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SECOND DIVISION
AUGUST 9, 2011

2011 IL App (1st) 102654-U
1-10-2654

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

FRANCISCO BARRERA,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 08 L7441
)	
THE HERITAGE AT MILLENNIUM PARK, LLC,)	Honorable
)	Bill Taylor,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Karnezis and Harris concurred in the judgment.

ORDER

Held: We affirm the trial court's judgment that the defendant, the seller of a condominium unit, did not provide proper notice to the plaintiff, a contract purchaser, under the default provision of the purchase agreement and the plaintiff is therefore entitled to a refund of his earnest money.

¶ 1 In July 2008 the plaintiff, Francisco Barrera, filed this action in the circuit court of Cook County to recover earnest money that the defendant, The Heritage at Millennium Park, LLC, retained as damages for the plaintiff's default of a contract to purchase a condominium unit from the defendant. After a bench trial, the trial court ruled in favor of the plaintiff because it found that the

defendant did not satisfy the notice provision in the default paragraph of the purchase agreement. On appeal, the defendant argues that the trial court erred in ruling for the plaintiff because: (1) the plaintiff's attorney had actual notice of default and the 20-day right to cure the default; and (2) the plaintiff anticipatorily breached the purchase agreement that excused the defendant from giving the plaintiff the required notice under the contract. For the following reasons, we affirm the judgment of the circuit court of Cook County.

¶ 2

BACKGROUND

¶ 3 On August 23, 2002, the plaintiff, Francisco Barrera, and his wife, Cecilia Barrera, executed a purchase agreement to buy condominium unit number 5401 at 130 North Garland Court in Chicago from the defendant, The Heritage at Millennium Park Condominiums, LLC. The purchase price of the unit was \$1,975,500 and the earnest money was \$197,550. The agreement contained a "Letter of Credit Earnest Money Rider" which required the plaintiff to obtain and keep current a letter of credit for the earnest money amount. Construction had not begun on the condominium project. The closing date would be determined when the defendant gave the plaintiff notice that the condominium and parking units were substantially completed. The defendant signed the purchase agreement on September 10, 2002.

¶ 4 The plaintiff's notice address on the first page of the purchase agreement was listed as "75 South Water Market, Chicago, Illinois 60605." The plaintiff's attorney was listed on the first page of the agreement as "Alesander Rimas Domanskis Boodell and Domanskis, 205 North Michigan Ave., Suite 4307, Chicago, Illinois 60601." The plaintiff and his wife included their address as "2334 N. Kenneth Ave., Chicago, IL. 60639" under their signatures in the agreement. The notice

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provision stated that all notices should be in writing and either personally delivered, delivered by courier, sent by facsimile or by certified mail with return receipt requested. The notices were to be addressed to the parties at the addresses contained in the first page of the contract, or as the parties designated in writing. The agreement also stated that “[t]he parties hereby appoint their attorneys as agents to give and receive notice and to execute on their behalves [*sic*] any amendment of this Condominium Purchase Agreement.”

¶ 5 The default provision of the agreement stated:

“**Defaults.** *** If Purchaser shall fail to make any payment herein provided for when due, or shall fail or refuse to carry out any other obligation of the Purchaser under the terms of this Condominium Purchase Agreement and any supplemental agreements made a part hereof and does not cure such failure within twenty (20) days after Purchaser’s receipt of notice thereof from Seller, Seller shall retain the Earnest Money, plus all accrued interest thereon, and all other sums theretofore paid by Purchaser, as liquidated damages in full settlement of all claims by Seller against Purchaser and as Seller’s sole and exclusive remedy; *** .”

¶ 6 On October 20, 2005, the plaintiff’s attorney, Alexander Domanskis (Domanskis), sent a letter to Jeffrey Richman (Richman), the attorney representing the defendant. Richman was an employee of Equity Marketing, the firm that handled the sales, marketing and contract administration of the condominium project. In the letter, Domanskis requested that the defendant delay the

completion and sale of the unit for at least three months. Although the plaintiff and his wife did not have a mortgage contingency provision in the agreement, Domanskis stated that they had credit issues affecting their ability to obtain a mortgage for the purchase. Domanskis requested that his clients have the right to assign their interest in the contract if the resolution of their credit issues delayed their ability to close on the unit. The defendant's attorney agreed to the extension of time. On November 8, 2005, Domanskis requested another delay of the completion and sale of the unit until at least mid-January. The defendant's attorney agreed. On December 9, 2005, Domanskis sent another letter to Richman requesting that the closing not take place before February 1, 2006. Richman agreed, but amended Domanskis' letter to add that the plaintiff needed to obtain a new earnest money letter of credit with an expiration date no earlier than April 1, 2006.

¶ 7 On January 26, 2006, the plaintiff extended his letter of credit to March 15, 2006. On February 27, 2006, Domanskis sent a letter to Richman requesting the purchase agreement be amended "changing the Buyer " to the plaintiff's business associate, Adalberto Amador (Amador). The next day, Domanskis sent a letter to Richman asking that "a new Buyer, Adalberto Amador, receive an assignment in escrow of the Buyer's rights" and that the closing date be delayed until March 15, 2006. Richman testified at trial that he did not agree to the closing date of March 15, and verbally told Domanskis that the closing was scheduled for March 7. Richman also testified that he had many conversations with Danius Dumbrys (Dumbrys), an attorney in Domanskis' office, concerning the plaintiff's inability to close.

¶ 8 A copy of an unsigned letter from the defendant dated March 7, 2006, and addressed to the plaintiff and his wife at "445 North Water Street, Chicago, IL 60611" stated that the closing was

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scheduled for March 7, 2006, and that the defendant was ready, willing and able to close on that date. The letter gave notice to the plaintiff and his wife that “in the event you do not cure such failures within twenty (20) days after your receipt of this notice, Seller shall retain the Earnest Money ***.” The letter contained a notation that a copy was sent to The Heritage at Millennium Park, LLC and the method of delivery was regular mail and certified mail, return receipt requested. The defendant did not produce a return receipt and the plaintiff testified that he never received the letter.

¶ 9 The plaintiff’s notice address on the contract, “75 Water Street,” was a building that the plaintiff owned at the time of the contract and used as a business. The plaintiff sold that property in either 2002 or 2003, but continued to rent it until 2005. The plaintiff acknowledged that in 2002 he received a notice from the defendant at his home address on North Kenneth Street, where his family still lived at the time of trial. The plaintiff testified that he did not recognize the address of 445 North Water Street or “know what it is.” The defendant was unable to produce evidence, or testimony, that the notice letter was sent to Domanskis or to the added purchaser, Amador.

¶ 10 On March 14, 2006, the plaintiff’s bank extended his earnest money letter of credit through June 30, 2006. On March 23, 2006, Domanskis sent Richman a letter stating that he was informed by the plaintiff’s mortgage broker, Graciela Beltran (Beltran), that “[t]he file was re-submitted” to the lender’s underwriting department. The letter stated that Beltran was targeting the first week of April for a possible closing date.

¶ 11 The first page of the purchase agreement admitted into evidence at trial contains the handwritten notations of Amador’s name added after the plaintiff and the plaintiff’s wife on the space listing the purchasers, the initials “emb” and the date of April 5, 2006. Ellen Bonifacic was the

defendant's contract administrator with whom Domanskis' office had been regularly corresponding. Amador's signature does not appear anywhere on the purchase agreement. On April 11, 2006, Domanskis wrote a letter to Beltran and warned that the plaintiff's letter of credit would be called by the defendant if Beltran could not finalize the loan and agree to a definite closing date.

¶ 12 On April 19, 2006, 43 days after the March 7, 2006, letter of default, the defendant wrote a letter to the plaintiff's bank that had issued his line of credit. The defendant stated that the plaintiff had defaulted under the terms of the purchase agreement; that all notices had been properly given to the plaintiff; the plaintiff had failed to cure the default within the specified contractual time period; and the line of credit amount was due to the defendant.

¶ 13 On May 12, 2006, Domanskis wrote a letter to Richman stating that the plaintiff had been diligent but unsuccessful in trying to obtain financing from multiple lenders in order to purchase the condominium. Domanskis argued that drawing on the letter of credit would be patently unfair and vindictive because the amount of \$197,550 grossly surpassed any loss or damages that the defendant had incurred. Domanskis suggested that the parties reach an amicable settlement and that the defendant should retain only a reasonable amount of the earnest money to cover the defendant's expenses in finding a new buyer for the condominium unit, "or some other amount."

¶ 14 On July 9, 2008, the plaintiff filed a lawsuit against the defendant and alleged: (1) the defendant violated the purchase agreement by failing to satisfy the notice provision of the real estate contract to give the plaintiff 20 days to cure the alleged default before executing on the earnest money line of credit; (2) the defendant was equitably estopped from retaining the earnest money because of the actions it took to aid the plaintiff in his efforts to secure a mortgage; and (3) the taking

of \$197,550 in earnest money without an accounting of the expenses the defendant incurred was a penalty that is against public policy in Illinois. The defendant filed an answer to the plaintiff's complaint and raised the affirmative defense that the plaintiff waived any requirements under the purchase agreement for a written notice of default when the plaintiff gave the defendant written notice that he could not close. In January 2010, the plaintiff filed a motion for summary judgment, which the trial court denied in March 2010.

¶ 15 A bench trial was held on August 11, 2010. On August 26, 2010, the trial court issued its final judgment in favor of the plaintiff after it concluded that notice was not properly sent as required under the default provision of the purchase agreement. The defendant filed a timely appeal from this judgment on August 27, 2010. We therefore have jurisdiction to hear this appeal. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994).

¶ 16

ANALYSIS

¶ 17 The defendant's appeal is from the trial court's judgment following a bench trial. The defendant argues that the facts of the case are undisputed; that the plaintiff's attorney had actual notice that the defendant declared the plaintiff in default; and that the plaintiff was given the required time to cure the default. The defendant claims that the only issue on appeal is the trial court's application of the law to the facts, and therefore urges this court to use a *de novo* standard of review. The defendant cites three cases where the facts were undisputed and the trial court was applying the law to the facts. See, *Norskog v. Pfiel*, 197 Ill. 2d 60, 755 N.E.2d 1 (2001) (where the appellate court reviewed the applicability of statutory privilege to the trial court's discovery order); *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill. 2d 218, 856 N.E.2d 389 (2006) (where the facts were

undisputed and the issue was interpretation of the statutory right to judgment interest); and *Bank One, Milwaukee v. Loeber Motors, Inc.*, 293 Ill. App. 3d 14, 687 N.E.2d 1111 (1997) (where the appellate court reviewed the grants of summary judgment concerning the applicability of the statutory entrustment doctrine). Here, the trial involved a factual question regarding whether the plaintiff was given sufficient notice of default by the defendant, either when the defendant fulfilled the contractual requirements or gave actual notice to the plaintiff's attorney.

¶ 18 The appropriate standard of review of a trial court's ruling after a bench trial is whether the judgment was against the manifest weight of the evidence. *Carey v. American Family Brokerage, Inc.*, 391 Ill. App. 3d 273, 277, 909 N.E.2d 255, 259 (2009). A judgment is found to be against the manifest weight of the evidence only where the opposite conclusion is apparent, or where the findings are arbitrary, unreasonable or not based upon the evidence. *International Capital Corp. v. Moyer*, 347 Ill. App. 3d 116, 122, 806 N.E.2d 1166, 1170 (2004).

¶ 19 The first issue that the defendant raises is whether the trial court erred when it did not rule that plaintiff had actual notice of the default letter that would overcome any deficiencies in the written notice requirement in the purchase agreement. The defendant notes that the trial court, in ruling on the plaintiff's motion for summary judgment on March 16, 2010, recognized that the purpose of a notice provision is to ensure that the party is informed and the notice delivered; where a particular notice does not strictly adhere to contractual requirements, it can be deemed sufficient if it apprises the party to be notified. *Rogers v. Balsley*, 240 Ill. App. 3d 1005, 1011, 608 N.E.2d 1288, 1292 (1993). The trial court decided that there was a question of fact whether the plaintiff had been informed of the defendant's default letter written on March 7, 2006, and therefore denied the

plaintiff's motion for summary judgment.

¶ 20 The defendant claims that this question of fact was resolved at trial by uncontradicted evidence that the plaintiff, through his attorneys, received actual notice of the March 7, 2006, default letter. Pursuant to the purchase agreement, the parties appointed their attorneys to receive notice for them. The defendant notes that the knowledge of an attorney is imputed to the client, even if the attorney has not actually communicated that knowledge to the client. *Yugoslav-American Cultural Center, Inc. v. Parkway Bank & Trust Co.*, 289 Ill. App. 3d 728, 737, 682 N.E.2d 401, 407-08 (1997). The defendant cites cases wherein the reviewing court held that the facts showed that the party received actual notice to satisfy a notice requirement. *E.g., Vole, Inc. v. Georgacopoulos*, 181 Ill. App. 3d 1012, 538 N.E.2d 205 (1989).

¶ 21 The defendant was unable to present evidence at trial that the March 7 letter with the incorrect address had been received by the plaintiff and, in fact, the plaintiff testified he had never received it. There is no indication on the letter that a copy was sent to Domanskis, the plaintiff's attorney listed on the contract. Domanskis was not present at trial, but his deposition was admitted into evidence that contained a statement that he had seen the letter. Domanskis was not asked when he saw the letter or under what circumstances he had viewed it. Thus the timing of his knowledge of the letter is speculative at best.

¶ 22 The defendant also argues that Domanskis had oral notice of the plaintiff's default and was told verbally that the plaintiff had 20 days to cure the default. Domanskis' deposition, however, reveals that there had been many discussions between himself and Richman regarding the plaintiff's inability to close. Domanskis was asked whether the defendant had set the closing date for March

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7, 2006 and stated:

“The closing dates get set, and then they give these notices of default. It’s not really clear whether it was a real closing date or not because they just set them without our approval or without our consent.

*** Mr. Richman said I need to do this, you know, this way, and you’ve got 20 days after that, you know, to do a closing. So it wasn’t necessarily that this was the closing date. And basically essentially I think he was saying that I’m granting your extension because, you know, you’ve got 20 days after the 7th to pull it together.”

¶ 23 There is nothing in this testimony that shows that Domanskis understood that the defendant had given a clear notice of default on March 7, 2006, with the right to cure in 20 days. The defendant had allowed three extensions before this and had cooperated with the plaintiff’s attempts to secure financing. Further, the defendant’s actions after the alleged date of default point to the fact that the defendant had allowed yet another extension of time for closing. The defendant waited 23 days beyond the 20-day cure period before it drew on the plaintiff’s letter of credit.

¶ 24 We conclude that the evidence at trial supports the trial court’s ruling that the notice provision in the purchase agreement was not properly adhered to, nor was there evidence that actual notice was given to the plaintiff of the alleged default and the commencement of the 20-day cure period. Therefore, the trial court’s judgment that the plaintiff is entitled to the return of his earnest money is not against the manifest weight of the evidence. Further, contrary to the defendant’s

argument, there is nothing in the record to support the theory that the trial court misapplied the law after it examined the facts.

¶ 25 The next issue that the defendant raises is that the plaintiff anticipatorily breached the contract when Domanskis verbally told Richman, prior to March 7, that the plaintiff could not close on March 7. The defendant claims that it was therefore excused from giving the plaintiff a notice of default. The defendant cites case law that holds that when a party to a contract repudiates his contractual duties before the time for performance of those duties, the other party may act as though the contract was ended and is not required to tender its performance. *Bituminous Casualty Corp. v. Commercial Union Insurance Co.*, 273 Ill. App. 3d 923, 930, 652 N.E.2d 1192, 1197 (1995).

¶ 26 A review of the record, however, discloses that the discussions between the attorneys for the parties concerned delays of the closing date and attempts to secure financing for the plaintiff so that he could continue with his obligations under the purchase agreement. The plaintiff extended his letter of credit on March 14, seven days after the alleged notice of default. On April 5, the defendant agreed to add Amador as an additional purchaser on the contract to aid the plaintiff in securing financing. The actions of the parties as reflected in the record do not indicate that the plaintiff had committed an anticipatory breach of the agreement. Thus, the trial court was correct in its ruling on this defense offered by the defendant.

¶ 27 In light of our holding that the trial court was correct in its rulings on the issues discussed, we need not address the other issues argued on appeal by the plaintiff.

¶ 28 For the reasons discussed, we affirm the judgment of the circuit court of Cook County.

¶ 29 Affirmed.