NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0446-12T3

CHARLES V. SIMONE, JR.,

Plaintiff-Appellant,

v.

NASSAU TOWER REALTY, LLC,

Defendant-Respondent,

and

SUSAN LENHARDT and MICHAEL J. O'BRIEN,

Defendants.

Argued January 24, 2013 - Decided May 7, 2013

Before Judges Ashrafi, Hayden and Lisa.

On appeal from Superior Court of New Jersey, Chancery Division, Mercer County, Docket No. C-57-09.

Eden P. Quainton of the New York bar, admitted pro hac vice, argued the cause for appellant (Roger Martindell attorney; Mr. Martindell and Mr. Quainton, on the brief).

James D. Young argued the cause for respondent Nassau Tower Realty, LLC (Fox Rothschild LLP, attorneys; Mr. Young, of counsel and on the brief, Abbey True Harris, on the brief).

PER CURIAM

This appeal concerns enforcement of the terms of a settlement reached by a landlord and a tenant pertaining to the exercise of the tenant's purchase option by a strict deadline.

The tenant, plaintiff Charles Simone, Jr., appeals from two orders of the Chancery Division dated August 10, 2012, denying his motion and instead granting the motion of defendant-landlord Nassau Tower Realty, LLC (Nassau), to enforce their February 17, 2012 settlement agreement. The Chancery Division's orders terminated Simone's right to purchase the condominium unit that has housed his retail shoe business since 1988 and discharged a lis pendens Simone had filed against the property. The court concluded that Simone breached the time-of-the-essence provision of the purchase option by failing to appear on the designated closing date to complete the purchase.

Simone argues on appeal, among other points, that the settlement agreement required Nassau to provide an amendment to the condominium's master deed as a condition precedent to closing on the sale and purchase, but that Nassau failed to do so by the closing date. We agree with that contention and conclude that Nassau's enforcement of the time-of-the-essence provision required its own strict compliance with the condition that it amend the master deed. Because there is no dispute that Nassau did not obtain an executed amendment of the master deed

until the day after the scheduled closing, we reverse the Chancery Division's orders and provide a limited opportunity for Simone to exercise the purchase option as established in the settlement agreement.

I.

In 1988, Simone entered into a lease agreement with a predecessor of defendant Nassau for commercial space on Nassau Street in Princeton for the purpose of operating a shoe store. The rented space was part of a building that consisted of two retail commercial spaces on the first floor, two residential apartments on the second floor, and a basement divided into four storage spaces, two beneath each first-floor space. Simone's lease was for one of the commercial spaces. It did not reference any area of the basement although use of the basement storage space was important to the operation of Simone's retail business. As part of the lease agreement, Simone was granted an "option to purchase the rented space from the Landlord at a purchase price equal to 10 times the fair annual market rental."

In the 1990s, Simone negotiated to exercise his purchase option but was not able to strike a deal with the landlord. A major obstacle was the parties' inability to agree on the proper manner in which to address the basement storage space. In addition to the space directly underneath his shoe store, Simone

used additional basement space for storage of his inventory and viewed the entire basement space he was using as critical to his decision to purchase the property.

In 1999, the building was converted into a condominium. Nassau became the owner of the two commercial units and the basement space (amounting to a 73% interest in the property), while defendants Susan Lenhardt and Michael J. O'Brien each owned one of the residential units (15.5% and 11.5% interests, respectively).[1]

In 2008, Simone again sought to exercise his option to acquire the property and eventually offered $1,095,000. Nassau rejected the offer, stating that under no circumstances would it sell additional basement space to Simone beyond the space directly underneath his store. Nassau eventually counter-offered to sell to Simone his commercial unit and the basement space directly underneath for $1,672,235, and to lease the rest of the basement storage space to Simone for $18,607 per year. Simone rejected the counter-offer.

Before Nassau made the counter-offer, in April 2008, Simone had filed a complaint in the Chancery Division seeking to

[1] The two individual defendants have no relevant interest in the appeal at this point, but the participation of one of them in the events leading to this appeal is relevant.

enforce his option to purchase the property. He also filed a lis pendens against the property. Four years after the litigation commenced, on February 17, 2012, the parties entered into a written settlement agreement.

The agreement provided that Simone would have the right to purchase his retail unit and the basement space directly underneath for $1,200,000. The closing date was to be no later than March 27, 2012. Paragraph 2 of the agreement contained the following time-of-the-essence provision:

> The Closing of title ("Closing") shall occur on the Outside Closing Date, TIME BEING OF THE ESSENCE, provided that Nassau shall have caused the Master Deed for the Property to be amended to include all appropriate land and improvements for the condominium in which the Property is a part.

The settlement agreement also provided that, if Simone completed the purchase, the parties would execute a lease for additional basement space "in form and substance satisfactory to the parties." The purpose of amending the master deed was to designate the additional basement storage space and thus to avoid potential disputes in the future about Simone's right to the use of that storage space.

The settlement agreement expressly provided for contingencies in the event that the parties failed to complete the purchase option. In that event, it provided the terms of a

"New Lease" that would automatically go into effect. Paragraph 6 of the agreement set forth the consequences should Simone fail to close on time:

> If, for any reason, other than Nassau's failure to provide good and marketable title to the Property by the Outside Closing Date insurable at regular rates by a title insurance company authorized to do business in the state of New Jersey, the parties fail to close on the sale of the Property notwithstanding the willingness of Nassau to deliver a Deed, Affidavit of Title, execute a Closing Statement and any other documents reasonable [sic] required by William A. Slover, Esq. [the closing agent] . . . Simone shall lose the right to purchase the Property and the New Lease attached hereto shall automatically and without further action by either party, commence in full force and effect.

Paragraph 8 addressed what would happen if Nassau caused the closing to fail:

> If, for any reason, Nassau is unable or unwilling to convey good and marketable title to the Property by the Outside Closing Date . . . Nassau waives its TIME OF THE ESSENCE rights hereunder and shall have thirty (30) additional calendar days in which to close title. If after said thirty (30) days, Nassau is unable or unwilling to convey title to Simone, . . . Simone . . . may upon notice to Nassau elect to continue the purchase of the Property or to enter into the New Lease, but, in all events, Nassau shall return to Simone the entire Escrow established hereunder.

The escrow referenced in paragraph 8 was $60,000 deposited by Simone. In the event of closing as scheduled, the full

amount would go toward the purchase price. In the event Simone failed to close, $5,000 would go to Nassau as security under the New Lease, $45,000 would be forfeited to Nassau, and $10,000 would be returned to Simone. In the event Nassau failed to close, the entire $60,000 would be returned to Simone.

Between the date of the settlement agreement, February 17, 2012, and the closing date, March 27, 2012, Simone obtained an inspection report on the property and learned about certain other liabilities and deficiencies that allegedly affected the purchase and sale. The attorneys for the parties communicated about these issues before the closing date, and Nassau alleges on appeal that it was these matters that actually caused Simone not to complete the purchase by the outside closing date.

Five days before the date of closing, on March 22, 2012, Simone's attorney emailed Nassau's attorney about "issues to address prior to closing" and requested to delay the closing until April 10, 2012. Nassau's attorney responded on Friday, March 23 at 3:48 p.m. with an email that said simply: "We are ready to close . . . . I am calling you now." This call apparently was not answered, and a follow-up email a half-hour later memorialized Nassau's response and also stated that Nassau would "not consent to any extension" of the closing date.

On March 26, counsel for Nassau wrote to Simone's attorney stating that Nassau was "ready, willing and able to convey title to the Property tomorrow, the Outside Closing Date." The letter made reference to the time-of-the-essence provision and other terms of the settlement agreement, stating that if closing should fail to occur, Simone would lose his right to purchase the property. The reply from Simone's attorney came the same day: "[I]t appears that your client is not ready, willing, and able to close." The reply further asserted: "In all the circumstances, you [sic] appearance at my office tomorrow at 3 p.m. will not qualify as satisfying the 'time of the essence' provision of the contract and your firm is not authorized to disburse the $60,000 escrow." Counsel's letter indicated that Simone remained "very interested and able" to close at a later date, after Nassau had addressed his concerns. Finally, counsel indicated that he would be out of the office until April 2. The reply did not mention the condition of paragraph 2 of the agreement requiring an amendment of the master deed or the terms of the basement lease, although Simone's attorney had not yet received the closing documents that would establish Nassau's compliance with those provisions of the settlement agreement.

In pursuit of Nassau's obligation to amend the master deed, counsel for Nassau circulated a draft amendment for the first

time on the morning of March 27, 2012, the closing date. An email from Nassau's attorney to the closing agent sent on that date at 10:34 a.m. indicated that an undated and un-notarized master deed amendment was attached, and that the amendment delivered at closing would be complete. The amendment designated areas of the basement to each of the two commercial units of the building.

Nassau's representative and counsel arrived for the closing at Simone's counsel's office on March 27, 2012 at 3:00 p.m. Neither Simone nor his attorney was present for the closing. The closing did not occur.

An email from counsel for the bank that held the mortgage, sent at 3:42 p.m. on March 27, indicated concern that the master deed amendment had not been approved by the 75% supermajority of the condominium interests necessary to make it valid (as noted previously, Nassau had only a 73% ownership interest). Sometime on March 27, Nassau obtained the signature of Michael O'Brien to the master deed amendment as originally drafted, thus obtaining more than 75% ownership interest for the amendment. However, Nassau subsequently modified the operative language of the amendment to address Simone's future right to rent storage space in the basement beyond that under his own unit. At 5:45 p.m. on March 27, Nassau's counsel sent an email with the revised master

deed amendment, which he indicated would have to be re-executed. The revised amendment was not executed by O'Brien until March 28, the day after the closing date.

On April 2, 2012, Simone's attorney apparently contacted Nassau's attorney by telephone and expressed Simone's continued desire to purchase the property at the amount specified in the agreement. Nassau's counsel responded with a detailed letter the same day. The letter (1) indicated that the $60,000 escrow funds would be disbursed according to the agreement, (2) stated that the New Lease attached to the settlement agreement was in full force and effect, and (3) demanded that Simone discharge the lis pendens filed against the property. Simone's attorney responded by letter on April 3, restating Simone's desire to proceed to closing, but no later than April 13, at which point he would have to re-apply for financing. In a telephone conversation of counsel on April 9, Nassau indicated it would still sell the property to Simone, but at a price of $1,500,000.

By letter dated the following day, April 10, Simone declined Nassau's new offer but countered that if Nassau would complete the transaction for the settlement price, Simone would agree not to withhold any funds to cover Nassau's potential bulk sale tax liability, one of the other issues that the attorneys had discussed and disagreed about prior to the closing date. On

April 13, Nassau sent Simone a check for $10,000, representing his portion of the escrow funds under the contingency that he had failed to purchase the property by the outside closing date. Simone held the check at that time, but he eventually deposited the check.

In June 2012, Nassau filed a motion in the Chancery Division to enforce the settlement agreement and to discharge the lis pendens. Simone cross-moved for specific performance of the agreement permitting him to purchase the property. The Chancery Division heard argument on the motions on August 10, 2012, and placed an oral decision on the record the same day. It granted Nassau's motion and denied Simone's cross-motion. Simone then filed this appeal, as well as an emergent motion for a stay, which we denied.[2]

II.

A disputed motion to enforce a settlement agreement is governed by the same standard as a motion for summary judgment. Amatuzzo v. Kozmiuk, 305 N.J. Super. 469, 474-75 (App. Div. 1997). A hearing should be held to determine the facts unless the materials "show that there is no genuine issue as to any

[2] We were recently informed by counsel that a sheriff's sale has been scheduled because Nassau's mortgage has been foreclosed. We are not in a position to determine the effect of the foreclosure judgment or a sheriff's sale on the dispute in this appeal.

material fact challenged and the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2; Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995).

Initially, we reject Nassau's assertion that Simone may not pursue this appeal because he accepted and negotiated the refund of $10,000 of the escrow money. The general rule is that "a litigant cannot seek appellate review of a judgment under which he has accepted a benefit." Tassie v. Tassie, 140 N.J. Super. 517, 525 (App. Div. 1976). The rule "is but a corollary to the established principle that any act upon the part of a litigant by which he expressly or impliedly recognizes the validity of a judgment operates as a waiver or surrender of his right to appeal." Ibid. Waiver will not be easily found, and the rule "governs only where the appeal constitutes a repudiation of the judgment under which the benefits were received or is materially inconsistent therewith." Simon v. Simon, 148 N.J. Super. 40, 42 (App. Div.), certif. denied, 75 N.J. 12 (1977); see also Beronio v. Pension Comm'n, 130 N.J.L. 620, 622 (E. & A. 1943) (acceptance of benefits did not apply because "there was no waiver or estoppel by acts or course of conduct inconsistent with the right of appeal"). The acceptance of benefits doctrine will generally bar an appeal only where it is inequitable for the litigant both to pursue the appeal and to accept the

benefits of the judgment attacked. See Simon, supra, 148 N.J. Super. at 42; Tassie, supra, 140 N.J. Super. at 526.

Simone deposited the check on October 12, 2012, after the Chancery Division denied his motion for specific performance of the settlement agreement. In depositing the check, Simone was accepting a benefit to which he was entitled in any event, even having lost his motion in every respect. The $10,000 represented the lowest amount Simone could possibly benefit under any view of the settlement agreement. On appeal, he seeks to increase his benefit by recognition and enforcement of a right to purchase the property at the agreed settlement price. His depositing the check was not inconsistent with his pursuit of the appeal. Simone is not estopped from pursuing his appeal on the ground that he accepted a benefit conferred by the court's judgment.

Simone's main argument on appeal rests on his reading of paragraph 2 of the settlement agreement as establishing a condition precedent to the time-of-the-essence requirement. He contends that Nassau was required by the terms of the settlement agreement to amend the master deed before Simone had any obligation to close by the outside closing date of March 27, 2012. Nassau counters with three arguments. First, it claims that because Simone did not raise the condition precedent

argument before the time scheduled for the closing, he should be equitably estopped from using that contention as an afterthought to defend against Nassau's motion to enforce other terms of the settlement agreement. Second, it argues that reading paragraph 2 as creating a condition precedent would conflict with other parts of the agreement, which clearly provide that only Nassau's unwillingness or inability to provide marketable title would prevent enforcement of the time-of-the-essence requirement for closing. Third, Nassau argues that, even if paragraph 2 did create a condition precedent, Simone's only remedy was to accept the new long-term lease.

With respect to estoppel and waiver, Nassau points to Simone's pre-closing letter stating that there were "three issues to address prior to closing," none of which involved the amendment to the master deed. Simone raised the issue of the master deed for the first time in his counsel's post-closing letter of April 3, 2012. Simone responds that he had no duty to remind Nassau before the closing date of its obligations under the contract, including the condition precedent to cause the master deed to be amended to include the proper designation of the property he would be leasing.

Equity may estop a party from repudiating a course of conduct that (1) misleads another as to a material fact, and (2)

causes the other party reasonably to rely to its detriment on that course of conduct. Winters v. North Hudson Reg'l Fire & Rescue, 212 N.J. 67, 86 (2012); Carlsen v. Masters, Mates & Pilots Pension Plan Trust, 80 N.J. 334, 339 (1979); Ridge Chevrolet-Oldsmobile, Inc. v. Scarano, 238 N.J. Super. 149, 154 (App Div. 1990). Estoppel is an "expansive and flexible" doctrine that "allows consideration of a range of factors," including the parties' relationship, the circumstances giving rise to the litigation, and the nature of the claims and defenses involved. Winters, supra, 212 N.J. at 86. Equitable estoppel is merely a specific application of the duty all contracting parties have to deal fairly and in good faith with one another. Knorr v. Smeal, 178 N.J. 169, 178 (2003).

The record does not reveal the nature of Nassau's reliance on Simone's failure to raise the master deed issue earlier. Nassau understood its responsibility under the settlement agreement to amend the master deed. It took steps to do so, but not promptly enough to have the amended deed ready before or on the date of the closing. Presumably, Nassau would have acted more expeditiously in amending the master deed had Simone's attorney raised the issue in the days before the closing. But Nassau provides no authority for the proposition that the mere failure of one party to a contract to remind the other of its

obligations will estop the first party from asserting its contractual rights. We reject Nassau's estoppel argument.

Nassau also claims that Simone waived his claim that the amendment of the master deed was a condition precedent to the closing. In contrast to estoppel, waiver is the "voluntary and intentional relinquishment of a known right, operative unilaterally and without regard to reliance by others." Merchants Indem. Corp. v. Eggleston, 68 N.J. Super. 235, 253 (App. Div. 1961), aff'd, 37 N.J. 114 (1962); accord Mazdabrook Commons Homeowners' Ass'n v. Khan, 210 N.J. 482, 505 (2012); A.P. Dev. Corp. v. Band, 113 N.J. 485, 497 (1988). Simone's silence, as opposed to some expression or implication of an intent not to rely upon the master deed condition, does not constitute a waiver of his asserted right to have the master deed amended before he was obligated to close on the purchase.

As to the primary issue of contract interpretation, we must review the specific terms of the parties' settlement agreement to determine whether amendment of the master deed was a condition precedent to a time-of-the-essence closing, or simply Nassau's promise to perform, which would not constitute Nassau's waiver of the time-of-the-essence provision if it failed to comply.

A settlement agreement is subject to the ordinary principles of contract law. Thompson v. City of Atlantic City, 190 N.J. 359, 374 (2007). The goal of contract interpretation is to determine the intent of the parties, as expressed in the language the parties used. Onderdonk v. Presbyterian Homes of N.J., 85 N.J. 171, 183-84 (1981). In divining the parties' intent, the contract should be read as a whole, in "accord with justice and common sense." Cumberland Cnty. Improvement Auth. v. GSP Recycling Co., 358 N.J. Super. 484, 497 (App. Div.), certif. denied, 177 N.J. 222 (2003) (quoting Krosnowski v. Krosnowski, 22 N.J. 376, 387 (1956)) (internal quotation marks omitted); accord 495 Corp. v. N.J. Ins. Underwriting Assoc., 86 N.J. 159, 164 (1981). The interpretation of a contract is a question of law. E.g., Selective Ins. Co. of Am. v. Hudson E. Pain Mgmt. Osteopathic Med. & Physical Therapy, 210 N.J. 597, 605 (2012).

The parties may condition either the existence of a contract or one party's performance on the happening of some specified event. 13 Williston on Contracts § 38.4 (Lord ed. 2000). A "condition" is defined as "an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due." Restatement (Second) of Contracts § 224 (1981). A condition precedent is an

"event that must happen before a contractual right accrues or [a] contractual duty arises." 13 Williston on Contracts § 38:7 (emphasis added). It is, therefore, a limit on the promisor's obligation to perform, which obligation is made dependent upon the occurrence of the condition. Whittle v. Associated Indem. Corp., 130 N.J.L. 576, 579 (E. & A. 1943). As a general rule, there must be strict compliance with conditions precedent to the obligations created by the contract. See id. at 581; Williston on Contracts § 38:6.

As to the method of creating a condition, 8 Corbin on Contracts § 31.1 summarizes the law:

> A fact or event may be made a condition of a contract right and duty by any form of words capable of interpretation. There is no one required form; but there are several common modes of expression that are familiar. . . . A promisor's duty is expressly conditional if the promise to render the specified performance is limited and modified by . . . a conditional clause. I promise to pay "if my ship comes in;" or "on condition that the goods are delivered by June first;" or "provided that there shall be no liability unless father wills me the farm;" or "this promise is to be null and void if the assured does not keep the books in a fireproof safe" — all these are recognized modes of making the promise conditional.
>
> [Emphasis added, footnotes omitted.]

Williston concurs: "Although no particular words are necessary for the existence of a condition, such terms as 'if,' 'provided

that,' 'on condition that,' or some other phrase that conditions performance usually connote an intent for a condition rather than a promise." 13 Williston on Contracts § 38:16 (emphasis added).

Applying these principles, we conclude that paragraph 2 contains conditional language: "TIME BEING OF THE ESSENCE, provided that Nassau shall have caused the Master Deed for the Property to be amended . . . " (emphasis added). Unlike typical contractual promises, satisfaction of the condition was not wholly within Nassau's control. Amending the master deed required Nassau to procure the signature of one of the other condominium owners. Although Nassau's ability to obtain that agreement might never have been in serious doubt, it was not certain to occur, and thus bore one of the hallmarks of a condition. Restatement (Second) of Contracts § 224.

Nassau argues that other provisions of the settlement agreement are inconsistent with reading paragraph 2 to create a condition precedent, and therefore, the parties must have intended to treat it only as Nassau's contractual promise. Specifically, Nassau points to paragraphs 6 and 8 that we previously quoted and their references to Nassau's failure to produce "good and marketable title" as the only exception to the requirement that Simone close by the outside closing date.

Nassau also points to the introductory paragraph of the settlement agreement, which states:

> This Agreement . . . evidences the parties' understanding that if Simone . . . fails to close title on the acquisition of the Property on the date of Closing for any reason (unless due to marketability of title), then Simone shall be deemed to have waived any and all right to acquire the Property now and forever . . . .

Although these passages reflect an intent to prevent a delay for "any reason" other than Nassau's unwillingness or inability to convey marketable title, they all sought to prevent Simone from delaying closing by his own actions. The property had been tied up for decades by Simone's option to buy. Thus, it is logical to read the settlement agreement as providing one last time-of-the-essence date certain, after which Simone's purchase option would be forever extinguished, unless the failure to close was caused by Nassau and not by Simone and the reason for it was included in the time-of-the-essence provision. Reading the master deed amendment as a condition precedent to the time-of-the-essence requirement is consistent with this understanding because Simone had no way to delay closing by causing the amendment to fail. Provided Nassau satisfied the condition of procuring an amended master deed, which it had forty days to accomplish from the time of the settlement, the

agreement left no room for Simone to refuse to close without forever relinquishing his right to purchase.

Nassau is certainly correct that the agreement must be read as a whole, but it is incorrect in arguing that the most harmonious interpretation of the agreement as a whole is to read amending the master deed to be a promise rather than a condition precedent. The parties' joint decision to make amending the master deed a condition to the time-of-the-essence closing had benefits for both sides that would not have existed if amending the master deed was only a contractual duty of Nassau. Simone could take comfort in the law imposing upon Nassau a duty to act in good faith and take reasonable measures to ensure that the condition would occur. 13 Williston on Contracts § 38.1; Restatement (Second) of Contracts § 245 cmt. a. And if Nassau was unable to procure the signature of another condominium association member despite its reasonable efforts, Nassau would not be liable to Simone's charge that it breached the contract. It is, therefore, not unreasonable to think that both Nassau and Simone preferred the conditional language.

The conditioning of closing on the amendment of the master deed also seems reasonable in light of the history of the parties' relationship. Simone's prior attempts to purchase the commercial space had failed. This fact alone might have sown

the seeds of mistrust between the parties. Simone demanded an amendment to the master deed during settlement negotiations because he needed a clear delineation of the basement space and his right to use it for storage. The space was critical to Simone's retail shoe business. It would be reasonable for him to demand that the master deed amendment be executed before agreeing to be bound by a time-of-the-essence closing.

Reading the master deed amendment as a condition precedent also does not contradict the introductory paragraph, which addresses Simone's failure to close title, not Nassau's failure to produce an amended master deed. The amended master deed was a closing document that was expressly required by the time-of-the-essence provision. Once Simone's duty to close materialized — after Nassau had caused the master deed to be validly amended and produced marketable title — Simone could not assert any reason to avoid the closing.

There were, therefore, two conditions to closing: Nassau would have to "have caused" the master deed to be amended, and Nassau would have had to convey marketable title. Nassau's failure to deliver marketable title at closing would waive the time-of-the-essence provisions and extend the closing deadline by thirty days. Similarly, if Nassau did not procure a master deed amendment by the closing date, but could have done so with

reasonable efforts, the time-of-the-essence provision would not apply but the closing would only be delayed.[3]

The Chancery Division concluded that the time-of-the-essence provision continued to be in force despite the absence of an executed master deed amendment on the closing date. It relied on the certification of the closing agent, which stated that the master deed amendment would customarily have been presented at the closing table and recorded sometime thereafter. Specifically, the closing agent stated:

> It is commonplace in commercial real estate transactions for the title company to receive and collect documents at closing, which would then be recorded and/or filed with the appropriate recording office of local, county or state agency following the date of closing in a certain order and priority, but not necessarily on the date of closing.

The issue, however, is not the recording of the necessary closing documents but their timely execution.

The Chancery Division considered particularly important that Simone and his attorney decided not to attend the closing, at which Nassau might yet have produced an amended master deed executed by the requisite percentage of ownership interest in the property. Nassau argues that "it is undisputed that Nassau,

[3] Simone, the beneficiary of the condition, was of course entitled to waive compliance with the condition if he desired.

at all times, had the required number of votes to amend the master Deed and that the additional required signature was obtained the day after the Outside Closing Date, and, but for Simone's failure to appear, would have been dealt with at the Closing table and/or post-closing."

What is more significantly undisputed, however, is that Nassau set the closing time of 3:00 p.m. on March 27 but did not have an executed and acceptable master deed amendment at the time of closing. As of 3:42 p.m. on March 27, Nassau still had not procured the signatures necessary to amend the master deed. An email sent at 5:45 p.m. from Nassau's counsel indicated that a "revised Amendment to the Master Deed" would have to be "re-executed." The revised amendment was executed by the requisite second ownership interest not on the date of closing but on the following day. As of the date and time of the closing on March 27, Nassau had not procured an amended master deed sufficient to satisfy the condition precedent.

The closing agent's function of collecting documents at the closing and recording or submitting them in a particular priority is not highly probative of whether the agreement that the parties signed conditioned a time-of-the-essence closing on the execution of a validly amended master deed. For the reasons we have stated, we read the language of the settlement agreement

as requiring the amendment to have been provided before or no later than the time of the closing in order to enforce the time-of-the-essence provision. Although Simone might have participated in the closing to determine whether a satisfactory amendment might be executed in time to complete the closing on March 27, the fact is that Nassau did not obtain an executed amended deed on that date.

Simone's decision not to attend the closing was a risk. Cf. Spring Creek Holding Co. v. Shinnihon U.S.A. Co., 399 N.J. Super. 158, 178-79 (App. Div.) (contracting party's decision not to perform in anticipation of breach by the other party), certif. denied, 196 N.J. 85 (2008). If Nassau had produced an amended master deed and good and marketable title, Simone's right to purchase the property would have been extinguished because he failed to close by the outside closing date. However, since the condition precedent was not satisfied at the time of closing, Simone had a right not to close, and the time-of-the-essence provision was no longer in force.

Having reached this conclusion, and since Simone promptly notified Nassau that it would complete the sale within a reasonable time after March 27, 2012, we hold that Simone is entitled to enforce the settlement agreement and to purchase the property at the agreed-upon price. Ordinarily, where a time-of-

the-essence provision is not in effect, a "reasonable extension of the time for performance" is imposed. Selective Builders, Inc. v. Hudson City Sav. Bank, 137 N.J. Super. 500, 507 (Ch. Div. 1975).

Here, the agreement provided that, if Nassau waived its time-of-the-essence rights by its inability or unwillingness to convey marketable title, it would have "thirty (30) additional calendar days in which to close title." At oral argument before us, Simone's counsel agreed that the same provision should have governed Nassau's failure to produce an executed master deed amendment at the time of the closing. In other words, the parties fixed thirty days as a reasonable extension of time to close on the sale in the event that the time-of-the-essence provision and the outside closing date were no longer in effect.

Therefore, we reverse the Chancery Division's August 10, 2012 orders and remand to the Chancery Division to consider the application of either party to fix a thirty-day deadline within which Simone may exercise his option to purchase the property at the price established in the settlement agreement, or forever relinquish his purchase option.

Reversed and remanded. We do not retain jurisdiction.