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2015 IL App (3d) 130935-U

Order filed May 15, 2015

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2015

WILLIAM SHORT and JIM MALOOF)	Appeal from the Circuit Court
REALTY, INC.,)	of the 10th Judicial Circuit,
)	Peoria County, Illinois.
Plaintiffs-Appellees,)	
)	Appeal No. 3-13-0935
v.)	Circuit Nos. 12-CH-31
)	12-LM-310
D. WILLIAM HANKINS,)	
)	Honorable
Defendant-Appellant.)	David J. Dubicki
)	Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Justices Holdridge and Lytton concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court did not err in granting award of specific performance to plaintiff-buyer and commission to realtor. Although plaintiff breached the land sales contract by failing to close on the contract date, defendant-seller did not provide notice of default and opportunity to cure as required by the contract. Plaintiff presented evidence that he was ready, willing and able to close on defendant-seller's property and would have closed on contract date or a date within a reasonable time.

¶ 2 Plaintiffs William Short and Jim Maloof Realty Inc. brought actions against defendant William Hankins for specific performance and breach of a commission provision in a real estate

listing contract executed between Short as buyer and Hankins as seller. Maloof Realty represented Short in the transaction. The closing did not take place on the contracted closing date and Hankins thereafter sought to declare the contract null and void. The trial court ruled in favor of Short on his claim for specific performance and in favor of Maloof Realty on its commission claim. Hankins appealed both rulings. We affirm.

¶ 3

FACTS

¶ 4

On August 1, 2011, defendant William Hankins entered into a listing agreement with Don Edie, a licensed real estate agent with the plaintiff, Jim Maloof Realty, Inc. Hankins sought to sell a vacant parcel of 83.54 acres he owned in Gladsford in Peoria County. The property was taken off the market on August 31, 2011, at Hankins' request. Hankins asked Edie to relist the property on October 22, 2011. Plaintiff William Short expressed an interest in buying the property. Short was represented by his real estate agent, John Leezer, also a realtor at Maloof Realtors.

¶ 5

Hankins and Short entered into a vacant land sales contract. Short signed the sales contract on October 22, 2011, and Hankins signed it on November 4, 2011. The contract specified the following terms: a purchase price of \$300,000; no financing contingency; and a December 2, 2011, closing date. A repair amendment to the contract required the removal of some 55-gallon drums on the property at least five days before the closing. In mid-November, Short sought to extend the closing date until December 29, 2011. The closing did not take place on December 2. On December 15, Edie received a letter from Hankins indicating he wished to terminate the land sales contract. On December 22, 2011, Short sent notice that Hankins had breached the sales contract and had 10 days to cure the breach. Short thereafter filed a complaint for specific performance (No. 12-CH-31) and Maloof Realty filed a complaint seeking the

commission owed by Hankins (No. 12-LM-310). The cases were consolidated and a bench trial took place.

¶ 6 John Leezer, a real estate agent and broker, represented Short in the sale. In mid-November, Short sought an extension of the December 2 closing date so that the credit union that was providing some financing for the purchase could have more time to complete the paperwork. Leezer believed Short would have been able to obtain the necessary funds by December 2 if the closing date remained December 2. Leezer contacted Hankins's agent, Edie, and per their discussion, Leezer understood that Hankins was agreeable to the extension. On November 14, Edie emailed Leezer and stated, "I talked to my seller and he is fine with [closing on December 29]." Leezer prepared a written extension agreement, which Short signed on November 16, and Leezer faxed to Edie on November 17. He then contacted Edie several times before December 2. Edie assured him that Hankins agreed to the extension but was not good at timely returning paperwork. He spoke to Edie four or five times after December 2. Edie never said Hankins would not sign the agreement. According to Edie, Hankins cancelled the land sales contract on December 15 via letter. Edie sent Hankins's letter to Leezer, who faxed it to Short.

¶ 7 William Short testified that he relied on the representations from Edie that Hankins agreed to the extension. Based on the representation, he informed the credit union that the closing was extended. The credit union did not inform him that the loan could not be processed by December 2 but stated that it would like more time. He would have requested accelerated processing if he knew Hankins had not agreed to the extension. He had sufficient funds for the closing, between refinancing his house, money in the bank, and the credit union loan if necessary.

¶ 8 Edie testified that he was a commercial realtor with Maloof Realty and was contacted by Hankins about selling a vacant lot in late July or early August. The property was listed and then taken off the market. Hankins contacted him again in October 2011 and signed a listing agreement. The contract included provisions stating that if the seller defaulted, the commission would still be due and that if the broker found a ready, willing, and able buyer and the seller refused the offer, the broker was entitled to the commission. Edie worked with Leezer, and Short submitted an offer to purchase on October 22, 2011. Hankins faxed a signed land sales contract back to Edie on November 4, 2011. Between November 4 and December 2, 2011, the closing date, Edie talked to Hankins two or three times. He told Hankins he had ordered the title work, it was completed on December 1, and the deeds were prepared.

¶ 9 Edie received a message from Leezer on November 17, 2011, requesting an extension of the closing date. Edie believed Hankins was agreeable to the extension. He faxed the written extension to Hankins and contacted Hankins a few days later to inquire about the written extension. He contacted Hankins two or three times asking him to sign and return the extension agreement but Hankins never did. Edie was not sure he ever actually spoke to Hankins about the extension but might have left messages. He faxed the extension agreement to Hankins again on December 13. On December 15, Edie received a letter from Hankins, and his son, Brent Hankins, which stated that Hankins would not proceed with the sale, that the contract was null and void. Edie contacted Leezer the same day and informed him about the letter.

¶ 10 Hankins testified he did not recall Edie contacting him before November 14 with Short's extension request. He did not recall receiving a fax from Edie on November 16, 2011, with the extension agreement. He never saw the extension agreement and never indicated to Edie or anyone that he would agree to the closing date extension. He did recall receiving a fax from

Edie in mid-December 2011 about an extension request. He did not believe he had any communication with Edie between November 14 and December 2. Hankins thought he would hear where and when the closing would be. He did not call Edie about it or cancel his appointments for the day in order to attend the closing. Hankins admitted at his deposition that he was aware the closing would not be December 2. He assumed Edie called him and told him the December 2 closing would not take place. On December 8, 2011, Hankins and his son, Brent Hankins, prepared a letter for Edie. The letter stated that the closing date was not honored and it was in Hankins's "best interests to withdraw from the contract, and consider the contract null and void."

¶ 11 Brent Hankins testified that he was the person responsible for removing the 55-gallon drums from the property by December 2 as required by the sales contract. His father did not ask him to remove the drums prior to December 2, or at any time.

¶ 12 The trial court issued an order on October 31, 2013, entering judgment in favor of Short on his claim for specific performance and in favor of Maloof Realty on its claim for a commission. The trial court found that Short and the Maloof Realty did not carry their burden of proof that there was an oral agreement to extend the closing date or that Hankins waived the requirement of the December 2 closing. The trial court further found that Short and Maloof Realty did establish other circumstances that excused their failure to close, pointing to Hankins' silence despite his knowledge that Short wanted an extension. The trial court found that although Edie lacked actual authority, Short was entitled to rely on Edie's representations that Hankins agreed to the extension.

¶ 13 The trial court found in the alternative that if Short breached the contract, Hankins failed to give Short notice and an opportunity to cure before terminating the contract as provided in

paragraphs 5 and 13 of the contract. Other findings made by the trial court included the breach, if any, regarding the closing date was not material; Short was ready, willing and able to close within a reasonable time of the December 2 date had he been informed by Hankins; and Hankins could not unilaterally terminate the contract for a minor breach. In the trial court's view, Hankins sought to terminate the contract because he had a change of heart about selling the property. Hankins appealed.

¶ 14

ANALYSIS

¶ 15

The issues on appeal are whether the trial court erred when it awarded specific performance to Short and awarded a commission to Maloof Realty.

¶ 16

We first consider Hankins' challenge to the award of specific performance. He argues that Short was not entitled to specific performance and the trial court erred in granting it. He maintains that Short was not ready, willing and able to buy the property on the December 2 closing date; Short's inability to timely close was not based on any affirmative conduct by Hankins; Hankins was not required to provide Short notice and an opportunity to cure Short's default; and the statute of frauds negates any oral agreement to extend the closing date.

¶ 17

Specific performance is appropriate as a matter of right and enforceable in equity "where the parties have fairly and understandingly entered into a valid contract for the sale of real property." *Schwinder v. Austin Bank*, 348 Ill. App. 3d 461, 477 (2004). A party is entitled to specific performance if it establishes either that the party has performed according to the contract terms or that the party was ready, willing and able to perform the contract but was prevented, and excused, from doing so by the other party's conduct. *Schwinder*, 348 Ill. App. 3d at 477. A buyer is ready, willing and able to perform when he has agreed to buy the property and has

sufficient funds to make the purchase or can obtain the necessary funds within the contractual time limit. *Schaller v. Weier*, 319 Ill. App. 3d 172, 178 (2001).

¶ 18 The trial court found that other circumstances excused Short's failure to close on December 2. The trial court relied *Omni Partners v. Down*, 246 Ill. App. 3d 57, 65 (1993), in determining that Hankins' conduct lulled Short into a false sense of security that the closing had been extended. It noted Hankins was aware of the extension request, but did not contact Edie until mid-December to notify him of Short's breach. In contrast, the defendant-seller in *Omni* failed to demand strict performance of the initial closing date and refused to set a new closing date. *Omni Partners*, 246 Ill. App. 3d at 64-65. Edie sent an email to Leezer notifying him that Hankins was agreeable to the extension but Edie also told Leezer that he had attempted to contact Hankins on several occasions and tried to secure Hankins' signature on the extension agreement but to no avail. The trial court found Short was entitled to rely on Edie's representations. We disagree. In light of Hankins' failure to execute the extension agreement, it was not reasonable for Short to assume the closing date had been extended. The trial court's finding that Short was entitled to rely on Edie's representations regarding the extension is inconsistent with its findings that there was no oral agreement to extend or that Hankins waived the closing. Without a written agreement to extend, Short was required by the terms of the contract to close on the property on December 2. He failed to close and breached the contract.

¶ 19 The contract required Hankins to give Short written notice of the breach within 10 days and an opportunity to cure. As found by the trial court, "assuming, *arguendo*, that Short was in breach," Hankins failed to provide notice and an opportunity to cure.

¶ 20 Paragraph 5 of the land sales contract provides:

“CLOSING. *** If the closing is delayed past the closing date due to the fault of either party, even if this transaction is subsequently closed, the defaulting party shall pay damages as provided in the Contract. The non-defaulting party will be entitled to collect damages as soon as the default occurs and the notice and cure provisions provided for in Paragraph 13, Default, are not applicable to this paragraph.”

¶ 21 Paragraph 13 provides:

“DEFAULT. If either party does not perform any obligation under this Contract (a “default”), the non-defaulting party shall give written notice of the default to the defaulting party. Notice must be given no later than seven (7) days after the scheduled closing date (or any written extension thereof) or possession. Failure to provide the notice shall limit available remedies of the non-defaulting party to recovery of the earnest money deposit. If notice is properly given, and the defaulting party does not cure the default within ten (10) days of the notice, the non-defaulting party may pursue any remedy available in law or equity, including specific performance.”

¶ 22 On December 15, Hankins sent a letter dated December 8 to Edie, who forwarded the letter to Leezer, who notified Hankins. The letter asserted the contract was null and void for a variety of reasons, including the missed closing. However, the notice of default was sent past the 7-day deadline set forth in the contract, which also required Hankins to provide Short a

10-day period to cure. Had Hankins provided timely notice of default, Short would have closed on the property. Short presented evidence supporting the trial court's finding that he was ready, willing, and able to execute the contract, including on the December 2 date, and within a reasonable time after that date had Hankins provided him an opportunity to cure. He testified he would have had the necessary funds on December 2 if he had known the closing was not extended. According to Short, the credit union never told him the loan could not be processed by December 2 and he would have sought an accelerated processing if needed.

¶ 23 The land sales contract required written notice of default and opportunity to cure be provided within seven days of a missed closing. The notice and cure provisions under paragraph 13 apply to all aspects of default, contrary to Hankins proposed interpretation that the inapplicability of notice and cure to the non-defaulter's ability to collect damages under paragraph 5 negates the applicability of paragraph 13's notice and cure provisions. Hankins did not comply with the notice requirements and failed to give Short an opportunity to cure the breach. Despite the December 2, breach, Short was ready, willing and able to perform the contract but was prevented from doing so by Hankins' failure to give him notice of default and the opportunity to cure it. The breach was not material and did not preclude an award of specific performance. Accordingly, we find the trial court did not abuse its discretion in granting specific performance to Short.

¶ 24 We next consider whether the trial court erred in awarding Maloof Realty a commission. Hankins argues because Short was not ready, willing and able to close and breached the contract, Maloof is not entitled to a commission.

¶ 25 In order for a broker to recover a commission, he must prove he either sold the property, or within the time of his authority, procured a ready, willing and able buyer to purchase the

property according to the contract terms. *Schaller*, 319 Ill. App. 3d at 177. The broker has the burden to show he is entitled to the commission and that the sale was the proximate result of his efforts. *Schaller*, 319 Ill. App. 3d at 178. Factual findings, such as whether a commission was due, will not be reversed unless they are against the manifest weight of the evidence. *International Supply Co. v. Campbell*, 391 Ill. App. 3d 439, 447-48 (2009).

¶ 26 The listing agreement required Hankins to pay Maloof a 5% commission on the sale of the property; the commission amount was \$15,000. Paragraph C provides:

“DEFAULT: If Seller enters into a fully executed contract for sale *** and Seller defaults under that contract, then a commission in the same amount as would have been payable upon a closing *** pursuant to this Contract shall be due immediately upon such default.”

¶ 27 Paragraph D provides:

“READY, WILLING & ABLE PERSON: If Broker procures a written offer from a Buyer who is ready, willing and financially able to consummate the proposed transaction concerning the Property according to the terms contained in this Contract, and Seller refuses to accept the offer, Broker shall be immediately entitled to a commission in the same amount as would have been payable upon a closing *** pursuant to this Contract.”

¶ 28 Under paragraphs C and D, Maloof Realty was entitled to its commission. The trial court found that Hankins breached the notice and cure provisions of the contract. The evidence established that Short would have obtained the funds by December 2 had he known the closing

was not extended. Similarly, had Hankins provided the required opportunity to cure, Short could have closed on a new date. It is undisputed that Edie secured Short as the buyer and procured a written offer for Hankins' property. Hankins failed to allow Short to cure his breach, entitling Maloof Realty to a commission under the terms of the listing agreement. We find the trial court's award of the commission was not against the manifest weight of the evidence.

¶ 29 For the foregoing reasons, the judgment to the circuit court of Peoria County is affirmed.

¶ 30 Affirmed