[mo-0414.009.0006.004]

COURT OF APPEAL - FOURTH DIST.
FILED
APR 28 1980
ROBERT L. FORD, Clerk
Deputy Clerk

NOT TO BE PUBLISHED IN OFFICIAL REPORTS
COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

VIRGINIA A. GARCIA,	(	
	)	
Plaintiff and Respondent,	(	
	)	
v.	(	4 Civ. No. 22126
	)	
JANE LA ROSA,	(	(Superior Court No. 404095)
	)	
Defendant and Appellant.	(	
	)	

APPEAL from a judgment of the Superior Court of San Diego County. Earl B. Gilliam, Judge. Affirmed.

THE COURT*

Jane La Rosa appeals a judgment ordering her to convey real property to Virginia A. Garcia. La Rosa contends she validly cancelled the contract and the evidence does not support the trial court finding time was not of the essence.

La Rosa agreed to sell Garcia a house located at 4260 Clairemont Drive, San Diego, for the purchase price of $42,250. The escrow instructions were signed by Garcia July 8, 1977, and

*Before Cologne, Acting P.J., Staniforth, J. and Wiener, J.

provided escrow was to close by July 29. The instructions were mailed to La Rosa for signature on July 8 but were not returned to the escrow holder until July 22. It was then too late to process Garcia's loan by July 29. La Rosa did not cancel or repudiate the contract on July 29, although the escrow deadline had arrived. Garcia's loan was approved by August 3. Garcia had originally been the person to insist on the specified closing date because she did not wish to incur additional rent. However, on account of the delay, she arranged for rental housing until the end of August. Accordingly, when her loan was approved she indicated there was no problem letting the escrow remain open until the end of August. On August 10 La Rosa attempted to repudiate the entire transaction by letter of cancellation.

The trial court found Garcia did everything possible to comply with the terms of the contract; La Rosa's delay in returning the signed escrow instructions delayed processing of the loan and constituted a waiver of La Rosa's right to rely on the time limitation; the contract interpreted in light of the circumstances did not provide time was of the essence but rather provided Garcia a reasonable time to comply with the terms and conditions; from July 22 to August 10 was not a reasonable time to expect Garcia to fully complete her obligations in the transaction, hence La Rosa had no right to cancel on that date; and the price of the house was an adequate consideration. The judgment decreed specific performance and costs in favor of Garcia.

The trial court may interpret a contract in light of the parties' expressed intentions and contemporaneous conduct (Pacific Gas & E. Co. v. G. W. Thomas Drayage, Etc. Co., 69 Cal. 2d 33, 38-39). Even where time if of the essence, passing a deadline does not automatically result in the buyer's forfeiting his rights (Katemis v. Westerlind, 120 Cal.App.2d 537; Williams Plumbing Co. v. Sinsley, 53 Cal.App.3d 1027). Time deadlines may be waived by conduct of the parties, such as failing to insist on observation of those deadlines (Chan v. Title Ins. & Trust Co., 39 Cal.2d 253, 258-259; Lifton v. Harshman, 80 Cal.App.2d 422, 433). Further, a party will not be heard to complain of a delay to which he has contributed. (See Riverside Fence Co. v. Novak, 273 Cal.App.2d 656, 663.)

Here the trial court's conclusions are supported by the evidence La Rosa did not originally insist on the July 29 deadline and did not immediately protest when it passed; she, herself, contributed to the lateness of the loan processing and to the situation where Garcia had to rent living quarters through the end of August; she offered no explanation indicating why a prompt sale was essential; and her testimony made obvious her only real reason for cancellation was the late discovery she might get a better price for the property.

Judgment affirmed.

FILED
Robert D. Zumwalt, Clerk
OCT 18 1978
BY R. PRICE, Deputy

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

VIRGINIA A. GARCIA, Plaintiff, vs. JANE LaROSA and DOES I through V, inclusive, Defendants.	)	No. 404095 MEMORANDUM OF INTENDED DECISION

This matter came on for trial in Department 11 on June 23, 1978, plaintiff, Virginia A. Garcia, appearing in person and through her attorney, Craig P. Fitzgerald, and defendant, Jane La Rosa, appearing in person and through her attorney, Douglas F. Webb. Evidence was taken by the Court and argument was presented by the respective counsel. The matter was taken under submission and respective counsel were to submit points and authorities.

The Court finds from the evidence that was submitted that plaintiff and defendant entered into an agreement for the sale of a home located at 4260 Clairemont Drive, San Diego, which provided

that defendant was to convey title to plaintiff and the sale price was $42,250. Pursuant to said agreement, an escrow was opened at the Mission Escrow Company.

Plaintiff signed escrow instructions (Plaintiff's Exhibit 1) on or about July 8, 1977, and thereafter the defendant signed said escrow instructions (Plaintiff's Exhibit 2) and said escrow instructions and exhibit were received by said escrow company on or about July 22, 1977.

Plaintiff did, pursuant to said agreement, deposit with said escrow company the sum of $1,000 on July 7, 1977 (Plaintiff's Exhibit 3) and plaintiff proceeded to arrange for the financing pursuant to said escrow instructions by contacting Glendale Federal Savings and Loan and said savings and loan did approve the loan for said premises and committed itself to lend money for the purchase of said premises (Plaintiff's Exhibit 8). On July 22, 1977, the said commitment was forwarded to said escrow company.

The Escrow Instructions (Plaintiff's Exhibits 1 and 2) which become the contract, provide that the escrow is to close on or before July 29, 1977, and provide in paragraph 6, in addition to other things, for a right of termination by either party of said contract.

On August 10, 1977, defendant did cancel said escrow and contract (Plaintiff's Exhibit 5). Defendant raises several issues as to whether or not said contract is enforceable, adequacy of consideration, delay by plaintiff, hence giving defendant the right to terminate and lastly if defendant can rely upon time of the essence.

The contract provides that the escrow should close on or before

July 29, 1977, and the evidence was that defendant did not return her signed copy of the escrow instructions, that is sign the contract, until July 22, 1977. At said time plaintiff had paid the deposit of $1,000 and the same was held by the escrow holder and the plaintiff had caused to be sent to the escrow holder the approval of the loan by Glendale Federal. The only thing left was for the escrow holder to make demand upon plaintiff for the balance of said down payment and for plaintiff to comply with same.

There is no evidence that plaintiff was delaying in complying with the terms and conditions of said escrow, but to the contrary the evidence is that plaintiff was doing everything possible to comply with the terms and conditions of said contract.

On the other hand, defendant did not inform the escrow company or give notice to them as to her agreement to the contract until July 22, 1977, and thus it is the finding of the Court that said action was either a hindrance or evidence of delay on the part of defendant. If the Court interprets said contract to contain the provisions that time was of the essence, then the Court would find that the defendant, by her conduct in failing to return said signed escrow instructions, i.e. contract, until July 22, 1977, would constitute a waiver of her right to enforce the time of essence provision.

However, on the other hand, the Court finds that said agreement did not contain a time of the essence provision but that the interpretation of the contract should be that if plaintiff should be given a reasonable time to comply with the terms and conditions of the contract and unless said conditions were complied with within a

reasonable time after July 22, 1977, defendant would then have the right to terminate the agreement.

The Court does not feel that between the dates of July 22, 1977, and August 10, 1977, was a reasonable time, that is the escrow company did not have a reasonable time to gather all of its important data, documents and information and to make demands from plaintiff and for plaintiff to comply with said demands such as the balance of the down payment. Hence, defendant exercised her right to terminate said agreement before a reasonable time had elapsed.

The defendant also raises the issue of adequate consideration and the Court must inquire as to the adequate consideration when plaintiff is seeking specific performance as a remedy in such case. The evidence submitted at the time of trial was that the plaintiff and defendant negotiated the price orally and they orally agreed upon the amount of $42,250. The evidence further shows that the defendant had indicated that a house similar to hers in the same neighborhood sold for $43,000 recently. There was also evidence by the defendant that the market value at said time was $50,500, but the defendant also related that this was based on information received at a later date.

The Court finds that the consideration of $42,250 in payment for the house was an adequate consideration. For the foregoing reasons, the Court finds that the plaintiff should be entitled to judgment against said defendant as prayed for.

Dated: OCT 18 1978

EARL B. GILLIAM

Judge of the Superior Court

(1) Garcia v La Rosa

Stage

employed by
Mission Escrow Co

June July 1977

La Rosa Came to office
July 7, 1977

PI Escrow Ins July 8, 1977
Org

PII Escrow Ins July 8, 77
Copy

Items Mrs La Rosa asked to
be placed thru
Prior

New loan by Ber

1,000 deposit

Callow bye 11/29/77

Mrs Garcia asked that Personal
property be included & Termite
~~re~~ report.

July 22, 1977 got
notice that new loan
had been approved

P-5 Cancellation document

Mrs La Rosa said wanted
to cancel — I said ok
also she
destroyed original deed
from Mr Gar → Mrs Garcia
and deed to Mrs Garcia

Mrs Garcia never said,
she did not ~~not~~ want to
go thru with escrow.

P-6 Telegram from Mrs Garcia

Cross

July 77 — D signed
grant deed

Don't recall getting the
check

Sent letter to Mr Rose
Can't recall if I went to
Post office or someone else
did

July 7, Thursday
July 8 Friday

Can't recall Carrice
Calling sing
Concert Escorts going to
close on 29th

W Does not remember Concert
but Garcia wanted to
continue Escorts for 3 or
4 weeks

(1)

La Rosa

74 years old

Purchased July 72

July 1, 77 - listed

for rent

She offered to buy - said

I hadn't thought of it

Came to terms

Wanted Escrow closed

by 29 - wanted to be

- then taking care of

house

Price 199.[illegible]

Escrow office said

P wanted to delay

July 77 - market value

50 500

Web

Witkin 37
Adequate ¶

CC 3391

Witkin says must
show adequate

1975 53 CA3 1037
P must prove delay
not intentional

CC 3275
No jury future unless
willful Breach

Am Cal v Chutin
255 CA2 526

Ty E all land sale k

1968 85 CA2 77

(2)

Mrs Garcia came into
Escrow on 7 or 8

(P3)

Escrow Receipt

1,000 still in escrow acc
[Ber placed thru]

Mrs Garcia came in July 7

Mrs Garcia did not sign
escrow Instruction on 7/7/77
but came back on

the 8th July 8, 1977
and sign
Mailed
Escrow Ins on 8th
to Mr La Rosa

(P-4) P-4 - sending ES/Grant
to by La Rosa

statement from lender
week or 10 days

Got ES/Ins from Mrs

La Rosa -3 July 22

Argument

Fitzgerald

2nd page of K

TP 11

Time being of Essence

Liquidate Damages

TP-6

Escrow has not been completed

then at earliest time

possible

(1)

Garcia

Met Mrs Lac Roso
I went to Rent
house

Shed did not
want to rent it
I had cat

She - said house sold
in neighborhood for 39,000

I said I'll give you
40,000

Called on phone every day thereafter

She said house sold down
street for 43,000

House relatively all the
same size.

Called on phone - said I'll
buy house asked what was
your asking 42,500
I asked 42,00

agreed to 42,250

(2)

Graverin

Signed Resum by 7/8/77

Prepared while I was in office

Signed Resum came back to Res/Office 7/22/78

Conversations re her signing Res Inv.

July 20 called and told ~~yo~~ why did you sign paper

She said / I went to ~~See~~ if you going to get loan

July 8, 177 went to Glenfed to get loan

did not have to get ~~another~~ any thing else re loan

(P-8) I D by ke — received in mail apx 8/1/77

Prem to get P-S (calculator) did you have anything else to complete

(3)

Garcia

Cross

Before 7/1/77
I sold 3 homes
in 3 years

July 7

Page 14,
L 26 & 27

July 8

Received Mrs LaRosa
but signed something
you then added
other terms

Aug 10
Telephone call from
Ray Skaggs

(4)

Question

Dep 28 L 14816

Moment to delay
Recess to end of
Day

Page 29 L 14

Now we've MB Mr Rose
Want entire Recess

7/7/77 Garcia v La Rosa

Pantry

P/S agt 8/10/77

P/E 1 agreed to K

July 7, 1977 for 42,250

P/E 2 Copy of 1

Signed by July 8, 157

La Rosa

Rec'd at Escrow given July 22, 77

P/E 3 Receipt when Garcia placed 1,000 deposit.

P/E 4 Lender approves loan

Valid K

Is the reason why

D my pick out

Adequacy of C

Delay

No evid of P wanting to delay close of Escrow

① Escrow officer can't remember

② Evid by D is that Escrow officer told her

Was time of the Essence in this Contract

The contract does not contain the phrase "that time is of the essence"

and further the conduct of D in failing to return her signed Escrow Instr, would amount to a a waiver of her right to enforce said provision if such were the case.

The contract is interpreted to mean that P has a reasonable time to execute all ~~documents~~ conditions

Her Q is ~~if~~ whether or not a reasonable time had elapsed between July 22, and

Aug 10 for P to deposit all items into Escrow

. The Ct found that there was reasonable time here