MCPB  
Sept. 30, 2004  
Item #11**MEMORANDUM**

TO: Montgomery County Planning Board

VIA: Richard A. Hawthorne, Acting Chief *ACH*  
Development Review Division

FROM: Richard A. Weaver, Coordinator *RAW*  
Development Review Division

SUBJECT: Preliminary Plan No. 1-00065E Panagos Property  
Request to Extend Validity Period

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**Background**

Following a public hearing on July 27, 2000, the Planning Board approved the above-captioned preliminary plan application ("Preliminary Plan"), which sought to create thirteen lots on 11.89 acres of land in the RE-1 and R-200 Zones ("Subject Property"). On December 21, 2000, the written opinion for the Preliminary Plan was mailed. On January 19, 2001, a Petition for Judicial Review of the Planning Board's decision was filed in the Circuit Court for Montgomery County. The Circuit Court upheld the Planning Board's decision on July 31, 2001, following oral argument by the parties. The petitioners did not appeal the Circuit Court decision.

As described in the attached letter submitted by Applicant's Counsel, dated September 2, 2004, following the conclusion of the administrative appeal John Panagos filed suit against the contract purchaser of the property, seeking, among other things, damages for breach of contract and repossession of the Subject Property. The defendants in that case filed a counter-claim. Panagos prevailed in the Circuit Court and, ultimately, in the Court of Special Appeals. The decision of that Court was issued last month and is included in this Staff Report.

**Request to Extend Validity Period**

Applicant presently seeks to extend the validity period of the Preliminary Plan by 24 months. The attached letter sets forth the Applicant's grounds for such extension and

includes several relevant documents for the Board's consideration. The Applicant states that a record plat cannot be recorded until the Mandate of the Court of Special Appeals is issued, which will serve to release the cloud on the title.

Staff believes that the Applicant has presented sufficient grounds to justify the granting of an extension of the validity period; however, Staff does not believe that 24 months is necessary to achieve recordation in this case and, therefore, recommends limiting the period of the extension to twelve (12) months. In Staff's view, the litigation surrounding the Subject Property constitutes "significant, unusual, and unanticipated events, beyond applicant's control . . ." Montgomery County Code § 50-35(h)(3)d.ii. (Grounds for Extension of the Validity Period of a Preliminary Plan).

### **Recommendation**

Under the above-cited Code section, in order to grant the instant request, the Board must find that such events "have substantially impaired applicant's ability to validate its plan and that exceptional or undue hardship . . . would result to applicant if the plan were not extended." Taking into account the particular circumstances of this case, including the protracted litigation period, Staff believes that requiring the submission of a new preliminary plan would pose an undue hardship on this individual applicant, in terms of both excessive delay and expenditure of substantial resources. Therefore, Staff recommends that the Planning Board grant an extension of the Validity Period for a period of twelve months.

### **ATTACHMENTS**

Letter from Applicant's Counsel, dated September 2, 2004

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September 2, 2004

Mr. Richard Weaver  
Development Review Division  
Maryland-National Capital Park and  
Planning Commission  
8787 Georgia Avenue  
Silver Spring, MD 20910

Re: Request for Extension of Preliminary Plan No. 1-00065

Dear Rich:

Enclosed herewith is an Application for Extension of the above-referenced Preliminary Plan, which is set to expire on October 1, 2004. In support of our request, we offer the following justification:

Preliminary Plan No. 1-00065 was approved, subject to conditions, at the Planning Board hearing on July 27, 2000. The Opinion granting the Preliminary Plan approval was mailed and became effective on December 21, 2000. On January 19, 2001, an appeal seeking judicial review of the action of the Planning Board was filed in the Circuit Court for Montgomery County, Maryland. That court upheld the action of the Planning Board following a court hearing on July 31, 2001. The date on which the applicable appeal period expired was August 31, 2001.

The Opinion of the Planning Board approving Preliminary Plan No. 1-00065 established a thirty-seven (37) month validity period for the Preliminary Plan (Opinion Condition 10). Section 50-35 of the Subdivision Regulations provides, in part, that "... in the event an administrative appeal is timely noted by any party authorized to take an appeal (the period during which time a preliminary plan must be validated is) the date upon which the court having final jurisdiction acts, including the running of any further applicable appeal periods" (clarifying parenthetical phrase added). Based on the above, we have calculated that the validity period for the above referenced preliminary plan will expire on October 1, 2004.

Subsequent to the successful defense of the Preliminary Plan Approval, a counter claim was filed in the Circuit Court for Montgomery County against the Applicants John and Mary Ann Panagos by Normandy Homes and Robert F. Keeler. Mr. Keeler, who had breached his contract to purchase the property was at the time residing in the residence and Mr. Panagos had filed a suit to have him evicted. John and Mary Ann Panagos had also sued Normandy Homes, the contract purchaser of the Subject Property, for breach of contract, conversion of property, and fraud.

While the Circuit Court case was pending, it was not feasible for Mr. and Mrs. Panagos to proceed to record the plats since Normandy Homes failure to do so was an essential element of

the pending litigation. Ultimately the Circuit court ruled in favor of the Panagos family and dismissed Keeler and Normandy's cross claims. Mr. Keeler and Normandy Homes then appealed that decision to the Maryland Court of Special Appeals. Unfortunately, during the course of this litigation, Mr. Panagos passed away.

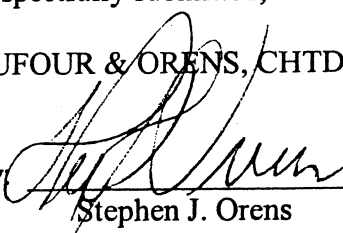
The Court of Special Appeals issued its Opinion affirming the decision of the circuit court in favor of Mrs. Panagos on August 11, 2004. We are still awaiting the Mandate of the Court, which will either allow the Appellants (Keeler/Normandy) to petition the Court of Appeals for *certiorari*, or, if no appeal is filed, will release the *lis pendens* that has precluded the applicants from proceeding. Until the Mandate releasing the cloud on title is finally issued by the appellate court and is not appealed, no (final) record plat can be recorded. In other words, control of the property will not revert to the Panagos family until the Court's Mandate is issued and the period in which the Appellants may Petition the Court of Special Appeals for *certiorari* has expired; at that time Mrs. Panagos may proceed with the recordation of a final plat.

Therefore, we respectfully request that the validity period for Preliminary Plan No. 1-00065 be extended for an additional 24 months, until October 1, 2006. Should you have any questions or require additional information in support of this request, please let me know.

Respectfully submitted,

DUFOUR & ORENS, CHTD.

By

  
Stephen J. Orens

Encl.

cc: Mary Ann Panagos  
Glenn Bonard  
Daniel Demeria  
Kinley Dumas

**COPY**  
**10.15.03**

September 4, 2003

A. Malcolm Shaneman  
Supervisor, Development Review Division  
Maryland-National Capital Park and Planning Commission  
8787 Georgia Avenue  
Silver Spring, MD 20910

Re: Preliminary Plan No. 1-00065 Panagos Property – Validity Period  
Preliminary Plan Opinion Date of Mailing December 21, 2000

Dear Mr. Shaneman:


The purpose of this letter is to confirm the date on which the validity period of Preliminary Plan 1-00065 will expire. The Preliminary Plan was approved by the Montgomery County Planning Board on July 27, 2000 and the approval Opinion was mailed on December 21, 2000. On January 19, 2001 an appeal seeking judicial review of the action of the Planning board was filed in the Circuit Court for Montgomery County, Maryland. That court upheld the action of the Planning Board following a court hearing on July 31, 2001. The date on which the applicable appeal period expired was August 31, 2001.

The Opinion of the Planning Board approving Preliminary Plan No. 1-00065 established a thirty-seven (37) month validity period for the Preliminary Plan. (Opinion Condition 10.) Section 50-35 of the Subdivision Regulations provides, in part that "... in the event an administrative appeal is timely noted by any party authorized to take an appeal (the period during which time a preliminary plan must be validated is) the date upon which the court having final jurisdiction acts, including the running of any further applicable appeal periods." (Clarifying parenthetical phrase added.)

Based on the above we have calculated that the validity period for the above referenced preliminary plan will expire on October 1, 2004. It would be appreciated if you would indicate whether you concur with our conclusion. Should that be the case please sign and date the enclosed copy in the appropriate place. Should you disagree please so inform me at your earliest convenience.

Very truly yours,

DUFOUR & KOHLHOSS, CHTD.

By:   
\_\_\_\_\_

A. Malcolm Shaneman  
September 4, 2003  
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Stephen J. Orens

cc: John Panagos

WE CONCUR:

DEVELOPMENT REVIEW DIVISION

By: \_\_\_\_\_  
A. Malcolm Shaneman                      Date

UNREPORTED

IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 1792

September Term, 2003

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Robert H. Keeler, et al.

v.

John Panagos, et ux.

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Adkins,  
Krauser,  
Thieme, Raymond G., Jr.,  
(Retired, specially assigned)

JJ.

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Opinion by Krauser, J.

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Filed: August 5, 2004

Appellant, Normandy Group, LLC, entered into a contract to purchase 11.9 acre parcel of land for residential development from appellees, John and Mary Ann Panagos. On the otherwise vacant property stood a manor house, into which Normandy Group's president, appellant Robert H. Keeler moved, "while the lots were under construction."

When Normandy Group allegedly failed to tender the \$300,000 deposit required by the contract, appellees filed suit against appellants, Normandy Group and Keeler, in the Circuit Court for Montgomery County seeking, among other things, damages for breach of contract and repossession of their property. Normandy Group and Keeler responded by filing a counter-claim demanding specific performance of the contract. The parties' conflicting claims were resolved upon cross-motions for summary judgment.

Concluding that Normandy Group breached its contract with appellees by failing to tender the required deposit and to "diligently pursue" the approval and recording of a plat, the circuit court granted appellees' motion for summary judgment and declared the contract null and void. From that judgment, Keeler and Normandy Group noted this appeal. They present the following issues for our review, which (except for a minor rewording of Issue II) are set forth below as they appear in appellants' brief:

- I. Whether the lower court erred as a matter of law in holding that the assignment of proceeds offered to and accepted by appellees failed to satisfy the deposit requirements agreed to by the parties, thereby justifying the unilateral rescission of the contract by



appellees.

II. Whether the circuit court erred as a matter of law in holding that appellants had failed to diligently pursue the approval and recording of a final plat as required by the contract, thereby justifying the unilateral rescission of the contract by appellees.

III. Whether the lower court erred as a matter of law by denying appellants' motion for summary judgment seeking specific performance of the contract.

IV. Whether the circuit court erred as a matter of law by denying the summary judgment of Robert Keeler, an individual, who was improperly named as a party appellant in the case.

Because we hold that the circuit court did not err in either finding that Normandy Group failed to tender the contractually-required deposit, thereby materially breaching the contract at issue, or in granting summary judgment against Keeler, individually, we shall affirm the judgment of the circuit court. In so holding, we answer the questions posed by Issues I, III, and IV. Having so held, we need not reach issue II: whether Normandy Group failed to diligently pursue the approval and recording of the final plat.

#### Background

Appellee John Panagos, now deceased,<sup>1</sup> and his wife, appellee Mary Ann Panagos, were the owners of an 11.9 acre parcel of land on Bells Mill Road in Potomac, Maryland. Forty-three years after

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<sup>1</sup> John Panagos died during this appeal.

appellees purchased the property, they entered into a contract on November 20, 2001, to sell it to Normandy Group, LLC, a residential real estate development company, for \$6 million (the "Normandy Contract").

The Normandy Contract contained two provisions that are central to the resolution of this appeal, paragraphs three and six. The first, paragraph three, required that Normandy Group, upon "ratification" of the contract, provide appellees with a \$300,000 deposit in the form of a promissory note that was to be held by an escrow agent. Upon payment of that deposit, Normandy Group had thirty days to conduct various tests and studies pertaining to the land, and could, at any time during that period, terminate the contract. After the thirty day period expired, Normandy Group was required to replace the promissory note deposit with a \$300,000 letter of credit. In the event that Normandy Group defaulted, the deposit would be forfeited and "deemed [to be] liquidated damages in lieu of any claims [appellees] may have at law or in equity." Furthermore, upon the expiration of that period, appellees were required to give possession of the manor house, the only structure on the otherwise vacant land, to Normandy Group so that it could "guard and protect the property while the lots [were] under construction."

The second provision, paragraph six of the contract, dealt with the approval and recording of a final subdivision plat. The 11.9

acre parcel of land, purchased by appellants, consisted of thirteen single family lots, including a residence. The second provision required Normandy Group, at its own expense, "to file for approval and recordation of Lots 12 and 13 immediately following the 30 day study period to diligently pursue and process the Final Plats needed for settlement." Once lots twelve and thirteen were approved and recorded, settlement was to take place within two weeks. The "Total Purchase Price" for the parcel, including the residence, was \$6 million.

Paragraph six further stated that, at settlement, appellees were to "convey to [Normandy Group] lots 12 and 13, free and clear of any encumbrance, for a cash payment of Five Hundred Thousand (\$500,000.00) each" and, in addition to that payment, appellants were to give appellees "a promissory note in the amount of Five Million Dollars (\$5,000,000.00) bearing an interest rate of Three Percent (3%) annually, interest only." Thereafter, the property was to be "taken down in stages;" that is to say, Normandy Group would "take down the balance of the lots at the rate of two (2) lots every ninety (90) days until all lots [were] conveyed." The balance of the promissory note was to be paid in full by March 2, 2003.

Less than three weeks after entering into the Normandy Contract, Normandy Group entered into a contract with Potomac Heritage Homes, Inc. another residential developer, to sell eleven of the thirteen lots to Potomac Heritage (the "Potomac Heritage

Contract"). That contract was contingent upon Normandy Group acquiring the land from appellees. Like the Normandy contract, the Potomac Heritage contract required a \$300,000 deposit. A check in that amount was sent by Potomac Heritage to the escrow agent, designated by the contract. The deposit was to be forfeited to Normandy Group in the event that Potomac Heritage defaulted under the contract. If, on the other hand, Normandy Group defaulted under the Potomac Heritage Contract, the deposit was to be returned to Potomac Heritage.

After the Potomac Heritage deposit was placed in escrow, Normandy Group sent the following assignment to appellees:

To John and Mary Ann Panagos:

Normandy Group LLC hereby assigns all its rights, title and interest to the \$300,000 cash deposit for the contract which exists between the Normandy Group and Heritage Homes, Inc. for the ten lots located at 9000 Bells Mill Road. John and Mary Ann Panagos accept this assignment with the understanding that the cash deposit will be replaced by a Bank Letter of Credit of same value.

Appellees signed and accepted the assignment on December 17, 2001. That day, appellees gave Keeler the keys to the manor house, and, pursuant to the contract, he moved in.

Approximately one month later, appellees wrote Normandy Group a letter, declaring the Normandy Contract to be null and void. They claimed that Normandy Group had breached their contract by not placing a \$300,000 letter of credit with the escrow agent at the end

of the thirty day study period, by not producing the certified financial statements of two of Normandy Group's investors, and by not paying the utility bills for the manor house. Normandy Group replied that the assignment of the cash deposit from Potomac Heritage amended the contract, and therefore, it was no longer required to provide the letter of credit. It further contended that the financial statements at issue were not required under the contract and that Keeler had requested that all of the utility bills to be placed in his name.

On March 25, 2002, appellees filed a complaint in the Circuit Court for Montgomery County, seeking injunctive relief and possession of the property. Two days later, the circuit court ordered Keeler to either leave the property within fifteen days or deposit \$300,000 into the court registry within that time. Keeler did not deposit the money into the registry and was evicted from the property.

When Potomac Heritage learned of the injunction action, it notified the escrow agent that its \$300,000 deposit was for the Potomac Heritage contract and was not to be used as deposit for the Normandy Contract. Counsel for Potomac Heritage wrote:

Please be advised that under no circumstances is Normandy Group LLC or your firm, as escrow agent, authorized to use the \$300,000.00 that Potomac Heritage Homes, Inc. has deposited pursuant to its contract with Normandy Group, LLC as the deposit pursuant to the Panagos contract with Normandy or to place it in the registry of the Court. That deposit has

nothing to do with Normandy's contract with the Panagoses dated November 20, 2001.

He threatened:

I just want to reiterate, [sic] any attempt by your client to use my client's money as a deposit for another contract (as he asked the judge to accept) will force us to proceed against all parties which may be culpable. It is my responsibility to protect my client's deposit of \$300,000 held in "escrow" by you. We will not accept service at this time; nor should anyone other than Potomac Heritage and Normandy Group be the parties to an interpleader action if one is warranted in the agreement, and the Rules of Professional Responsibility.

After the circuit court granted the injunction, Keeler and Normandy Group brought a counter-claim against appellees seeking, among other things, specific performance of the Normandy Contract. Appellees then amended their complaint, adding Normandy Group as a party, together with a claim for breach of contract and a request for a declaratory judgment declaring the Normandy Contract to be null and void.<sup>2</sup> Having broadened the scope of their complaint, appellees moved for summary judgment, arguing that the assignment of the "cash" deposit, made pursuant to the Potomac Heritage Contract, was illusory and thus appellants' failure to post a valid deposit constituted a breach of the Normandy contract. The circuit court agreed. Finding "a failure of consideration . . . in that there [was] no deposit in connection with th[e] contract," it

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<sup>2</sup> Appellees also added a conversion claim, but later withdrew it.

granted summary judgment in favor of appellees.

Appellants pressed the court to reconsider its decision. It agreed to do that, if Normandy Group paid \$300,000 cash into the court registry. Normandy Group was thus given another chance to keep the contract alive by paying the contractually-required deposit into the court registry. Although Normandy Group represented to the court that it had complied with that condition, the money was never paid into the court registry. Consequently, at a subsequent hearing on this matter, the court found, once again, that Normandy Group had failed to pay the deposit required by the Normandy contract. Adding that Normandy Group had also failed to "diligently pursue" the approval and recording of the plat for lots twelve and thirteen, which was also required under the contract, it granted summary judgment once again in favor of appellees.

#### Standard of Review

In reviewing a grant of summary judgment, we turn first to the rule that governs such decisions, Maryland Rule 2-501. That rule provides: "Any party may file at any time a motion for summary judgment on all or part of an action on the ground that there is no genuine dispute as to any material fact and that the party is entitled to judgment as a matter of law." Md. Rule 2-501. Thus, our task is to determine if there is a "genuine dispute of material fact" and, if not, whether the moving party "is entitled to judgment

as a matter of law." *Id.*

"In determining whether a genuine dispute of material fact exists and, if not, what the ruling of law should be, the court examines the pleadings, admissions, and affidavits, etc., resolving all inferences to be drawn therefrom against the moving party." *Gross v. Sussex, Inc.*, 332 Md. 247, 256 (1993) (citation omitted). "In other words, all inferences must be resolved against the moving party when determining whether a factual dispute exists, even when the underlying facts are undisputed." *Id.* But, we caution, "the mere existence of a scintilla of evidence in support of the plaintiffs' claim is insufficient to preclude the grant of summary judgment; there must be evidence upon which the jury could reasonably find for the plaintiff." *Beatty v. Trailmaster Foods, Inc.*, 330 Md. 726, 738-39 (1993).

#### Discussion

Normandy Group contends that the court erred in granting summary judgment on the grounds it had failed to pay the deposit, required by the Normandy Contract, because "the assignment of proceeds offered to and accepted by appellees did satisfy the deposit requirements agreed to by the parties." We disagree.

"It is . . . well settled that an earlier agreement may be modified by a later one, by mutual consent." *Thomas v. Hudson Motor Car Co.*, 226 Md. 456, 460 (1961); see also, e.g., *Geramiyar v.*



Geramifar, 113 Md. App. 495, 502 (1997) ("Contracts may ordinarily be modified or terminated by subsequent agreement of the Parties."). Such a modification, we have held, "is 'an abandonment of the original contract and a creation of a new contract.'" *Dept. of Pub. Safety and Corr. Servs. v. ARA Health Servs., Inc.*, 107 Md. App. 445, 458 (1995), *aff'd*, 344 Md. 85 (1996) (quoting *Linz v. Schuck*, 106 Md. 220, 234 (1907)). But, except for modifications of contracts involving the sale of goods, see Md. Code (1978, 2002 Repl. Vol.), § 2-209(1) of the Commercial Law Article, consideration is required for the modification of an existing contract, see *Freeman v. Stanbern Constr. Co.*, 205 Md. 71, 78 (1954); *ARA Health Servs., Inc.*, 107 Md. App. at 459 (citing 5A M.L.E. *Contracts* § 232 at 355 (1982)), and, by consideration, we mean anything that is "a detriment to the promisor or a benefit to the promisee." *Shimp v. Shimp*, 287 Md. 372, 385 (1980) (emphasis in original).

The Normandy Contract initially required that Normandy Group provide a \$300,000 deposit in the form of a promissory note, which was to be replaced by a letter of credit in that amount thirty days later. Three days before the letter of credit was due, however, Normandy Group and appellees signed and agreed to the following assignment:

Normandy Group LLC hereby assigns all its rights, title and interest to the \$300,000 cash deposit for the contract which exists between the Normandy Group and Heritage Homes, Inc. for the ten lots located at 9000 Bells Mill Road.

In accepting the assignment, appellees agreed that the cash deposit would be replaced by a letter of credit of the same value at a latter date not specified in the assignment. This assignment, Normandy Group contends, modified the contract and eliminated an immediate need for it to comply with the letter of credit requirement of the Normandy Contract.

As Normandy Group correctly notes, "[i]n Maryland, a debt which has actual or potential existence is the proper subject of an assignment, the assignee ordinarily acquiring all the rights against the debtor that were possessed by the assignor at the time of the assignment." *Motor Vehicle Sec. Fund v. All Coverage Underwriters, Inc.*, 22 Md. App. 586, 614 (1974) (citation omitted). Indeed, had appellees actually acquired any rights to the Potomac Heritage deposit, under the assignment, those acquired rights would have been adequate consideration for the modification claimed by Normandy Group. But, as appellees note, any rights to that deposit that they acquired, pursuant to the assignment, were at best "illusory." There are no conceivable circumstances under which the deposit would have ever become available to appellees.

In fact, the assignment undercut the very purpose of the deposit. The deposit was to protect appellees in the event that Normandy Group defaulted on the Normandy Contract. As the two contracts - the Normandy Contract and the Potomac Heritage Contract - were linked, if Normandy defaulted on the Normandy Contract, it

would necessarily be in default under the Potomac Heritage Contract as that contract was contingent upon Normandy Group successfully acquiring appellees' property under the Normandy Contract. And once it defaulted on the Potomac Heritage Contract, neither it nor appellees would have any right to the Potomac Heritage deposit. Thus, the assignment did not confer any benefit on appellees, nor did it impose any burden on Normandy Group; therefore, it was not supported by adequate consideration. See *Shimp*, 287 Md. at 385. Accordingly, the circuit court did not err in declaring the Normandy Contract null and void. See *Cherry v. Loffler*, 265 Md. 704, 712-13 (1972) (affirming the trial court's decree that a contract for the purchase of real estate became null and void upon purchaser's failure to tender a deposit on the sale price.)

Normandy Group argues, however, that appellees waived their right to rescind the contract by accepting the assignment. We disagree. The Court of Appeals has held that "[a] right to rescind, abrogate, or cancel a contract must be exercised promptly on discovery of the facts from which it arises; it may be waived by continuing to treat the contract as a subsisting obligation." *Prince George's County v. Silverman*, 58 Md. App. 41, 59-60 (1984) (quoting *Coopersmith v. Isherwood*, 219 Md. 455, 462 (1963)). In determining whether a party has waived its right to rescind the contract, we explained: "The general rule is that the right to rescind must be exercised within a reasonable time, [and] . . . the

important consideration being whether the period has been long enough to result in prejudice to the other party." *Id.* at 60 (quoting *Coopersmith*, 219 Md. at 462); see also *Benjamin v. Erb*, 138 Md. App. 459, 483 (2001) ("The right to rescission . . . must be exercised within a reasonable time, which is determined, in large part, by whether the period has been long enough to result in prejudice." (quoting *Cutlar v. Sugarman Org.*, 88 Md. App. 567, 578 (1991))).

Appellees accepted the assignment on December 17, 2001. At that time, they gave the keys to the manor house to Keeler and allowed Keeler to move into the property. One month later, appellees wrote to Normandy declaring the contract to be "null and void" because, among other things, Normandy had failed to tender a deposit as required under the contract. Normandy was not, however, prejudiced by this delay. Indeed, it was given numerous opportunities to cure its default by posting a sufficient deposit into the court registry, yet it failed to do so.

As to the only question Keeler presented - whether the circuit court erred in granting summary judgment against Keeler in his individual capacity - we find no error. Appellees acknowledge in their brief that Keeler was not a defendant to the declaratory judgment and breach of contract claims against Normandy Group. But, by his own doing, he was a named counter-plaintiff in the counter-claim against appellees seeking specific performance of the

contract. To that extent, we find no error in entering summary judgment against Keeler on his own counter-claim.

**JUDGMENT AFFIRMED.**

**COSTS TO BE PAID BY APPELLANT.**