2016 IL App (1st) 150277-U

FOURTH DIVISION
May 5, 2016

No. 1-15-0277

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

TRACY URY,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 13 CH 23908
	)	
ALESSANDRO DI BARI,	)	Honorable
	)	Sophia H. Hall
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ELLIS delivered the judgment of the court.
Justices Howse and Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court's grant of summary judgment to seller of real estate affirmed. Unambiguous language of contract entitled seller to retain earnest money deposit if buyer defaulted, and there was no genuine issue of material fact that buyer had defaulted on contract. Despite buyer's illness, neither doctrine of legal impossibility or commercial frustration excused buyer's performance, where real estate was not destroyed, seller was not requesting specific performance of contract, and parties had already agreed that forfeiture of buyer's earnest money was seller's sole and exclusive remedy if buyer defaulted under terms of contract.

¶ 2 Plaintiff Tracy Ury sold her condominium to defendant Alessandro DiBari for $540,000. Pursuant to the parties' real estate contract, defendant deposited earnest money of $54,000 in escrow and was required to provide the balance of the purchase price at closing. The contract also provided that if the buyer defaulted, the seller's sole remedy was receipt of the earnest

money. Defendant defaulted by failing to close on the purchase of the transaction but refused to authorize the release of the earnest money to plaintiff from the escrowee who was holding it.[1]

¶ 3 Plaintiff filed a declaratory judgment action against defendant seeking a declaration that defendant was in default and seeking an award of the earnest money. Defendant filed three affirmative defenses: (1) the contract was deemed null and void based on his inability to secure the required mortgage commitment; (2) he was stricken with a sudden neurological condition requiring hospitalization in Rome which made it "impossible" for him to proceed with the purchase of the condominium; and (3) plaintiff failed to mitigate her damages. Defendant also filed a counterclaim alleging it was "impossible" for him to attend the closing. In the alternative, defendant alleged he was unable to secure the required mortgage commitment. Defendant sought the return of his earnest money deposit.[2]

¶ 4 Plaintiff filed a motion for summary judgment, which the trial court granted after concluding that defendant's default was not excused by either the doctrine of impossibility of performance or the doctrine of frustration of purpose. The trial court considered defendants' affidavits and his physician's affidavit submitted in support of defendant's response but reasoned

[1] There appears to be some discrepancy in the record as to the actual amount of the earnest money. In their briefs, both parties refer to the earnest money total of $55,000.The trial court order refers to the "full amount of the earnest money" as $54,494 "plus interest, if any." But the amended complaint and a letter in the record from the escrowee references the earnest money of "$54,000." The contract also indicates that the final amount would have been $54,000 because it stated that defendant deposited $1,000 with the escrowee as "Initial Earnest Money" and further provided that the "Initial Earnest Money shall be increased *to* *** 10% of the Purchase Price." (Emphasis added.) Although we take note of this discrepancy, we need not concern ourselves with it further since the parties in this appeal dispute only their entitlement to the earnest money, and do not dispute the precise amount contained in the trial court's order.

[2] The contract was contingent on defendant obtaining a mortgage commitment by June 7, 2013, and further required that, should he fail to do so, he notify plaintiff by that date to allow her the opportunity to secure the required commitment. The record indicates that defendant failed to do either. In her answer to defendant's affirmative defenses and counterclaim, plaintiff denied receiving notice from defendant of his failure to obtain a loan within the time specified in the mortgage contingency. This issue has not been raised on appeal.

that they showed only that he was temporarily hospitalized and were insufficient to show that defendant's ability to perform the contract was "totally or nearly totally destroyed," that "he, or someone acting on his behalf, could never be present at a closing on the purchase of the real estate," or that he had "tried all practical alternatives available to permit performance." Defendant appealed. For the reasons that follow, we affirm.

¶ 5 I. BACKGROUND

¶ 6 On May 2, 2013, the parties entered into a real estate purchase and sale agreement (the contract) in which defendant agreed to buy plaintiff's condominium, Unit 4AC at 1255 North State Street in Chicago (the Property). The purchase price was $540,000. Pursuant to the contract, defendant deposited earnest money of $54,000 (10% of the purchase price) in escrow and was required to provide the balance of the purchase price at closing. The contract stated, "Time is of the essence." The contract stated that "[i]n the event of default by Buyer, the Earnest Money ***shall be paid to Seller."

¶ 7 The contract also contained a contingency clause providing for a seven day attorney approval period. Defendant's attorney modification letter, dated May 13, 2013, contained several modifications including the following: "The closing shall be on August 20, 2013 and possession of the Property shall be given to the Purchaser at closing." The attorney modification letter also stated, "In the event of the Purchaser's default under the terms of the Contract, the forfeiture of Purchaser's earnest money shall be the Seller's sole and exclusive remedy." Plaintiff accepted these modifications.

¶ 8 At some point, defendant went to Italy. According to the affidavits submitted by defendant, he underwent an emergency neurosurgical operation on August 2, 2013, and remained hospitalized until August 12, 3013, when he was transferred to a rehabilitation center in Rome.

¶ 9 On August 14, 2013, defendant's attorney sent a letter to plaintiff's attorney which stated: "please accept this as formal notification that [defendant] will not be proceeding with the purchase of the subject Property." The letter noted that, according to defendant's representative in Italy, defendant was incapacitated in the hospital and it was "medically impossible" for him to complete the transaction. At the time defendant provided this notice, all contingencies in the contract had expired. The contract contained no language stating that either party's performance was contingent or conditioned on their medical condition at the time of closing. Also, defendant's letter did not request an extension of time or any accommodation that would allow him to perform his closing obligations.

¶ 10 On August 28, 2013, plaintiff's attorney wrote to defendant's attorney and stated that defendant's notice of termination of the contract and his failure to close the purchase was a default under the contract and requested defendant's consent to the joint direction to the escrowee to release the earnest money to plaintiff. Plaintiff received no response.

¶ 11 On October 23, 2013, plaintiff filed a declaratory judgment action, subsequently amended, against defendant and the escrowee. The escrowee later deposited the earnest money with the court and was dismissed from the case.

¶ 12 The amended complaint sought a declaration that defendant was in default and that plaintiff's sole and exclusive remedy under the contract was receipt of the earnest money, to which she had an immediate right. Defendant filed three affirmative defenses: (1) the contract was deemed null and void based on his inability to secure a mortgage; (2) he was stricken with a sudden neurological condition requiring hospitalization in Rome which made it "impossible" for him to proceed with the purchase of the Property; and (3) plaintiff failed to mitigate her damages. Defendant also filed a counterclaim alleging it was "impossible" for him to attend the

closing. In the alternative, defendant alleged he was unable to secure the necessary mortgage commitment. Defendant sought the return of his earnest money deposit. Plaintiff filed an answer to defendant's counterclaim and affirmative defenses, and discovery ensued.

¶ 13 After discovery closed, plaintiff filed a motion for summary judgment on her claims and defendant's counterclaims and affirmative defenses. The trial court, after giving defendant additional time to file a supplemental affidavit, held a hearing and granted plaintiff's motion. The trial court considered defendants' two personal affidavits and his physician's affidavit submitted in support of defendant's response and concluded that defendant's default was not excused by either the doctrine of impossibility of performance or the doctrine of frustration of purpose. The trial court reasoned that the affidavits showed only that defendant was temporarily hospitalized and were insufficient to show that defendant's ability to perform the contract was "totally or nearly totally destroyed," that "he, or someone acting on his behalf, could never be present at a closing on the purchase of the real estate," or that he had "tried all practical alternatives available to permit performance." This appeal followed.

¶ 14 II. ANALYSIS

¶ 15 A. Standard of Review

¶ 16 Our standard of review for the trial court's order granting summary judgment is *de novo*. *Hall v. Henn*, 208 Ill. 2d 325, 328 (2003). Summary judgment is proper where the pleadings, depositions, admissions, and affidavits on file, viewed in the light most favorable to the nonmoving party, reveal that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Id.* A genuine issue of material fact exists where the material facts are disputed or the material facts are undisputed but reasonable persons might draw different inferences from those undisputed facts. *Mashal v. City of Chicago*, 2012 IL

112341, ¶ 49. If there is no dispute as to any material fact and it is only the legal effect of the undisputed facts that is at issue, summary judgment may be granted where the undisputed facts permit but one inference. *Balma v. Henry*, 404 Ill. App. 3d 233, 242 (2010). Although summary judgment is to be encouraged as an expeditious method of disposing of a lawsuit, it is a drastic measure and should be allowed only when the right of the moving party to judgment is free and clear from doubt. *Olson v. Etheridge*, 177 Ill. 2d 396, 404 (1997). In reviewing a grant of summary judgment, we may affirm on any basis appearing in the record, regardless of whether it was the ground on which the circuit court relied. *Rodriguez v. Sheriff's Merit Commission of Kane County*, 218 Ill. 2d 342, 357 (2006).

¶ 17 B. Defendant's Default

¶ 18 It is undisputed that the parties entered into a valid and binding contract for the sale of the Property. Defendant has not claimed that the contract was ambiguous. "Where the terms of an agreement are unambiguous, the parties' intent must be determined solely from the language of the agreement itself, and it is presumed that the parties inserted each provision deliberately and for a purpose." *Jameson Realty Group v. Kostiner*, 351 Ill. App. 3d 416, 426 (2004). The plain language of the contract states, "Buyer shall deliver the balance of the Purchase Price *** to Seller and Seller shall execute and deliver the Deed *** to Buyer at '***Closing***.' " (Emphasis in original.) The parties also agreed that "[i]n the event of default by Buyer, the Earnest Money ****shall* be paid to Seller." (Emphasis in original.) The parties further agreed, per defendant's attorney's modification, that the forfeiture of Purchaser's earnest money “shall be the Seller's sole and exclusive remedy" and that "[t]he closing shall be on August 20, 2013 and possession of the Property shall be given to the Purchaser at closing."

¶ 19 On August 14, 2013, defendant sent formal notification that he would not be proceeding with the purchase of the Property. Defendant's failure to close the purchase transaction was a default under the contract.

¶ 20 C. Defendant's Affirmative Defense of Medical Impossibility

¶ 21 Only one of defendant's three affirmative defenses is at issue in this appeal. In his second affirmative defense and counterclaim, defendant claimed that his medical condition made it "impossible" to proceed with the purchase of the Property. In response to plaintiff's motion for summary judgment, defendant claimed that either "the doctrine of impossibility" or "the doctrine of frustration" excused his performance. Defendant also argues on appeal that they apply to excuse his performance. He does not discuss each doctrine separately but refers to them collectively.

¶ 22 The doctrine of impossibility was addressed by the Illinois Supreme Court in *Leonard v. Autocar Sales & Service Co*., 392 Ill. 182 (1945). The court began by discussing the well-established general rule that "where parties, by their own contract and positive undertaking, create a duty or charge upon themselves, they must abide by the contract and make the promise good, and subsequent contingencies, not provided against in the contract, which render performance impossible, do not bring the contract to an end." *Id*. at 187. One of the exceptions to this general rule is the doctrine of legal impossibility, where the continued existence of a particular person or thing is so necessary to the performance of the contract that it is implied as a condition of the contract, such that the death of that person or destruction of that thing shall excuse performance. *Id*. at 189.

¶ 23 More recently, our supreme court explained that "[t]he doctrine of legal impossibility, or impossible performance, excuses performance of a contract only when performance is rendered

objectively impossible either because the subject matter is destroyed or by operation of law." (Emphasis added.) *Innovative Modular Solutions v. Hazel Crest School District*, 2012 IL 112052, ¶ 37. *Innovative Modular Solutions* involved a vendor seeking cancellation fees after its lease contracts with a school district were cancelled. The school district argued that it was not required to pay the cancellation fees under the contract based on impossibility, namely that the district's financial affairs had been taken over by a state-sponsored body brought in following a fiscal emergency. The court rejected the impossibility defense, explaining that "the subject matter of the lease contracts, the modular buildings, have not been destroyed, nor [had the statute authorizing the state body to take over the district's affairs] rendered performance of the contracts *objectively impossible* by operation of law." (Emphasis added.) *Id*.

¶ 24 The distinction between objective impossibility and subjective impossibility has been described as follows:

> "It is generally well settled that subjective impossibility, that is, impossibility which is personal to the promisor and does not inhere in the nature of the act to be performed, does not excuse nonperformance of the contractual obligation. Subjective impossibility or personal inability to perform one's contractual promise ordinarily is to be distinguished from objective impossibility of performance. The distinction, as explained by Williston, is between 'the thing cannot be done' (this being called objective impossibility) and 'I cannot do it,' called subjective impossibility." C.T. Foster, Annotation, Modern Status of the Rules Regarding Impossibility of Performance as Defense in Action for Breach of Contract, 84 A.L.R.2d 12, 29-30 (1962) (quoting Williston, Contracts (Rev. ed.) §1932).

¶ 25 In this case, even if we were to assume for the moment that any "impossibility" existed, it would only involve a subjective impossibility—plaintiff's personal inability to go through with the purchase because of his physical ailment—not the requisite objective impossibility. The subject matter of the contract in this case was the Property, the condominium at 1255 North State Street in Chicago, Unit 4AC. Had the Property been destroyed, defendant might be entitled to the affirmative defense of legal impossibility. But the condominium was not destroyed. Plaintiff does not and could not argue that the Property was incapable of being purchased. He is only saying that he, personally, could not purchase it because of circumstances unique to him. In this context, the impossibility defense is unavailable. See *Leonard*, 392 Ill. at 190 (lease agreement not subject to rescission on ground of impossibility, though federal government temporarily condemned property for military use, preventing party from operating its business: "Nor is there any place here for an application of the rules governing the construction of contracts whose subject matter has subsequently been destroyed or ceased to exist. The subject matter of the contract is the property *** which *** is undestroyed and still in existence."); *YPI 180 North LaSalle Owner, LLC v. 180 North LaSalle II, LLC*, 403 Ill. App. 3d 1, 7 (2010) (sale of commercial property not subject to rescission based on impossibility, despite buyer's claim that global credit crisis prevented buyer from obtaining commercial financing, because property was still objectively capable of purchase and risk of non-financing was foreseeable to parties); *Mouhelis v. Thomas*, 95 Ill. App, 3d 181, 183 (1981) (contract for purchase of real estate would not be rescinded based on impossibility where purported buyer lost his job and could not secure financing for loan; subject matter of contract was property, which was not destroyed, and buyer's employment status "was not an element essential to the performance of the contract ").

¶ 26 As plaintiff has correctly noted, impossibility due to the ill health of a person has only been held to excuse performance in cases involving personal-services contracts, where the ill person's performance was the object of the contract itself. For example, in *Parker v. Arthur Murray, Inc*., 10 Ill. App. 3d 1000 (1973), the contract was for dance lessons, and the plaintiff dance pupil suffered injuries rendering him incapable of continuing the dance lessons. The court held that plaintiff was entitled to recover the prepaid sums for the uncompleted lessons. *Id*. at 1002.

¶ 27 It is not altogether clear from the record what, precisely, defendant is claiming prevented his performance. He could make the case that his illness prevented him from attending the closing on the specified, contracted-for date, but he did not seek an extension of that date from plaintiff and otherwise fails to explain why, ultimately, he could *never* go through with the deal. Although he was obligated to put forth some evidence to at least create a question of fact on this issue, and he has not done so, we cannot imagine any scenario that would entitle him to relief under the impossibility doctrine. As we have noted above, if his claim is that his illness caused some unspecified financial difficulties that rendered him financially unable to proceed with the purchase, the impossibility doctrine would not assist him. See, *e.g.*, *YPI 180 North LaSalle Owner, LLC*, 403 Ill. App. 3d at 7; *Mouhelis*, 95 Ill. App, 3d at 183; see also *Ner Tamid Congregation of North Town v. Krivoruchko*, 638 F.Supp.2d 913, 931-34 (2009) (buyer's failure to obtain financing due to unexpected and severe economic downturn did not excuse its performance under impossibility doctrine). If his claim is that, due to his physical ailments, the property was no longer of use to him—that it was too big for him, or had too many stairs for his feeble condition, or something of that nature—the impossibility doctrine would likewise be unavailable, because that problem is unique to him, and he still could not demonstrate that the

property is objectively incapable of purchase. See, *e.g.*, *Innovative Modular Solutions*, 2012 IL 112052, ¶ 37; *YPI 180 North LaSalle Owner, LLC*, 403 Ill. App. 3d at 6.

¶ 28 Whatever may be the reason behind defendant's supposed inability to go forward with this transaction—assuming he truly *was* unable to do so—it would be based on circumstances personal to him and would not demonstrate objective impossibility. To paraphrase Professor Williston, defendant does not and could not argue that " 'the thing cannot be done; ' " rather, he is merely arguing that " '[he] cannot do it.' " C.T. Foster, Annotation, 84 A.L.R.2d at 29-30 (quoting Williston, Contracts (Rev. ed.) §1932). Because there was no destruction of the subject matter of the Property, because it was not objectively impossible to purchase this property, we find the doctrine of legal impossibility to be inapplicable as a matter of law.

¶ 29 Furthermore, application of the doctrine of impossibility requires " 'that the party demonstrate that it has tried all practical alternatives available to permit performance.' " *Downs v. Rosenthal Collins Group, LLC.*, 2011 IL App (1st) 090970, ¶ 39 (quoting *Illinois-American Water Co. v. City of Peoria*, 332 Ill. App. 3d 1098, 1106 (2002)); see also *YPI 180 North LaSalle Owner, LLC*, 403 Ill. App. 3d at 8 (buyer did not demonstrate that it had no other means of producing the funds necessary to close on property purchase, even after being denied financing). Defendant here has not demonstrated that he made *any* such efforts. As we have noted, defendant did not request an extension of time or *any* accommodation to facilitate closing. One might reasonably expect that, had defendant sought an extension of time so that he could recover from his illness before proceeding with the closing, he would have received one. But he made no attempt to keep this transaction alive. He merely informed plaintiff he would not proceed with the purchase and told her to put the Property back on the market to mitigate *her* damages. For this additional reason, the defense of impossibility is unavailable under these facts.

¶ 30 Defendant also relies on the doctrine of frustration. The Illinois Supreme Court recognized this doctrine, also called "commercial frustration," in *Leonard*, 392 Ill. 182. The court noted that this doctrine, an extension of the doctrine of legal impossibility,

> "rests on the view that where from the nature of the contract and the surrounding circumstances the parties when entering into the contract must have known that it could not be preformed unless some particular condition or state of things would continue to exist, the parties must be deemed, when entering into the contract, to have made their bargain on the footing that such particular condition or state of things would continue to exist, and the contract therefore must be construed as subject to an implied condition that the parties shall be excused in case performance becomes impossible from such condition or state of things ceasing to exist." *Id*. at 188.

See also *Illinois-American Water Co.*, 332 Ill. App. 3d at 1106 ("The doctrine of commercial frustration will render a contract unenforceable if a party's performance under the contract is rendered meaningless due to an unforeseen change in circumstances.").

¶ 31 "The doctrine of commercial frustration is not to be applied liberally." *Smith v. Roberts*, 54 Ill. App. 3d 910, 913 (1977). The party asserting frustration must establish that (1) the frustrating event was not reasonably foreseeable; and (2) the value of counterperformance was totally or nearly totally destroyed by the frustrating cause. *Id*.

¶ 32 We agree with the trial court that defendant has failed to articulate any basis for the application of the commercial frustration doctrine. Most notably, as to the second prong of the test, defendant has come nowhere close to establishing that his ailment has destroyed or nearly destroyed the value of plaintiff's performance. See *Greenlee Foundries, Inc. v. Kussel*, 13 Ill. App. 3d 611, 619 (1973) (party asserting frustration to avoid lease obligation must show that

purpose for which lease was entered into was "totally, or nearly totally, frustrated"). Defendant has not argued, in any way, that the Property no longer has any value to him. This is not a situation as in *Smith*, for example, where a clothing store wanted to lease adjacent space to create a new wing on the store, but then the existing store was destroyed in a fire. See *Smith*, 54 Ill. App. 3d at 912. The new space—the appendage to the main store—had no value without the main store itself. Thus, this court held that the purpose of the lease had been frustrated by the destruction of the existing clothing store. *Id.* at 913. Here, in contrast, defendant has not shown—has not even *tried* to show—how his illness has suddenly rendered the sale of the Property worthless.

¶ 33 Nor has defendant established the existence of a "frustrating event" in the first instance, or even created a genuine issue of material fact on the question. He has established that he was unable to attend the planned closing date in August, but he has not demonstrated that he was unable *ever* to close. Indeed, the undisputed facts show that the defendant sought to opt out of the deal even before the closing date had arrived, and that defendant never made the slightest attempt to get an extension, to seek any accommodation whatsoever from plaintiff (other than a complete voiding of the deal), or to find some way to have someone attend an extended closing date in his stead if he could not do so personally. Defendant was given a more than fair opportunity by the trial court to make his case for how his illness translated into a permanent inability to close on this Property, and he completely failed to do so.

¶ 34 Finally, as to the question of reasonable foreseeability, while we could agree that the specifics of defendant's medical condition may not have been within the contemplation of the parties, the idea that the buyer might not go through with the purchase was very much within the parties' contemplation. The parties included a liquidated-damages provision that provided a

forfeiture of the escrow money in the event the buyer, defendant, backed out of the deal. See, *e.g.*, *Mouhelis*, 95 Ill. App. 3d at 184 (while failure to obtain mortgage financing might constitute frustrating event, it was not unforeseeable condition, as indicated by financing-contingency provision in real estate contract); *YPI 180 North LaSalle Owner, LLC*, 403 Ill. App. 3d at 7 (risk of non-financing was foreseeable to parties to commercial real estate contract).

¶ 35 For all of these reasons, we uphold the trial court's rejection of defendant's claim of commercial frustration.

¶ 36 Because defendant defaulted on the contract by failing to close, and because defendant's assertion of the impossibility and commercial-frustration defenses must fail, the trial court properly entered summary judgment in favor of plaintiff on the complaint and counterclaim.

¶ 37 III. CONCLUSION

¶ 38 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 39 Affirmed.