That's what the jury finding was.

MS. PENDERY: Actually, on both of them, the jury finding was that Lawler failed to comply and actually the court of appeals doesn't go into that at all. They don't have to talk about whether he breached or didn't breach or whether the Court interpreted the contract correctly because they just hope he doesn't perfect an appeal on the other kind of damages. It's only on the specific performance. So, you know, that maybe a little nice of you there but actually the court of appeals didn't even discuss the contract breach.

JUSTICE: What we're stuck with --

MS. PENDERY: In addition --

JUSTICE: What we're stuck with is who breached? And the jury said "your guy did."

MS. PENDERY: Okay. And the jury said my guy did not comply. The jury said -- he said -- DiGiuseppe didn't fail to comply. That doesn't even get DiGiuseppe past the first stone on specific performance. He didn't even get to ready, willing, and able because he hasn't proved that he did comply. It's the Campbell v. City Transport kind of thing. The jury's failure to find on our cause of action, failure to find that he didn't comply, is not a finding that he did comply on his own cause of actions. So, he's not sustaining the burden. And clearly, if you're saying that -- simply saying in a pleading --

JUSTICE: I'm not a real estate expert. If the seller breaches two weeks before the closing by sending a letter saying, "Sorry, I've sold it to somebody else," the buyer still has to go to trial and prove that they complied with the contract? They don't have to do that on any other kind of contract.

MS. PENDERY: Not that they complied. That's the -- they have to show that they -- Yes, they have to show the basic of elements of, "I complied with the contract." That's a part of equity. Am I entitled to go more --?

JUSTICE: On every other area of contract law and maybe real estate's different, whoever -- the first prior material breach, in effect, that's what -- no, no -- I guess, prior material breach excuses any subsequent breaches.

MS. PENDERY: I agree with that. If you wanna talk --

JUSTICE: -- So, it doesn't matter, once there's a prior material breach, it doesn't matter whether you complied or not after that. You

get the right to sue?

MS. PENDERY: Right. But you need to -- but you need to have proved that you were -- and this is not separately, I mean to claim and unclaim separate but this is his first time. You need to prove that you had done everything you were supposed to do. Then you have to prove that you could've closed the contract. You're not just using this as speculation to tie things up. This is --

JUSTICE: Ms. Pendery, was there an objection to the failure to submit a different question? For example, question number two says, "Did DiGiuseppe fail to comply with the contract?" You say that was yours on his breach. Was there an objection that he failed -- that there is a failure to submit an affirmative finding or affirmative question on him with a burden proof on him but he failed to comply?

MS. PENDERY: No, I'm just saying --

JUSTICE: Then the question I have is this. "Is that not a shade of a question as to the first element that you have listed in your brief that he complied with all terms of the contract?" Is that not a shade of that in some manner?

MS. PENDERY: I don't believe it is. First of all, a jury's declining defines someone failed to comply with the contract is not a finding that they did comply.

JUSTICE: [inaudible] understand that.

MS. PENDERY: Right. And it's even --

JUSTICE: But if the trial court were to take it that way, at some point, the trial court's entitled to have deemed findings of things and that's why I was asking about the objection. There was none --

MS. PENDERY: None. And, hey, this case was -- this maybe not the best case for you to write on. It's poorly tried, poorly submitted, poorly pleaded, etc. And it's got odd facts and what have you but that was our issue. That was not his issue and I don't think that you can hold out of --

JUSTICE: We call them your issues and his issues but the fact of the matter is the court's charge? And the question is what can the court do pursuant to these findings about the jury?

MS. PENDERY: Well, the court cannot supply or imply into that finding as much as they would have you imply into it. You are back to the burden of proof issue. You are back to the, you know. Is that the plaintiff's issue, is that the defendant's issue? I'm sure you can think of some instances in which, by implication, an answer to one supplies [inaudible], but this isn't it [inaudible].

JUSTICE: On another note, you, it seemed to me that DiGiuseppe was satisfied with the specific performance of judgment in the end. So, why do you say that in order to complain now about the brief and regardless whether they had to perfect an appeal on that?

MS. PENDERY: Well, interestingly they never ask for the earnest money back because the contract language which, again, they just base lined, gives a remedy if Lawler breaches is DiGiuseppe can choose between immediately terminating and getting the earnest money back or say things for specific performance. He does not terminate, he doesn't ask for back, as he said, "I don't give a damn about my money, my money in this." He's going to, you know, ride the four or five years of text to get the --

JUSTICE: But you said he is waiving the rights even the right to argue for the earnest money?

MS. PENDERY: Sure. But well --

JUSTICE: Because he didn't perfect it. Is that right?

MS. PENDERY: Well, because it is confusing. You've got Justice

Wainwright has described it. It is confusing though because what they're asking for in the court of appeals, what they were asking the jury for, what everything they had was the money damages which they specifically waived in the contract and not the earnest money. So, the first time they ever asked for the earnest money is on motion for rehearing in the court of appeals and that's why the court of appeals is saying, "Oh that's a little late, it's certainly wasn't anything that was ever presented to the jury and it's not one of those alternative things that's in a finding and included in the judgment." Money damages are not included."

JUSTICE: I'm a little confused about that point, what the chief raises. The record includes about April 29th, DiGiuseppe's and Frisco's notice of appeal. And it includes dated May 13, a quarter issue on May 13, 2003, court of appeals' order granting appellee's motion and determining that the notice of cross appeal filed with the trial court on April 29, 2003 is deemed timely filed. And maybe, you want to brief this as some supplemental briefing but it looks like there's a notice of appeal on the record and an order by the court of appeals that it was timely filed.

MS. PENDERY: Yeah, I probably do want to brief on that 'cause that's something new --

JUSTICE: Does that make that changes the nature that means to --

MS. PENDERY: It might -- it might. It can, although again, the earnest money does never come up.

JUSTICE: Well, it changes the nature of the waiver, at least. If -- if those are -- they look like they're in our --

MS. PENDERY: It might -- I need to tell -- I was not even aware of those -- based on -- I can't believe the court of appeals opinion. But also, in all of your cases where you have that instance of what you can pull back in and go back to you and take alternatively. You're looking at things that were included in the judgment and in fact, this judge had to, on his own motion, disregard the finding of the money damages which includes a hundred of the earnest money in order to get to where he found the specific performance. So, anyway, that'll brief [inaudible]. I think, we need to get back so we would have the burden proof to look at who's asking for what extraordinary remedy and be cautious of giving developers, who by these gangs for a business, the opportunity to, as I say, file suit first file the money later, keep the property tied up by the [inaudible].

CHIEF JUSTICE JEFFERSON: Thank you, [inaudible].

REBUTTAL ARGUMENT OF CRAIG T. ENOCH ON BEHALF OF THE PETITIONER

MR. ENOCH: With the Court's permission, just a few comments on the [inaudible]. First of all, I understand that Mr. Lawler has distributed a timeline of pertinent events. I think it's obvious when you read it that their timeline of events are written according to their version of the facts, but it's not particularly late so I just want to call your attention to this. Is there a time that they've submitted as the Court saw in the response as we've also said in our briefings, all those responsibility goes to the mayor whether they breached the contract which Lawler did. The jury said that they did so we're beyond that. I would like to point out to the Court that the trial judges in equitable circumstances often craft the remedy. Injunctions, as an example, are

often crafted by the trial judge on what events will happen, what we will set up as a way of determining whether there are violations of the order. This is no different if the actual remedy is specific form, as the trial judges would craft, whatever that remedy would look like. However, their judgment will come.

I'd like to follow up on a couple of things -- allocation of risk. Let's talk about allocation of risk. Mr. DiGiuseppe offered higher than market value for this property in exchange for the opportunity to work on zoning. We all know that zoning affects the value of property. So what happens when, when encouraged -- as the record will show, we're encouraged to continue working on zoning throughout the process. All the while Mr. Lawler is gone, and now for that value of the property has given out the contract to somebody else, all the while encouraging us to continue working on zoning. Who's the one who keeps the value of the property after the work has been done? But we're not really here arguing about that. What I want to conclude -- finish on -- what's really the policy and it's something that I keep looking, not focused on until I saw the amicus brief come in and that's the policy about the remedies of specific performance. It is not helpful, as a jurisprudential matter, to require a party who was not the briefing party to come forward and prove they did comply with the contract as their burden for specific performance. As an example, specific performance will necessarily be in the future after the Court's ruling. And it is only then that they're required to be able to perform. The Court can more efficiently craft a remedy. As an example, you must perform by X date in order to get that remedy than to say, "Are you ready to [inaudible] to pay to perform?" And then having a final judgment, and in five days afterwards, they're not able to perform. So, as a matter of policy, it's a more efficient process jurisprudentially to have the Court designate how the specific performance will apply.

JUSTICE O'NEILL: Let me ask you real quickly. I'm confused on question number six about money damages. It seems like the contract says, "you can either get your earnest money back or seek to enforce for specific performance."

MR. ENOCH: Yes.

JUSTICE O'NEILL: And yet we've got a jury question on damages for $295,696.32. What are we to do with that? I mean, if the Court would determine that specific performance should have gone to the jury, what happens on alert ?

MR. ENOCH: We've asked the return of the earnest money which is $500,000.

JUSTICE O'NEILL: But -- I mean, that wasn't sought before the jury, we were just --

MR. ENOCH: That's correct. Your Honor, on the earnest money, there was no dispute how much that earnest money was. It's $200,000. That's not really -- I mean, that's just not anything anybody's arguing about. In the trial court, obviously Mr. DiGiuseppe's attorney's talk if Mr. Lawler is going to take away the only valuable right we have which is specific performance. Then by law, we're going to come after the damages, but all the parties can see the damage was --

JUSTICE O'NEILL: But, I mean, we don't have the authority to -- what would we do? What would our disposition be? Remand to the trial court for entry of judgment for return of earnest money in accordance with the contract? Is that what it would be? I mean, we --

MR. ENOCH: Certainly. If that was -- if the alternative was to simply return the earnest money, we've asked for that in the Court of Appeals. The Court of Appeals said we waived it. We've asked for that

here as an alternative. There is no dispute that $200,000 was paid. They concede $200,000 was paid as the escrow and so we would seek that if that, in the alternative, for the $200,000. I think the Court would have no difficulty coming to that kind of judgment [inaudible] without even remanding to the trial court.

JUSTICE: Well, it's -- it's clear that, your client asked for at least a hundred thousand dollars of the earnest money at the trial court because a hundred thousand was awarded. What about the other hundred thousand? Was it asked for at the trial court?

MR. ENOCH: Your, Honor, it was not asked for at the trial court. But on the other hand, we asked for specific performance. We elected our remedy. We did not lose our remedies to specific performance until we got to the Court of Appeals. And this Court has been clear that we have no obligation to seek a review of the trial court's judgment that gives us our turn.

JUSTICE O'NEILL: I guess why I'm confused about this is the contract said that he could terminate the contract and receive a refund and there was -- he didn't terminate the contract. So, would there not be a question as to whether you are entitled to a refund? I mean, refund seems to be, yes, seems to be contention upon terminating and that didn't happen --

MR. ENOCH: Uh, maybe I'm mistaken on and my memory is not yet clear on it. I understood that in the event of seller's breach, the purchaser has the option of requesting return of the earnest money or a specific performance. And I may mislead. I may not be remembering that but that was a particular question I looked at and I think they were all alternate remedies in the event of seller's breach. And in this case, of course, we have the jury find that it was a seller's breach.

JUSTICE: Any further questions?

JUSTICE: Just one other, Counselor. Are you gonna submit something supplementary addressing the notice of appeal waiver point, as well?

MR. ENOCH: I look forward to that. I think I win on the law anyway but I look forward to doing that --

CHIEF JUSTICE JEFFERSON: Okay. Thank you. The case is submitted. We'll take a brief recess.

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