IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

STEPHEN DONNELLY and LINDA DONNELLY Plaintiffs	)	CIVIL NO. 14/1983
v.	)	
GORDON THOMPSON REAL ESTATE and BYRON VICKERY, Defendants	)	

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MEMORANDUM OPINION
(August 31, 1984)

FEUERZEIG, J.

The defendant, Gordon Thompson Real Estate, has moved for summary judgment, which motion has been joined by defendant Byron Vickery. At issue is whether the real estate contract entered into by the parties is enforceable against the plaintiffs and whether the plaintiffs are entitled to recover their $14,000 escrow deposit because the closing did not take place. The court finds that there is a material issue of fact, therefore, summary judgment will be denied.

The motion for summary judgment is founded on undisputed findings of fact set forth by this court in a pretrial order dated October 12, 1983 as well as the signed offer to purchase of Stephen and Linda Donnelly, the deposition of Janet Barnes, a loan officer for the Bank of America, and the affidavit of Carol E. Thompson, a real estate agent for Gordon Thompson Real Estate. The plaintiffs have not submitted any affidavit contravening the facts stated in the affidavit of Janet Barnes.

Where a motion for summary judgment is supported as provided in Rule 56, Fed.R.Civ.P., "an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response by affidavits or otherwise as provided in this rule must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." Rule 56(e). Summary judgment, therefore, is proper if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits show there is no genuine issue as to any material fact. <u>La France Equipment International Corporation v. Llewellyn</u>, Civil No. 514/83 (Terr. Ct., Div. of St. Croix, 1983).

FACTS

Accordingly, the court finds the following to be uncontested facts:

1. On May 10, 1983, an offer to purchase Parcel No. 132, Estate Fish Bay, St. John, U.S. Virgin Islands, for $140,000.00 was signed by the plaintiffs, Stephen and Linda Donnelly.

2. On May 27, 1983, the offer was accepted by Byron Vickery personally and on behalf of the owners of Parcel No. 132, Estate Fish Bay, St. John.

3. Two pertinent conditions were included in the offer to purchase:

a. "The closing shall take place in St. John, Virgin Islands within 60 days of the date of acceptance of this offer, however, failure to do so within this time for any legitimate reason shall not nullify this offer."

b. "This sale is subject to the buyers obtaining mortgage financing at local bank, all furnishing included."

4. On July 13, 1981, the sellers agreed to an extension of the time for a closing for a period of 30 days.

5. On July 15, 1981, the plaintiffs made an applica-

tion to the Bank of America for financing.

6. On August 18, 1981, the Bank of America offered to finance the purchase of Parcel No. 132 in the amount of $105,000 or 75 percent of the appraised value, whichever is less. The amount advanced was not to be less than $100,000 because of the Virgin Islands usury laws governing real estate loans up to and including $100,000. The interest rate was to be 16.25 percent.

7. An appraisal of the property was completed and submitted on August 21, 1981, fixing the market value at $120,000. As a result a loan in the amount of $100,000 pursuant to the August 18, 1981 Bank of America offer to finance could not be made.

8. On August 24, 1981, the plaintiffs signed a power of attorney appointing Thomas K. Moore as attorney in fact "to do and perform all and every act and thing whatsoever requisite, necessary or proper to be done in and about the premises . . . to bring about a closing."

9. On September 13, 1981, Thomas K. Moore, acting under the power of attorney from the plaintiffs ordered title insurance in the amount of $140,000 from Harold Monoson who issued a binder on September 17, 1981.

10. On October 5, 1981, Thomas K. Moore wrote the Donnelly's. A copy went to Carol Thompson, an agent and employee of the broker and defendant Gordon Thompson Real Estate. The letter primarily related to the condition of

the premises. In addition, in pertinent part, the letter states:

> Since it appears that we will not be closing soon, I have enclosed copies of the Assumption of Mortgage, Purchase Money Mortgage Note and Second Priority Purchase Money Mortgage which I have drafted pursuant to your instructions. I have not forwarded these to you earlier since we have been going to close any day now for the last two or three weeks.

11. On or about October 13, 1983, Janet Barnes, loan officer for the Bank of America, to the "best of her memory" told Mr. Moore the bank was willing to provide a mortgage at 15½ percent for $80,000.

12. On October 13, Carol Thompson, on Gordon Thompson Real Estate, Inc., letterhead, wrote the Donnellys stating that Mr. Moore had advised her that the Donnellys would have their application submitted to another bank, specifically recommending submission to First Pennsylvania. She also forwarded a new offer of purchase stating that "the other document has expired."

13. On November 2, 1981, Thomas Moore wrote Carol Thompson requesting a refund of the $14,000 escrow deposit, stating that the purchase was "contingent on financing and such financing has not been obtained."

13. On November 13, 1981, Carol Thompson Wrote Thomas Moore advising that Mr. Vickery "feels very strongly that it

[the deposit] should not be returned. The time factor on the contract was extended to accommodate the buyers when we sought mortgage financing from the Bank of America."

14. On November 30, 1981, Mr. Moore wrote to Mr. Vickery stating that "as of this date we have yet to receive any written correspondence from you explaining why you feel the deposit should not be refunded. I find this position difficult to understand since as you know my client was turned down for financing by both Chase Manhattan Bank and Bank of America."

15. Closing never took place. As a result, $7,000 of the $14,000 deposit was disbursed on August 6, 1982, to defendant Vickery in accordance with the offer to purchase.

DISCUSSION

When Janet Barnes communicated to Mr. Moore the availability of financing at the Bank of America that communication was tantamount to communication to the plaintiffs. This conclusion is founded upon the fact that on August 24, 1981 the plaintiffs as buyers signed the power of attorney appointing Thomas Moore as the attorney in fact to "do and perform all and every act and whatsoever requisite, necessary, or proper to be done in and about the premises, executing notes and mortgages and receiving deeds in our names and making payments therefor in association with said closing as fully as we might or could do if personally present, hereby ratifying and confirming all that the said attorney shall lawfully do or cause to be done by virtue hereof." Correspondence to Mr. Moore from the sellers referred to the plaintiffs as Mr. Moore's clients, and specifically referred to a request by the buyers for financing. This was followed by Mr. Moore's procurement of title insurance on the subject property and his advising the buyers of information he received about the condition of the property. Consequently, the court concludes the communication by Janet Barnes to Mr. Moore was binding on the plaintiffs. As a result, a principal condition of the offer to purchase, the obtaining of local financing was met.

This conclusion is buttressed by the fact that for almost three months after the intended closing date, both parties showed an intention of closing the transaction as soon as financing was obtained by the plaintiffs. The plaintiffs even made efforts to obtain financing in October of 1981 after the intended closing date. Thus, in spite of the 60 day provision of the contract that provision logically must be read as meaning that failure to close within 60 days was not a condition to the enforcement of the contract. Failure to perform within the time stipulated, therefore, does not permit a conclusion that time was of the essence. Riley v. Warner, 233 S.W.2d 626 (1950). The sellers, therefore, could not back out of the agreement if the sellers took more time than was anticipated to arrange financing which, of course, is what happened in this instance. To permit the buyers to say that they could back out is not only inconsistent with the language of the agreement and its general interpretation, but with the intention and conduct of the parties.

The only issue that prevents this court from granting summary judgment to the defendant Gordon Thompson Real Estate is the fact that nothing is in the record or before the court that establishes with any degree of specificity what, in fact, was the intention of the parties with respect to the phrase "obtaining mortgage financing at local bank." Specifically, what appears to be at issue is whether the mortgage financing offered by the Bank of America through Janet Barnes to Mr. Moore at 15½ percent for $80,000 was within the contemplation of the parties.

The Donnelly's, through their attorney Rhys S. Hodge, contend that each bank application prepared for the plaintiff by defendant Gordon Thompson Real Estate was for 75 percent financing of the purchase price. Nothing, however, is before the court to substantiate that statement. There can be no dispute, though, that the offer of the Bank of America to finance the purchase in the amount of $105,000 was 75 percent of the $140,000 offer to purchase. That financing, of course, could not go through because the appraised value of the property turned out to be less. than $140,000.00. Mr. Donnelly's affidavit, although not a model of clarity, does, tend to suggest that 75 percent financing was a prerequisite. Specifically, in paragraph 9 of affidavit, Mr. Donelly states "even had such subsequent offer been made as asserted by Janet Barnes in her deposition, an offer to finance $80,000 as stated would not have been satisfactory financing as 'financing' is used in the offer to purchase. It is clearly understood that the plaintiff's would only proceed if they obtained financing in the sum applied or in near proximity thereto." In addition in paragraph 10 he states, "I was never interested in a second mortgage - or other such gimmicks as I did not feel comfortable with such arrangements did not know whether they were legal, and did not feel comfortable with a scheme to get around the bank's assumption.' Consequently, while it is not clear because none of the applications has been submitted, there is an inference based upon the August 18, 1981 offer by the Bank of America, that the application made by the Donnelly's was for 75 percent financing. The court, therefore, believes as in Makris v. Noland, 335 A.2d 655 (N.H. 1975) that the clause of the contract relating to "the buyers obtaining mortgage financing at local bank" creates an issue of fact as to the meaning of that phrase and whether the offer made by the Bank of America satisfied that condition. Accordingly, the court is left with no other alternative, pursuant to Rule 56 to find that there is an issue of fact as to the intent of the parties with respect to "obtaining mortgage financing at local bank." Accordingly, defendant's motion for summary judgment would be denied.

DATED: August 31, 1984

HENRY L. FEUERZEIG
JUDGE

ATTEST:
VIOLA E. SMITH
Administrator/Clerk of the Court