

COURT OF COMMON PLEAS OF PHILADELPHIA
ORPHANS' COURT DIVISION
O.C. No. 1897 DE of 2003
Control No. 040561
Estate of Louis Baselice, Deceased

OPINION

Introduction

In a case of deja-vu all over again, petitioner Gary Silver is making yet another attempt to badger the sale of real estate by judicial proceeding rather than appearing at agreed upon settlement dates or tendering agreed upon payments. To achieve this goal, he has initiated duplicative proceedings, first in the Civil Trial Division and then in the Orphans' Court Division. He has appealed adverse rulings from both divisions—without success—and at least in one instance without bothering to file an appellate brief. He repeatedly adopted a brinkmanship strategy of filing numerous “emergency petitions” that resulted in short-lived settlement agreements, after which the parties were plunged back into court.

Once again, Gary Silver is filing an appeal. This time he is appealing this court's June 17, 2005 decree dismissing his exceptions to the February 9, 2005 decree that dismissed his petition to compel the Baselice Estate to accept his offer to purchase property at 1334 Jackson Street for \$150,000. For the reasons set forth below, the exceptions were dismissed as lacking merit. They also represent another cynical attempt to exploit judicial process without legitimate argument, meritorious facts or citation to precedent.¹

Factual Background

On November 18, 2003, petitioner Gary S. Silver filed a petition for a citation directed against Donato Baselice, Executor of the Estate of Louis Baselice, deceased, to show cause why the Estate

should not accept an offer from Gary Silver to purchase premises located at 1334 Jackson Street in Philadelphia for the sum of \$150,000. According to the petition, Louise Baselice died on September 9, 2002, leaving a Last Will and Testament dated February 2, 1999. In item THIRD of the will, the deceased had provided:

It is my strong wish (sic) and desire that my Executor allow the right of first refusal to purchase specific properties owned by me at my death, to certain individuals as hereinafter set forth—

(iv.) 1334 Jackson Street, Philadelphia, PA –Gary Silvers. (Gary Silver and Gary Silvers are one and the same individuals).²

Silver's Orphans' Court petition concedes that there had been "extensive litigation" between the parties in the civil trial division over his effort to compel specific performance by the Estate of an agreement of sale for the 1334 Jackson Street property. In fact, the parties had previously been embroiled in extensive litigation in the civil division over Silver's attempt to revive an expired agreement of sale to purchase the 1334 Jackson Street property. That litigation resulted in an order by Judge Carafiello dismissing Gary Silver's complaint.³ Gary Silver appealed this ruling, but his appeal was dismissed for failure to file a brief.⁴

Despite this dismissal of his complaint, Silver subsequently filed two emergency petitions in the civil division to stay execution. The parties eventually entered into a November 18, 2003 settlement agreement stipulation which provided, inter alia, that Silver could remain on the premises until its sale either to third parties or to Silver with the requirement that he pay \$1,000 a month in rent. A

1 See, e.g., 4/6/05 Brief of Gary Silver in Support of Exceptions to Decree dated February 9, 2005.

2 Silver 11/18/03 Petition for Citation ¶ 5.

3 In his Complaint in Silver v. Estate of Louis Baselice, November 2002, No. 3082, Silver sought to enforce an agreement of sale for real property for \$85,000 dated August 22, 2001 that he had entered into with Louis Baselice prior to Baselice's death. After Silver learned that in December 2002 that the Estate had listed the property for sale at a price higher than \$85,000, he sought specific performance of the August 22, 2001 agreement. The Estate responded with preliminary objections that this agreement should not be enforced because Silver never tendered an \$8,500 cash deposit that had been required by the August 23, 2001 agreement. Moreover, Silver had failed to complete settlement by November 2, 2001 as required by the agreement. By order dated April 7, 2003, Judge Carafiello sustained the preliminary objections and dismissed Silver's complaint.

handwritten addendum to the stipulation provided that the writ of possession was stayed “until December 18, 2003 pending further order of Orphan’s Court, to wit, in the event that there is no order entered in Orphans’ Court staying the Writ of Execution further writ can issue on December 19, 2003 without further order of court.”⁵

4 Gary Silver v. The Estate of Louis Baselice, No. 1524 EDA 2003, Order (Pa. Super. 10/21/03)

5 See November 18, 2003 Stipulation for Settlement Agreement, December 2002, No. 3082 attached as Ex. D to Silver’s 2/19/04 Emergency Petition to Stay Writ of Possession. The petitioner generally references this extensive litigation before Judge Carrafiello, who sustained the Estate’s preliminary objections and dismissed the Silver’s complaint by order dated April 7, 2003 and opinion dated June 12, 2003

On September 3, 2003, Mr. Silver filed an emergency petition for stay of a writ of possession issued for the 1334 Jackson Street property. Judge Carrafiello granted this emergency petition by order dated September 4, 2003, which postponed the writ of possession until October 1, 2003 on condition of payment of the September 2003 rent of \$1,000. Another emergency petition for stay of writ of possession was filed by Mr. Silver on October 1, 2003. Judge Carrafiello scheduled a hearing for October 9, 2003. On November 18, 2003 an emergency petition for reinstatement of the writ of possession was filed. The parties thereafter entered into the following stipulation that was approved by Judge Carrafiello on November 18, 2003:

STIPULATION FOR SETTLEMENT AGREEMENT

AND NOW, this 18 day of November 2003, it is hereby stipulated by the parties hereto, acting through their respective counsel who are duly authorized to sign this stipulation as follows:

NOW, WHEREFORE, in consideration of the mutual promises contained herein, and intending to be legally bound, it is agreed that:

1. Gary Silver and Occupants will continue to reside in 1334 Jackson Street, Philadelphia, PA. 19148.
2. Gary S. Silver and Occupants will pay \$1,000.00 per month rent due by the 5th of each month beginning November 1st 2003 and each month thereafter until the property is sold. Rent to be paid to A. Criniti Realty, Inc. (*Handwritten: November’s rent shall be paid 11/21/03*)
3. Gary S. Silver and Occupants will upon signing of this agreement pay \$425.52 for gas & electric bills due and will continue to pay all utilities upon presentation.
4. Gary S. Silver and Occupants will permit For Sale sign to be put on the property and will not remove it, will permit the realtor for the Estate of Louis Baselice, deceased to bring people through the house upon 24 hours notice and will keep the property in a clean and neat condition.
5. Gary S. Silver and Occupants will permit the Estate of Louis Baselice, deceased, to inspect the property and make any needed repairs for the sale of the property.
6. Gary S. Silver and Occupants will provide the Estate of Louis Baselice, deceased, with a set of keys to the residence.
7. Gary S. Silver and Occupants will remove the cat litter from the basement tub.
8. Upon sale of the property to a third person Gary S. Silver and Occupants agree to vacate the premises upon thirty days notice.
9. If the property is sold to Gary S. Silver and Occupants the above will remain in effect until the date of sale of the property.
10. If Gary S. Silver and Occupants fails to adhere to any of the above paragraphs the Estate of Louis Baselice, deceased, may request this Court for an order allowing the immediate eviction of Gary S. Silver and Occupants.

The undersigned counsel, with the authority and consent of their respective clients, execute this stipulation the day and year first above written.

Meanwhile, Silver's November 18, 2003 Orphans' Court petition for a citation was pending. On February 19, 2004, Gary Silver once again filed another emergency petition—but this time with Orphans' Court-- seeking to stay execution of a writ of possession (the "February 2004 Emergency Petition") for the 1334 Jackson Street property. In response to that motion, this court scheduled a hearing for February 25, but before it was held the parties reached a stipulation of settlement dated February 24, 2004. The February 24, 2004 stipulation provides:

STIPULATION FOR SETTLEMENT AGREEMENT

AND NOW, this 24th day of February 2004, it is hereby stipulated by the parties hereto acting through their respective counsel who are duly authorized to sign this stipulation as follows:

NOW, WHEREFORE, in consideration of the mutual promises contained herein, and intending to be legally bound, it is agreed that:

1. The Writ of Possession will be stayed until on or after March 2, 2004, pending the sale of the premises known as 1334 Jackson Street, Phila. Pa. 19148
2. Gary Silver will pay \$5,000.00 at the signing of this agreement by certified funds or Attorney Escrow check representing the \$5,000.00 down payment.
3. Gary Silver will provide a copy of the mortgage approval at the signing of this agreement.
4. The sale of property will occur on March 1st 2004 at 3:00 p.m. at 2617 South 17th Street, Phila. Pa. 19145, pursuant to the terms of the agreement of sale for the property dated December 3rd 2003 and attached hereto.
5. All utilities owned by Gary Silver for the property will be paid at settlement.
6. Real Estate Taxes for 2004 have been paid by the Estate and will be pro-rated at settlement.
7. The Estate will provide a roofing certification to purchaser at settlement.
8. In the event that the Buyer, Jane Marie D'Amato, is in default of her obligations under the agreement of sale of December 3rd 2003, regarding the premises known as 1334 Jackson Street, Philadelphia, PA 19148, and settlement does not occur on or before March 1st 2004, because of said default, then in that event, Gary Silver and/or his wife, Jane Marie D'Amato, give up all rights to purchase the property.
9. In the event that the Buyer, Jane Marie D'Amato, is in default of her obligations

Handwritten: Writ of Possession stayed until December 18, 2003 pending further order of Orphans' Court, to wit, in the event that there is no order entered in Orphans' Court staying the Writ of Execution further Writ can Issue on December 19, 2003 without further order of court

under the Agreement of Sale of December 3rd 2003, regarding the premises known as 1334 Jackson Street, Philadelphia, PA 19148, and settlement does not occur on or before March 1st 2004, because of said default, then in that event, Gary Silver and/or his wife, Jane Marie D'Amato, give up all rights to possession of the said property.

10. By signing this agreement Gary Silver and his wife Jane Marie D'Amato agree they will not file any action of any kind in any Court to stay any further action of the Estate to evict them from the premises known as 1334 Jackson Street, Phila. PA 19148, in the event that the buyer Jane Marie D'Amato is in default of her obligation under the agreement of Sale of December 3, 2003, regarding said premises, and settlement does not occur on or before March 1st 2004, because of said default.
11. Further Gary Silver and his wife Jane Marie D'Amato agree that should either of them file a bankruptcy petition that petition will NOT act as a stay to the eviction proceedings of the Estate against Gary Silver and the Estate will be permitted to evict all residents from the premises known as 1334 Jackson Street, Phila. PA. 19138.
12. By signing this agreement, Gary Silver and his wife Jane Marie D'Amato and the Estate of Louis Baselice, deceased, acknowledge that they have received representation from their Counsel, that they are giving up important rights that they may have been able to avail themselves of and that they are freely giving up those rights as part of this agreement.

Unfortunately, this February 24, 2004 settlement stipulation also proved short-lived. Less than one month after this stipulation was signed by counsel, Gary Silver on March 16, 2004 filed his second emergency petition in Orphans' Court to stay execution of a writ of possession. After a preliminary ex parte conference with the petitioner and his counsel, this court scheduled a hearing, which was held on March 17, 2004. Shortly after the hearing began, the Estate's attorney informed this court that the writ had already been executed.⁶

The parties were nonetheless invited to present their arguments on the substantive issues as to the enforceability of (1) the February 24, 2004 stipulation of settlement (the "February 2004 stipulation") and (2) the agreement of sale dated December 3, 2003 ("December 2003 sale agreement") for the 1334 Jackson Street property. The petitioner essentially argued that his

emergency petition to stay the writ of possession for the 1334 Jackson Street property should be granted because the purchaser, Jane Marie D'Amato, (the petitioner's wife) was not in default of the December 2003 sale agreement or of the February 2004 stipulation, even though they had received notice that a writ of possession was scheduled for execution on March 17, 2004.⁷ Although he conceded that settlement for the 1334 Jackson Street property had not taken place on March 1, 2004 as required by the February stipulation,⁸ petitioner asserted that the February 2004 stipulation incorporated the December 2003 sale agreement and that these documents had to be interpreted in tandem.⁹ More specifically, he emphasized that the settlement did not take place because the Purchase Money Mortgage had not been committed. This failure—he asserted—did not constitute a default under the terms of the December sale agreement.¹⁰ The petitioner invoked Rosen v. Empire Valve & Fitting, Inc., 381 Pa. Super. 348, 553 A.2d 1004 (1989) to support this argument¹¹ and pointed to the Mortgage Contingency provisions of the December 2003 sale agreement, Section 6 (c). That section set forth a mortgage commitment date of January 15, 2004. Yet, it further provided:

If a written commitment is not received by Seller by the above date, Buyer and Seller agree to extend the mortgage commitment date until Seller terminates this Agreement in writing by notice to Buyer.¹²

In essence, therefore, petitioner asserted that the seller had the burden of terminating the agreement by written notice if he chose to do so for failure to obtain the mortgage commitment:

There has been no termination of this agreement by the seller in this case. . . . It's not really a default. There would have been an option of the seller to terminate the agreement. They never executed that option.¹³

6 See 3/17/04 Notes of Testimony (hereinafter "N.T.") at 8.

7 See Silver's 3/16/04 Emergency Petition, ¶11.

8 See Silver's 3/16/04 Emergency Petition, ¶ 3; 2/24/04 Stipulation, ¶4.

9 See 3/17/04 N. T. at 14-19.

10 Silver's 3/16/04 Emergency Petition, ¶¶ 3 & 8. See also 3/17/04 N.T. at 17-18, 26-29.

11 See 3/17/04 N.T. at 13-15.

12 See December 2003 Sale Agreement, 6 (C) & 3/17/04 N.T. at 15.

13 See 3/17/04 N.T. at 15.

Finally, the petitioner noted that a letter dated March 16, 2004 indicated that the sum of \$140,283.26 had been wired from Gateway Funding to Constitution Abstract Company for the closing of 1334 Jackson Street.¹⁴ He noted that his attorney by letter had informed the Estate of a new settlement date scheduled by letter for March 16, 2004.¹⁵

The Estate, however, did not waive the March 1, 2004 settlement date or accept a new settlement date and had so informed petitioner two days prior to the hearing.¹⁶ Instead, the Estate asserted that the purchasers had defaulted on their agreement of sale, and the stipulation merely gave them “one more shot” to show up for settlement on March 1, 2004 which they failed to do.¹⁷ The Estate also argued that it had terminated the sale agreement so that consequently the stipulation controlled.¹⁸ It argued that Rosen v. Empire Valve & Fitting, Inc. was factually inapplicable since it dealt with the return of a security deposit rather than with the sale of property.¹⁹ When asked to produce proof that the December agreement had been terminated, the estate subsequently submitted the following letter dated January 19, 2004:

John,

This letter is to notify you that your Client has breached her contract for the purchase of 1334 Jackson Street, but (sic) not supplying the additional deposit of Four Thousand Dollars (\$4,000) which was due 15 days after the signing of the Agreement of Sale dated on 12-3-03.

Enclosed you will find a Release form which when signed by your buyer we will return her initial deposit of One Thousand Dollars. Thank you.

Sincerely,

14 See 3/17/04 N.T. at 20. See Ex. P-1.

15 See Silver’s 3/16/04 Emergency Petition, ¶ 4-5 & Ex. D.

16 See 3/17/04 N.T. at 9, 24, 30.

17 See 3/17/04 N.T. at 30, and generally 29-31.

18 See 3/17/04 N.T. at 24-27.

19 See 3/17/04 N.T. at 31. The Estate’s interpretation of Rosen is valid. That case focuses only on the narrow issue of whether the sales agreement at issue permits the buyer to recover his down payment where a mortgage commitment is withdrawn. See Rosen, 381 Pa. Super. at 349, 553 A.2d at 1004. It has little relevance to the issue of whether failure to obtain a mortgage commitment constitutes a breach that would invalidate the sale agreement.

Anthony Criniti

Ex. D-1.

Finally, the Estate asked the court to consider, as a matter of equity, the extensive litigation history of this case: the Estate had repeatedly sought writs of possession, but then relented when the petitioner filed his “last minute” emergency requests for “one more chance.”²⁰ In fact, the Estate emphasized once again, the present writ had already been executed.²¹

After completion of the argument, this court issued an opinion that focused on the issue raised in the emergency petition of whether to stay execution and concluded that it was moot due to the execution of the writ. This conclusion was affirmed by the Superior Court, which adopted this court’s reasoning. This court did not rule on the substantive issues raised by the petition, because the pleadings had not been completed. On September 28, 2004, the Estate filed an answer with new matter, to which Gary Silver filed a reply. Based on the record as a whole, including the pleadings, the March 17, 2004 hearing and the documents presented, this court by decree dated February 9, 2005 denied Gary Silver’s petition. Gary Silver subsequently filed exceptions to this order, based on the following grounds:

1. The Decree of February 9, 2005 disposed of Gary S. Silver’s Petition for a Citation to Show Cause Why the Estate Should Not Accept an Offer from Petitioner Gary S. Silver, Esquire to purchase premises 1334 Jackson St., Philadelphia, PA 19148 for the sum of \$150,000.00 without a hearing.
2. The Decree of February 9, 2005 is in direct contradiction to the Court’s Opinion regarding its Order of March 17, 2004.²²

Oral argument was held on these Exceptions on May 17, 2005. By decree dated June 17, 2005, the Exceptions were dismissed. Gary Silver has now filed an appeal of that dismissal.

²⁰ See 3/17/04 N.T. at 32.

²¹ See 3/17/04 N.T. at 32-33.

Legal Analysis

These two exceptions set forth by Gary Silver are without merit. First, Mr. Silver did have his day in court. A hearing was held on Gary Silver's petition on March 17, 2004 and then oral argument was scheduled as to the exceptions on May 17, 2005. Secondly, the decree of February 9, 2004 which dismissed Gary Silver's petition was based on the record as a whole—pleadings, documents, and hearing—and was not in direct contradiction to the May 14, 2004 opinion and order which addressed the narrower issue presented by the emergency petition of whether to stay the writ of execution.

A. The Issues Raised in the Pleadings Were Adequately Addressed in the Hearing and Argument Held on March 17, 2004 and May 17, 2005

In his exceptions, Gary Silver complains that his petition for citation to show cause why the Estate Should not accept an offer to purchase the 1334 Jackson Street property was denied without hearing. Yet neither in his exceptions nor in his brief in support of those exceptions does Silver outline any factual issues that required an additional hearing. Silver's memorandum of law, for instance, fails to address the substantive issue of why his petition should have been enforced. Instead, he makes the hollow claim that he was "denied his day in court."²³ No facts in controversy are outlined; no precedent is cited. Similarly, during the May 17, 2005 argument on the exceptions, Mr. Silver's counsel failed to outline any factual issues that required hearing. Instead, he coyly stated:

It's our position that there are important material facts that the Court doesn't know. This isn't the time and place to go into them, but we felt were denied an opportunity to present that to The Court, and maybe after The Court had seen the evidence that we had would

22 Exceptions filed by Gary S. Silver

23 Silver 4/6/2005 Memorandum (unnumbered).

have viewed the case differently and made a different determination.²⁴

Moreover, at this May argument, counsel conceded that “the local rules are clear that it lies within the court’s discretion as to whether a hearing is necessary.”²⁵

The pleadings in this controversy were not closed until after Silver’s emergency petition was dismissed. An analysis of those pleadings reveals that no issues of fact were raised other than the legal issues that were dealt with in the March 17, 2004 hearing. For instance, in his petition for a citation, Silver requested a citation directed toward Donato Baselice “to show cause why the Estate should not accept from petitioner his offer to purchase Premises 1334 Jackson Street, Philadelphia, Pennsylvania 19148 for the sum of One Hundred Fifty Thousand (\$150,000) Dollars.”²⁶ The petition does not reference any contract that would support this claim, but states instead that the Estate and Gary Silver had been embroiled in “extensive litigation between the parties in the Civil Division of the Court of Common Pleas of Philadelphia County involving an action for specific performance brought by the Petitioner against the Estate for enforcement of an Agreement of Sale for the aforesaid real property of the Decedent, and a Landlord/Tenant Action brought by the Estate against your petitioner.”²⁷ That litigation cannot be the basis for recovery in Orphans’ Court. Judge Carrafiello has already issued a ruling and opinion disposing of that controversy, ruling that Gary Silver was not entitled to specific performance of an agreement of sale for the 1334 Jackson Street property for two reasons: (1) Silver failed to make a requisite deposit pursuant to the agreement, and; (2) he failed to make settlement on the

24 5/17/2005 N.T. at 3.

25 5/17/2005 N.T. at 2.

26 Silver Petition, Wherefore Clause.

27 Silver Petition, ¶ 8.

scheduled date of November 2, 2001.²⁸ Although Gary Silver appealed this order and opinion, his appeal was subsequently dismissed for failure to file a brief. It is thus not possible for Gary Silver to invoke the controversy before the Civil Trial Division as a basis for the claim set forth in his November 2003 Orphans' Court petition.

Another claimed basis for Silver's petition to compel the sale of the 1334 Jackson Street property is language in the will of Louis Baselice which Gary Silver quotes as providing in ITEM Third:

It is my strong wish (sic) and desire that my Executor allow the right of first refusal to purchase specific properties owned by me at my death, to certain individuals as hereinafter set forth—

(iv.) 1334 Jackson Street, Philadelphia, PA – Gary Silvers (Gary Silver and Gary Silvers are one and the same individual).²⁹

There is a serious problem with this claim. As the Estate argues, the decedent's language expressing a "wish and desire" that a right of first refusal to purchase 1334 Jackson Street be offered to Gary Silver is merely precatory language, and hence not binding on the Estate.³⁰ This court agrees. When such words as "it is my wish" are expressed in a will, courts have characterized them as precatory language that is not mandatory. See Lindsay's Estate, 311 Pa. 536, 538, 166 A. 848 (1933). As the Pennsylvania Superior court has observed in Estate of Warner, 391 Pa. Super. 124, 129-30, 570 A.2d 544, 547 (1990), precatory language in a will is not binding on the executor or trustee. More significantly, Gary Silver's petition itself essentially concedes that he was given this right of first refusal which became the subject of extensive litigation in the civil trial division when he failed to make the requisite deposit and meet the settlement date. Moreover, even when the Estate gave Silver another chance to

28 See *Silver v. Estate of Baselice*, slip. op. December 2003, No. 3082 (6/2/03, Carrafiello, J.).

29 *Silver* 11/18/03 Petition ¶ 5.

purchase the 1334 Jackson Street party by agreeing to the February 24, 2004 Stipulation, Silver once again failed to make settlement on the specified date of March 1, 2004. Hence, although the Estate did give Silver an opportunity to purchase the 1334 Jackson Street property, he failed to meet the requirements of the agreements he had entered into with the Estate.

B. This Court's Decree Dismissing Silver's Petition Was Not in Direct Contradiction with the March 17, 2004 Opinion But Is Predicated on the Completed Record

As a second exception, Silver argues that this court's decree of February 9, 2005 is in direct contradiction with its May 14, 2004 Opinion regarding the March 17, 2004 order dismissing the emergency petition to stay the execution of the writ of possession. The May 14, 2004 opinion outlined the entire record before the court at that time, but its ruling was limited to the narrower issue of whether the emergency petition to stay execution of the writ of possession. It noted that during the March 17, 2004 hearing on Gary Silver's emergency petition, his counsel elaborated on another substantive reason why the Baselice Estate should be compelled to sell the 1334 Jackson Street property to him that was not fully presented in the petition. Significantly, at that March 17th hearing, counsel for Gary Silver was given a full opportunity to present his substantive arguments—which was primarily a legal argument based on two written documents: the agreement of sale dated December 3, 2003 and the February 24, 2004 settlement stipulation. In essence, Silver is still seeking specific performance, but this time of an agreement to sell real estate dated December 3, 2003 as amended by the February 2004 stipulation.

Essentially, Silver argued that he was not in default of the December 2003 agreement of sale for the 1334 Jackson Street property despite his failure to obtain a mortgage commitment prior

to the settlement date of March 1, 2004 that was repeatedly set forth in the February 2004 stipulation. In making this argument, Silver invoked paragraph 6 C of the December 2003 agreement³¹ which provides:

(c) **Mortgage commitment date Jan. 15, 2004 (handwritten).** If a written commitment is not received by seller by the above date, **Buyer and Seller agree to extend the mortgage commitment date until Seller terminates this Agreement in writing by notice to Buyer.**³²

In other words, the failure to obtain a mortgage commitment by January 15, 2004 is not fatal unless the seller terminates the agreement in writing. This argument, however, ignores critical language set forth in paragraph 5 of the December 2003 Agreement which specifically refers to the settlement date under a “time is of the essence” provision. That paragraph sets forth the **“DATES/TIME IS OF THE ESSENCE.”** More specifically, the December 2003 Agreement states:

(A) The said date for settlement and all other dates and times referred to for the performance of any of the obligations of this Agreement are agreed to be of the essence of this Agreement and are binding.³³

The Agreement also provides that “The date of settlement is not extended by any other provision of this Agreement and may only be extended by mutual written agreement of the parties.³⁴ The February 2004 Stipulation invoked by Silver clearly and unambiguously provides that the “sale of property will occur on March 1st 2004 at 3:00 p.m at 2617 South 17th Street, Phila., Pa. 19145 pursuant to the terms of the agreement of sale for the property dated December 3rd 2003 and attached thereto.”³⁵ Hence, the provisions in the December 2003 Agreement of Sale making the settlement date a date “of the essence” would be incorporated by the February 2004

31 3/17/2004 N.T. at 15.

32 December 3, 2003 Agreement at Paragraph 6(C).

33 Decemerm3, 2003 Agreement at Paragraph 5 (A).

Stipulation which specifically and repeatedly provides for a March 1, 2004 settlement date. Indeed, the February 2004 Stipulation could not be more emphatic as to the necessity of completing settlement by March 1, 2004. First, the February 2004 Stipulation clearly states that if settlement did not take place on March 1, 2004, “Gary Silver and/or his wife, Jane Marie D’Amato, give up all rights to purchase the property.”³⁶ The February 2004 Stipulation then provides that if settlement does not occur on March 1, 2004, “Gary Silver and/or his wife, Jane Marie D’Amato, give up all rights to possession of the said property.”³⁷ To hammer in this point, the February 2004 Stipulation states that by “signing this agreement, Gary Silver and his wife Jane Marie D’Amato agree they will not file any action of any kind in any Court to stay any further action of the Estate to evict them from the premises known as 1334 Jackson Street, Phila. PA 19148, in the event that the buyer Jane Marie D’Amato is in default of her obligation under the agreement of sale of December 3, 2003, regarding said premises, **and settlement does not occur on or before March 1st 2004, because of said default.**”³⁸

While it is true, as Silver argues, that his failure to obtain a mortgage commitment prior to the March 1, 2004 settlement date did not constitute a default under the terms of the December 2003 Sale Agreement, his failure to appear for a March 1, 2004 settlement clearly was a default under both the December 2003 Sale Agreement and the February 2004 Stipulation.

Where a contract for the sale of real estate provides that the for settlement is of the essence, the seller is not obliged to sell the property if the buyer fails to timely perform. Wasserman v. Steinman, 304 Pa. 150, 155 A.302 (1931). Pennsylvania courts recognize that even though an

34 December 3, 2003 Agreement at Paragraph 5(C).

35 February 2004 Stipulation at ¶ 4.

36 February 2004 Stipulation at ¶ 8.

37 February 2004 Stipulation at ¶ 9.

38 February 2004, Stipulation at ¶ 10.

agreement specifies that the date of a settlement is “of the essence,” it may be waived by oral contract or by the conduct of the parties. Even so, where the “time of settlement is made the essence of the contract for sale of real estate, it still remains the essence of the contract, although a definite extension of time has been granted.” Davis v. Northridge Development Associates, 424 Pa. Super. 283, 289-90, 622 A.2d 381, 385 (1993). Accord Eagle Prop. Inc. v. Equireal, 449 Pa. Super. 476, 487, 674 A.2d 297, 303 (1996). In cases involving agreements for the sale of real estate, from the moment the agreement of sale is executed equitable title to the real estate vests in the grantee. The seller is then considered as trustee of the real estate for the buyer who is deemed the trustee of the balance of the purchase price for the seller. If the seller violates the terms of the agreement, the buyer may seek specific performance of the agreement. Keeney v. Dreibelbis, 65 Pa. D & C. 4th 172, 177-78 (Berks Cty. 2003). It is well established, however, that specific performance is not a matter of right but of grace. Mrahunec v. Fausti, 385 Pa. 64, 68, 121 A.2d 878, 880 (1956). Specific performance may be granted only where the plaintiff is clearly entitled to that relief, there is no adequate remedy at law and justice requires such a result. Wagner v. Estate of Rummel, 391 Pa. Super. 555, 561, 571 A.2d 1055, 1058 (1990). Finally, specific performance involves the exercise of equity and discretion by the court; it should not be ordered where it may result in hardship or injustice to the other party. Id., 391 Pa. Super. at 561, 571 A.2d at 1058.

In this case, it would be an injustice to the Estate not to enforce the March 1, 2004 settlement date. There is no dispute that petitioner did not appear on March 1, 2004 for settlement on the agreement of sale for the 1334 Jackson Street property. Although he subsequently attempted to reschedule a settlement date for March 16, 2004, the seller/Estate would not agree to this change in settlement date. Moreover, there was no evidence or argument

presented that the seller waived the March 1, 2004 settlement date that was so emphatically set forth in the parties February 2004 stipulation. See Wasserman v. Steinman, 304 Pa. 150, 155, 155 A.. 302, 303 (1931)(if petitioner alleges that timely performance has been waived, he must allege waiver, setting forth the facts and circumstances constituting waiver). Instead, Silver's legal argument centers on his claim that he did not breach the December 2003 sale agreement by failing to obtain a mortgage commitment.

In light of the petitioner's repeated failures to appear for settlement for the 1334 Jackson Street property or to meet the requirements of prior agreements, it is understandable that the Estate would have made the March 1, 2004 settlement date such a critical element of the February 2004 Stipulation. Unfortunately, Gary Silver once again failed to honor a stipulated agreement with the Estate. Consequently, his Orphans' Court petition seeking to compel the Estate to sell him the 1334 Jackson Street property was properly dismissed by order dated February 9, 2005.

DATE: _____

BY THE COURT:

John W. Herron, J.