No. 03-9154

United States Court of Appeals
for the Second Circuit

JOHN DiSTEFANO,

Plaintiff-Appellant,

v.

JEAN DONNELLY MACLAY,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of New York, No. 00-CV-7534, Honorable Joanna Seybert

BRIEF FOR DEFENDANT-APPELLEE JEAN DONNELLY MACLAY

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PRELIMINARY STATEMENT

Pursuant to Rule 28.2 of the Second Circuit Rules, defendants-appellees state that the decision appealed from was rendered by the Honorable Joanna Seybert of the United States District Court for the Eastern District of New York. The decision is not reported, but is reproduced in the Joint Appendix at pages 160 to 172.

STATEMENT OF THE FACTS

Jean Donnelly Maclay, Ann Barry Natter, and Mary Jane Donnelly (collectively, the "Owners")[1] jointly own a parcel of approximately 0.42 acres of vacant land in Southampton, New York. Joint Appendix ("JA") 16, 87, 161. Because of the size and shape of the lot, *see* JA 93, a building permit to build a house on the property could not lawfully be obtained without, as an intermediate step, procuring several variances from applicable zoning requirements, such as those governing minimum distances from adjacent streets. JA 53, 87.

[1] The appellate caption designates Ms. Maclay as the sole defendant-appellee. In fact, Ms. Natter and Ms. Donnelly are co-defendants in the case and equal owners of the property at issue. In appellees' acknowledgement letter submitted shortly after the appeal was docketed, counsel for appellees submitted a proposed corrected caption adding Ms. Natter and Ms. Donnelly to the caption as additional defendants-appellees, but this correction has not yet been incorporated into the official caption.

On August 3, 1999, the Owners entered into a contract to sell the property to plaintiff-appellee John DiStefano. JA 16-22.[2] The parties agreed that the purchase price for the property would be $45,000 (net to the Owners). JA 16.

The contract incorporated a rider conditioning the obligations of the parties on Mr. DiStefano's procurement of a building permit for a house on the property within 180 days of the date of the contract (which period ended on January 30, 2000), and giving both parties the power to terminate the contract if that contingency was not fulfilled by that time:

> 1. This contract is expressly conditioned and contingent upon purchaser, at purchaser's own cost and expense, obtaining a building permit from the Suffolk County Department of Health Services and the Town of Southampton. Purchaser agrees to make due and diligent application for such building permit and shall have 180 days from the date hereof within which to obtain all necessary municipal approvals, including a building permit, for the construction of a single family dwelling. In the event that said building permit has not been obtained within 180 days from the date hereof, either party shall have the right to cancel this contract. Purchaser agrees to provide in writing, to seller's attorney, the written basis for any conclusion that the premises does not constitute a buildable lot for the purpose of construction of a single family dwelling.
>
> 2. In the event seller cancels this contract under paragraph 1 above, seller shall reimburse purchaser for

[2] The pages of the contract reproduced in the Joint Appendix are out of order. The pages reproduced as pages 19 and 20 belong after the page numbered 21.

> all expenditures to date of cancellation attendant to the permits sought hereunder.

JA 20.

The parties agreed that all communications for purposes of the contract had to be made in writing, and set out a detailed procedure for doing so:

> Any notice or other communication ("Notice") *shall be in writing* and either (a) sent by either of the parties hereto or by their respective attorneys who are hereby authorized to do so on their behalf or by the Escrowee, by registered or certified mail, postage prepaid, or (b) delivered in person or by overnight courier, with receipt acknowledged, to the respective addresses given in this contract for the party and the Escrowee, to whom the Notice is to be given, or to such other address as such party or Escrowee shall hereafter designate by Notice given to the other party or parties and the Escrowee pursuant to this paragraph.

JA 21 (Contract § 25) (emphasis added). The parties expressly emphasized that the writing requirement applied to all waivers of rights under the contract: "Neither this contract nor any provision thereof may be waived, changed or cancelled *except in writing*." JA 21 (Contract § 28(b)) (emphasis added).

After the parties entered into the contract, Mr. DiStefano took certain steps toward satisfying the building permit contingency. However, he did not meet the contractual 180-day cut-off date to obtain a building permit. Indeed, the January 30, 2000 deadline came and went and Mr. DiStefano had not yet even prepared or submitted a variance application, let alone gotten it approved. Mr. DiStefano's

counsel ultimately submitted a variance application to the Town of Southampton Zoning Board of Appeals. JA 80. As a current property owner, Ms. Maclay needed to sign the variance application, and, did so on March 28, 2000, in keeping with her obligation under the contract to "execute . . . such further instruments and documents . . . as may be reasonably requested by" Mr. DiStefano.[3] JA 51-58. Neither Ms. Natter, Ms. Donnelly, nor Mr. DiStefano signed the variance application. JA 55, 56.

In October 2000, the zoning board held a hearing on the variance application. JA 135-36. It granted the variance application for the property on November 2, 2000. JA 94-97. Nevertheless, as the variance decision emphasized in italic font, "*This is Not a Building Permit.*" JA 94. Further approvals were necessary to obtain a building permit, particularly approval from the Suffolk County Department of Health Services. JA 89, 138. Mr. DiStefano had thus not obtained a building permit, and, indeed, he has never done so to this day.

Shortly thereafter, on November 10, 2000, counsel for the Owners gave formal, written notice to Mr. DiStefano that they had elected to terminate the contract in light of the fact that the building permit contingency had not yet been

[3] Section 28(g) of the contract requires that "[e]ach party shall, at any time and from time to time, execute, acknowledge where appropriate and deliver such further instruments and documents and take such other action as may be reasonably requested by the other in order to carry out the intent and purpose of this contract." JA 21.

satisfied, and that more than 180 days had elapsed since the parties entered into the contract. JA 70; *see also* JA 71-72. In keeping with the Owners' contractual obligation to "reimburse [Mr. DiStefano] for all expenditures to date of cancellation attendant to the permits sought," JA 20, the termination letter (and two others following it) requested Mr. Distefano to let the Owners know the amount of such expenditures. JA 70, 71, 72.

Mr. DiStefano claims that on November 3, 2000, he left Ms. Maclay a voicemail stating that he was willing to close the contract immediately without satisfying the building permit requirement. JA 81, 137-39. Mr. DiStefano also claims to have waived the building permit contingency in a telephone conversation with Ms. Maclay on November 6 or November 7, 2000. JA 139. The Owners categorically deny these claims that Mr. DiStefano expressed a desire to waive the building permit requirement at any time before they terminated the contract. But it is undisputed that Mr. DiStefano never communicated any desire to waive the building permit contingency in writing — as required under the contract's provisions regarding written waivers and other communications, JA 21 — before the Owners terminated the contract in writing on November 10.

Mr. DiStefano filed this lawsuit against the Owners on November 17, 2000 in New York State court, seeking specific performance of the contract and damages. JA 160. On December 20, 2000, the Owners removed the case to the

United States District Court for the Eastern District of New York under that court's diversity jurisdiction. JA 3.

After the close of discovery, the Owners moved for summary judgment, arguing that they had validly terminated the contract because (1) the contract gave them the right to terminate if Mr. DiStefano failed to procure a building permit within 180 days from the date of the contract, and (2) Mr. DiStefano had failed to procure a building permit within that time. On September 29, 2003, the district court granted the Owners' motion. The district court found that the contract unambiguously allowed either party to cancel the contract at any time "[i]f the Plaintiff failed to obtain a building permit within 180 days of the Contract." JA 169.

The district court also rejected Mr. DiStefano's argument that Ms. Maclay's signature of the zoning variance application had somehow waived the Owners' right to terminate the contract. The district court observed that "there was no indication [in the variance application] that the Defendants were waiving their right to cancel at any time after the 180 days had passed." JA 170. The district court also held that "the conversations between the Plaintiff, his lawyer, and Maclay could not act as a waiver" of contract provisions because the contract required that any such waivers and communications must be in writing. JA 170-71.

This appeal followed.

SUMMARY OF ARGUMENT

1. Mr. DiStefano claims that he waived the building permit requirement in a telephone voicemail message he left for Ms. Maclay on November 3, 2000, and again in a subsequent telephone conversation with her. This contention raises no issue of material fact precluding summary judgment for two independent reasons.

First, Mr. DiStefano had no power to waive the building permit requirement unilaterally, and he does not allege that the Owners ever agreed to waive that requirement. While Mr. DiStefano claims that he was entitled to waive the provision unilaterally because it was allegedly included in the contract solely for his benefit, he ignores a controlling decision of the New York Court of Appeals that post-dated all of his cases on this point and that expressly held that the "sole benefit" cases have no application — and do not allow any power of unilateral waiver — where the contract expressly gives both parties the power to terminate if the provision is not satisfied. The parties' contract here contains such language expressly giving the Owners, as well as Mr. DiStefano, the right to terminate if the building permit contingency is not satisfied within 180 days after the contract was signed. Therefore, Mr. Distefano had no power unilaterally to waive the building permit requirement, and his claim to have attempted to do so would be immaterial even if it were true. *See infra* Part I(A).

Second, Mr. DiStefano simply ignores that the contract contains an express writing requirement specifying that all waivers must be written. Such provisions are fully enforceable under New York law. Mr. DiStefano does not claim to have made any written waiver; rather, he relies upon claimed *oral* statements in a voicemail message and in a subsequent telephone conversation. Therefore, even if Mr. DiStefano had the power to waive the building permit contingency unilaterally, he does not claim to have done so in a manner that would be effective under the contract. *See infra* Part I(B).

2. Mr. DiStefano also argues that the Owners' termination of the contract was barred by the doctrine of laches, because the 180-day period for Mr. DiStefano to comply with the building permit requirement ended on January 30, 2000, but the Owners did not terminate until November 10, 2000. The doctrine of laches has no application here, because it is an equitable *defense* available under certain circumstances where a plaintiff has delayed bringing a lawsuit. It has no application to a defendant's conduct in exercising rights under a contract, and the cases addressing that latter question (as well as basic principles of fairness and common sense) fully support the Owner's ability to exercise their right to terminate even after having allowed Mr. DiStefano additional time to perform. *See infra* Part II.

ARGUMENT

I. MR. DiSTEFANO'S CLAIM TO HAVE ORALLY WAIVED THE PERMIT REQUIREMENT IS IMMATERIAL.

Mr. DiStefano's primary argument is that there is a factual dispute regarding whether he "advised Maclay on November 3, 2000 and thereafter" that he waived the building permit requirement and was willing to proceed directly to closing. Appellant Br. at 15. Mr. DiStefano contends (1) that the building permit clause was for his sole benefit, *id.* at 16-18, (2) that he therefore had the right unilaterally to waive that provision, *id.* at 18-19, and (3) that the provision was "not self-executing," *id.* at 19-21.

This argument is incorrect for two reasons. First, New York's highest court has held that the "sole benefit" analysis has no application where the contract expressly gives both parties the right to terminate in the event that a contingency does not occur. Second, it is undisputed that Mr. DiStefano did not waive the building contract requirement *in writing* before the Owners tendered their written termination of the contract, and the contract's writings-only provision is fully enforceable under New York law. Each of those reasons independently forecloses Mr. DiStefano's argument as a matter of law.

A. The New York Court Of Appeals Has Rejected The Application Of The "Sole Benefit" Cases In This Context.

Mr. DiStefano had no power unilaterally to waive the building permit contingency. In *W.W.W. Associates, Inc. v. Giancontieri*, 77 N.Y.2d 157 (1990), the New York Court of Appeals rejected the argument that "an unambiguous reciprocal cancellation provision should be read . . . as a contingency clause for the sole benefit of plaintiff purchaser, subject to its unilateral waiver." *Id.* at 159.[4] In that case, the parties to a contract for the sale of real property added a contingency to the contract after the prospective purchaser learned that there was a lis pendens against the property in question. *See id.* at 161. The contingency provided that "in the event such litigation is not concluded, by or before 6-1-87 either party shall have the right to cancel this contract." *Id.* at 160. Before the end of the contingency period, "with the litigation still unresolved, [the prospective buyer] . . . wrote [the prospective sellers] that it was prepared to close" notwithstanding the non-satisfaction of the litigation contingency. *Id.* The prospective buyer cited *BPL Development Corp. v. Cappel*, 446 N.Y.S.2d 134 (App. Div. 1982), *DeFreitas v. Holley*, 461 N.Y.S.2d 351 (App. Div. 1983), and similar cases for the proposition that "[r]eciprocal cancellation clauses can be waived by the party for

[4] Mr. DiStefano has not appealed the district court's application of New York substantive law to govern his contract claim in this diversity action, JA 167, and his appeal brief applies New York law, Appellant's Br. at 16.

whose benefit they were intended." 77 N.Y.2d at 159.

The New York Court of Appeals rejected this argument. *See id.* at 162. It held that where "there is no ambiguity as to the cancellation clause in issue, read in the context of the entire agreement, and that it confers a reciprocal right on both parties to the contract," *id.* at 163, the "sole benefit" cases do not apply, because the contract "plainly manifests the intention that [the prospective seller], as well as [the prospective buyer], should have the right to cancel." *Id.* The "rejoinder — that defendants indeed had the specified absolute right to cancel the contract, but it was subject to plaintiff's absolute prior right of waiver — suffers from a logical inconsistency that is evident in a mere statement of the argument." *Id.* Thus, "[b]y ignoring the plain language of the contract, plaintiff effectively rewrites the bargain that was struck." *Id. See also, e.g., Ecologics Mgmt., Inc. v. Mallaber*, 569 N.Y.S.2d 276, 276 (App. Div. 1991) (finding "sole benefit" issue irrelevant because "[t]he contract unambiguously empower[ed] either party to cancel the contract upon nonperformance of any of the stated contingencies" (citing *W.W.W. Associates*)); *Delta Props., Inc. v. Fobare Enters., Inc.*, 674 N.Y.S.2d 817, 819 (App. Div. 1998) (citing *W.W.W. Associates*).

W.W.W. Associates, Inc. is squarely on point here. The instant contract unambiguously grants a reciprocal power to both parties to cancel if the permit contingency is not satisfied after 180 days. JA 20 (providing that "either party

shall have the right to cancel this contract" in that event). Indeed, this contractual provision is even clearer in showing that the Owners have an equal termination right than the provision at issue in *W.W.W. Associates, Inc.*, because it goes on specifically to discuss the consequences "[i]n the event *seller* cancels this contract under" that provision. JA 20 (emphasis added). Moreover, other provisions of the contract expressly give options to one party only, thus reinforcing the conclusion that the parties' use of reciprocal language in this provision was deliberate. *E.g.*, JA 17 (Contract § 12, granting inspection right to purchaser), 18 (Contract § 19, granting seller power to adjust purchase price), 21 (Contract § 23(b), granting purchaser remedial power in case of default). *See W.W.W. Assocs., Inc.*, 77 N.Y.2d at 163 (noting that other paragraphs "expressly bestowed certain options on the purchaser alone"). The presence of a merger clause in the contract reinforces that conclusion still further. *See id.* at 160; JA 21 (merger clause).

Because the provision "confers a reciprocal right on both parties to the contract," 77 N.Y.2d at 163, application of "the 'party benefited' cases" is foreclosed, *id.* at 162, and Mr. DiStefano enjoys no "absolute prior right of waiver," *id.* at 163. His claim to have unilaterally attempted to waive the building permit contingency is irrelevant because he had no power to modify the contract in that manner without the agreement of the Owners.

Mr. DiStefano fails to cite *W.W.W. Associates*. Moreover, all of his authorities on the "sole benefit" issue pre-date that controlling Court of Appeals decision. And the two cases on which he places primary emphasis, *BPL Development Corp.* and *DeFreitis*, were cited by the prospective buyer in *W.W.W. Associates*, *see* 77 N.Y.2d at 159, but rejected as inapplicable where the contractual provision at issue unambiguously confers a reciprocal termination right, *id.* at 162.[5] For this reason alone, Mr. DiStefano's argument is without merit.

[5] Moreover, Mr. DiStefano's authorities are unavailing even apart from *W.W.W. Associates*. They involved situations (1) where the buyer waived satisfaction of a contract provision *before* the provision's time limit had expired (or where the provision had no time limit), *see BPL Dev. Corp.*, 446 N.Y.S.2d at 134; *DeFreitas*, 461 N.Y.S.2d at 352; *Porter-McCann Co. v. Kaiser*, No. 84 Civ. 1098 (RLC), 1984 WL 695, at *1-3 (S.D.N.Y. July 31, 1984), (2) where the seller's attempted termination was held invalid because it occurred only *after* the buyer had fully performed the contingency, *see Schatten v. Briedis*, 558 N.Y.S.2d 110, 111 (App. Div. 1990); *Kramer v. Brown*, 517 N.Y.S.2d 180, 182 (App. Div. 1987), or (3) where the seller's right to terminate had not been triggered at all, because the time had not run out to satisfy the contingency, *see Spuches v. Royal View, Inc.*, 216 N.Y.S.2d 468, 470 (App. Div. 1961). None of these cases authorize a buyer unilaterally to waive a contract provision *after* the agreed time to satisfy it had already expired. Even if the building permit contingency was solely for Mr. DiStefano's benefit, the 180-day time limit on the resolution of that contingency was also for the Owners' benefit. *See, e.g.*, *BPL Dev. Corp.*, 446 N.Y.S.2d at 135 (holding that "the clear intent of the parties, as expressed in the contract, was to set a time limit on plaintiff's efforts to obtain [the] approval"); JA 172 (holding that the building permit provision authorized the Owners "to walk away if Plaintiff did not get the permits in a specified period of time").

B. There Was Undisputedly No Written Waiver Before The Owners Terminated.

Even if Mr. DiStefano had the right unilaterally to waive the building permit requirement, he did not make any such waiver in a legally effective manner. The parties expressly agreed that all communications under the contract must be made in writing, specifically including any waivers of contractual rights. JA 21 (Contract §§ 25, 28(b)). The whole purpose of including such a writing requirement in a contract is to foreclose litigation of disputed factual questions over whether (or when) relevant communications were delivered. *See, e.g., Jaffe v. Paramount Communications Inc.*, 644 N.Y.S.2d 43, 47 (App. Div. 1996) (observing that "the requirement that notice be in writing . . . promoted clarity of rights and avoided litigation by limiting occasions for disputes based upon misunderstandings or undocumented claims"); *W.W.W. Assocs., Inc.*, 77 N.Y.2d at 162 (precluding extrinsic evidence "imparts stability to commercial transactions" by eliminating issues of fraud, perjury, death of witnesses, faulty memories, and improper evaluations of extrinsic evidence by juries). "Such considerations are all the more compelling in the context of real property transactions, where commercial certainty is a paramount concern." *Id.*

This Court has previously held that under New York law "writings only" contractual provisions are fully enforceable. *See Towers Charter & Marine v. Cadillac Ins. Co.*, 894 F.2d 516, 521-22 (2d Cir. 1990) (holding that generally "a

written agreement that expressly states it can be modified only in writing cannot be modified orally").[6] Numerous New York courts have applied this principle to preclude litigation of whether alleged oral statements were in fact made under contracts containing writing requirements. *See, e.g., Hollinger Digital, Inc. v. LookSmart*, 699 N.Y.S.2d 682, 682 (App. Div. 1999); *F.B. Transit Rd. Corp. v. DRT Constr. Co.*, 661 N.Y.S.2d 367, 368 (App. Div. 1997); *Bank of New York v. Spring Glen Assocs.*, 635 N.Y.S.2d 781, 784 (App. Div. 1995).

Here, Mr. DiStefano makes no argument that he waived the building permit requirement in writing, as expressly required by the parties' contract, before the Owners exercised their power to terminate. Rather, he argues only that he made such a waiver *orally*, by "telephon[ing] Maclay and le[aving] a message on her answering system that variances had been granted and that he was willing to close on the contract immediately." Appellant's Br. at 11; *see also id.* (claimed oral waiver over telephone "[o]n November 6 or November 7, 2000"). Therefore, Mr. DiStefano's claimed waiver would have been legally ineffective even if he had made it, and the district court properly granted summary judgment.

[6] The only two exceptions to the enforceability of such a provision have no application here. Mr. DiStefano does not allege that the parties acted in any way to implement his purported oral waiver in whole or part. *See* 894 F.2d at 522. To the contrary, the Owners terminated the contract just days later. Nor does any party contend that the Owners relied on Mr. Distefano's claimed oral waiver. *See id.* In the absence of these two exceptions, the writing requirement applies. *See id.*

Mr. DiStefano does not address the effect of the writings clauses in the parties' contract. Indeed, Mr. DiStefano does not even inform the Court that these provisions of the contract exist, even though the district court discussed the effect of the writing requirement at length, and rejected Mr. DiStefano's oral waiver claim on this basis. JA 170-71.

II. THE DOCTRINE OF LACHES IS INAPPLICABLE.

Mr. DiStefano also argues that the doctrine of laches precluded the exercise of the Owners' termination right because the 180-day period for Mr. DiStefano to obtain a building permit ended on January 30, 2000, but the Owners did not terminate the contract until November of that year. Appellant's Br. at 21-23. In the first place, Mr. DiStefano did not raise this argument in the district court, and it is therefore waived. *See, e.g., Kraebel v. New York City Dep't of Housing Preservation & Dev.*, 959 F.2d 395, 401 (2d Cir. 1992). In any event, the argument is meritless.

Mr. DiStefano does not cite a single case in his discussion of laches. And for good reason. The Owners are the *defendants* in this action. Laches precludes a *plaintiff* from waiting too long to bring a lawsuit.[7] *See, e.g., Hill v. W. Bruns &*

[7] Mr. DiStefano also makes a passing reference to the Owners' failure to "mak[e] a 'time is of the essence' demand." Appellant's Br. at 22. Like laches, Mr. DiStefano waived any "time is of the essence" argument by failing to preserve it in his summary judgment briefing below. *See, e.g., Kraebel*, 959 F.2d at 401. His fleeting, one-sentence mention of the issue in his appeal brief, unsupported by

Co., 498 F.2d 565, 568 (2d Cir. 1974) ("Laches is a doctrine aimed at avoiding the commencement of stale claims in equity where it is impossible or difficult for a defendant to defend because evidence has been destroyed or lost and the defendant thereby prejudiced as a result of the delay in the institution of the action."); *Saratoga County Chamber of Commerce, Inc. v. Pataki*, 100 N.Y.2d 801, 816, *cert. denied*, 124 S. Ct. 570 (2003). For this reason, the doctrine of laches has no application here.

Mr. DiStefano makes no estoppel argument on appeal (and failed to preserve one below), and any such claim would have required some express promise (or deceitful conduct amounting to a false representation) by the Owners upon which Mr. DiStefano reasonably relied. *See, e.g., Cyberchron Corp. v. Calldata Sys. Dev., Inc.*, 47 F.3d 39, 44 (2d Cir. 1995); *Brelsford v. USAA*, 734 N.Y.S.2d 707,

(continued...)

any discussion or citations, would have been inadequate to raise it on appeal in any event. *See infra* n.8. He is also wrong on the merits: time is of the essence as a matter of law where a contract provision sets out a period of time for performance of a contingency and authorizes cancellation in the event the deadline is not met (which constitutes an "option" provision). *See, e.g., Ittleson v. Barnett*, 758 N.Y.S.2d 360, 361-62 (App. Div. 2003); *Boghosian v. SCS Props., Inc.*, 750 N.Y.S.2d 197, 199 (App. Div. 2002); *Steinberg v. Linzer*, No. 01-27860, 2002 WL 221104, at *7 (N.Y. Sup. Ct. Jan. 10, 2002); *Karan v. Sutton E. Assocs. — #88*, 680 N.Y.S.2d 509 (App. Div. 1998). Finally, it is undisputed that the Owners repeatedly advised Mr. DiStefano that they were urgently concerned about the time it was taking him to perform. JA 9, 48, 81, 115, 131, 136 (noting that Ms. Maclay had asked Mr. DiStefano to "[c]all her day or night" with updates regarding the timing).

709-10 (App. Div. 2001). He makes neither claim and could not have under these facts, because the writing requirement of the contract precluded reasonable reliance upon alleged oral statements and Mr. DiStefano can allege no conduct inconsistent with the contract as written. *See, e.g., Towers Charter & Marine Corp.*, 894 F.2d at 522; *Hollinger Digital, Inc.*, 699 N.Y.S.2d at 682 ("In view of the requirement for a written agreement, plaintiff could not have reasonably relied on defendant's alleged representations."); *Chadirjian v. Kanian*, 506 N.Y.S.2d 880, 882 (App. Div. 1986); *Joseph Victori Wines, Inc. v. Vina Santa Carolina S.A.*, 933 F. Supp. 347, 354 (S.D.N.Y. 1996).[8]

[8] Mr. DiStefano also appears to claim, in a single sentence of his brief within the laches section, that Ms. Maclay's execution of the variance application on March 28, 2000 "manifested [the Owners'] waiver or modification of the right to terminate." Appellant's Br. at 22. This single-sentence "argument" is a bare conclusion, supported by no discussion or citations, and as such falls far short of preserving the issue in this appeal. *See, e.g., Cuoco v. Moritsugu*, 222 F.3d 99, 112 n.4 (2d Cir. 2000) ("This single, conclusory, one-sentence argument [in an appeal brief] is insufficient to preserve any issue for appellate review."); *Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998) ("Issues not sufficiently argued in the briefs are considered waived and normally will not be addressed on appeal."). In any event, this suggestion is plainly incorrect on the merits for numerous reasons. *First*, the variance application makes no mention of the contract between the parties, and on its face does nothing to waive any right to terminate the contract. JA 51-58. *Second*, the contract *required* Ms. Maclay to sign the variance, so it was obviously no waiver of rights under the contract. JA 21 (Contract § 28(g) ("Each party shall . . . execute . . . such further instruments and documents and take such other action as may be reasonably requested by the other in order to carry out the intent and purpose of this contract.")). *Third*, only Ms. Maclay, and neither of the other Owners, signed the variance application, and thus could not have waived the Owners' collective cancellation right. JA 56. And *fourth*, the district court

More generally, there is no unfairness in this result. The Owners merely exercised their unambiguous right under a valid time limit provision governing the time when the right to purchase at the negotiated price and terms would remain unconditionally open. That provision empowered *both* Mr. DiStefano and the Owners to terminate the contract after the specified period if intervening changes in conditions or values warranted, and parties may rationally choose to reserve the right to cancel a transaction after a specified period of time in light of the possibility that intervening changes could render the transaction undesirable for one or both. *See, e.g., Lewis v. Atlas Corp.*, 63 F. Supp. 217, 220 (D.N.J. 1945) (observing that "desiring to protect themselves against delay over which they could exercise no control and dealing as they were with securities of possible fluctuating values [the parties to a contract] considered the element of time and made it a condition nullifying the contract on a day certain on failure of the approvals sought"), *aff'd*, 158 F.2d 599 (3d Cir. 1946). The parties' contract was entirely unambiguous in conferring that right upon the Owners, and Mr. DiStefano's argument would "effectively rewrite[] the bargain that was struck." *W.W.W. Assocs.*, 77 N.Y.2d at 163.

(continued...)
addressed this issue at length in a discussion to which Mr. DiStefano offers no response. JA 170-72.

Moreover, the contract provides for the Owners' reimbursement of Mr. DiStefano's expenditures in attempting to obtain a building permit, JA 20 (and the Owners have repeatedly indicated their willingness to make such reimbursement, JA 70, 71, 72). So Mr. DiStefano will incur no loss from any of his expenditures, and the Owners will not be unjustly enriched by receiving the value of such expenditures.

Even more fundamentally, however, principles of fairness decisively *foreclose* Mr. DiStefano's complaints about the Owner's "delay." After all, Mr. DiStefano *himself* wanted the extra time because of his *own* failure to satisfy the building permit contingency within the contractually specified time. *E.g.*, JA 131-32. Having extracted the Owners' generosity in granting him substantial additional time to perform, Mr. DiStefano's attempt to turn around on appeal and characterize this forbearance as "inexcusable" "delay," Appellant's Br. at 23, is reminiscent of "the behavior of a person who kills his parents and pleads for the court's mercy on the ground of being an orphan." *Checkpoint Sys., Inc. v. United States Int'l Trade Comm'n*, 54 F.3d 756, 763 n.7 (Fed. Cir. 1995). The Federal Circuit rejected a similar "delay" argument in no uncertain terms in *Checkpoint Systems, Inc.*:

> Checkpoint further argues that the equities in this case weigh against invalidation of the Lichtblau patents because Lichtblau actively pursued patent protection for the invention while, as Checkpoint asserts, Kaltner "slept." We fail to see what equities lie with a corporation that, rather than making a good faith

> judgment concerning conflicting claims of inventorship among its employees, puts off the prior inventor while continuing to develop the invention with his help. Checkpoint's assertion now that the prior inventor "slept" on his invention may qualify as a new definition of "chutzpah."

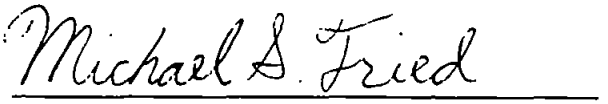
Id. at 763.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: February 18, 2004

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that, on this 18th day of February, 2004, I caused two (2) copies of the foregoing BRIEF FOR DEFENDANT-APPELLEE JEAN DONNELLY MACLAY to be served via Federal Express overnight courier, upon:

William P. Maloney, Esq.
Esseks, Hefter & Angel
108 East Main Street
Riverhead, NY 11901

I also hereby certify that on this 18th day of February, 2004, I caused the original and ten (10) copies of the foregoing BRIEF FOR DEFENDANT-APPELLEE JEAN DONNELLY MACLAY to be filed, via Federal Express overnight courier, in the Office of the Clerk, United States Court of Appeals for the Second Circuit.

Michael S. Fried
Attorney for Defendant-Appellee