NOT DESIGNATED FOR PUBLICATION

RICHARD F. TEICHGRAEBER, III AND MARY W. BROWN	*	**NO. 2004-CA-1669**
	*	**COURT OF APPEAL**
VERSUS	*	**FOURTH CIRCUIT**
REMAX REALTY, BRUCE R. HOEFER, JR. AND ELIZABETH HOEFER	*	**STATE OF LOUISIANA**
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2003-12916, DIVISION "G-11"
Honorable Robin M. Giarrusso, Judge
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Judge Edwin A. Lombard
* * * * * *

(Court composed of Judge Charles R. Jones, Judge Terri F. Love, Judge Edwin A. Lombard)

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AFFIRMED

This case involves conflicting claims to money deposited under an agreement to purchase and sell real estate.

RELEVANT FACTS

In spring, 2003, Appellants, Elizabeth Grace, wife of/and Bruce R. Hoefer, Jr., (the "Hoefers"), listed for sale their New Orleans home located at 5934 Chestnut Street (the "Chestnut Property"). Appellees, Mary Brown, wife of/and Richard F. Teichgraeber (the "Teichgraebers"), expressed an interest in purchasing the Chestnut Property. On April 6, 2003, after negotiations, the parties entered into an Agreement to Purchase and Sell (the "Chestnut Agreement"). The Teichgreabers' obligation to purchase was subject to the suspensive condition that they obtain financing for $288,000 at an annual rate not to exceed 6%. Pursuant to the agreement, the Teichgrabers gave a $10,000 deposit to the Hoefers' real estate agent, RE/MAX New Orleans Properties ("REMAX"), to hold in escrow.

On March 24, 2003, prior to entering into the Chestnut Agreement, the Teichgraebers entered into a separate Agreement to Purchase and Sell their New Orleans home located at 1526 Henry Clay Avenue (the "Henry Clay Property"). Under the Henry Clay Agreement, the buyers' obligation to purchase the home was conditioned upon their obtaining a loan on specified terms. Pursuant to the agreement, the buyers deposited $15,000 with the Teichgraebers' real estate agent, Keller Williams Realty ("Keller Williams"), to be held in escrow.

The closing for the Chestnut Property was originally set to be passed on or before May 30, 2003. However, because of the Memorial Day weekend, the Chestnut Property closing was moved to June 3, 2003. On May 31, 2003, Keller Williams told the Teichgraebers and the Hoefers' REMAX agent that the buyers of the Teichgraebers' home could not obtain the requisite financing. The Teichgraebers agreed to allow their buyers an additional two weeks, through June 16, 2003, to obtain the requisite financing. The Teichgraebers and the Hoefers then agreed to modify the Chestnut Agreement to extend the time for closing through June 16, 2003.

By letter dated June 2, 2003, Hibernia Mortgage Banking ("Hibernia")

notified the Teichgraebers that their loan application had been approved subject to the condition that the first and second mortgages totaling $230,181 on their Henry Clay home be satisfied from the sale of the home for $683,000. On June 9, 2003, the Teichgraebers' buyer informed them that they could not obtain financing for the Henry Clay home. On June 15, 2003, the Teichgraebers agreed to cancel the Henry Clay Agreement and return their buyer's $15,000 deposit. That same day the Teichgraebers submitted to the Hoefers a Cancellation of Agreement to Purchase or Sell and asked the Hoefers to return their $10,000 deposit and cancel the Chestnut Agreement.

On June 17, 2003, the Hoefers notified the Teichgraebers that they were in default of the Chestnut Agreement and that the deposit currently held in escrow by REMAX, would be forfeited. On June 18, 2003, the Teichgraebers confirmed in writing that they considered the Agreement cancelled and requested the immediate return of their deposit.

PROCEDURAL HISTORY

The Teichgraebers filed suit against the Hoefers and REMAX seeking to have the Chestnut Agreement declared null and void and their deposit of $10,000 returned with interest and attorney fees. In response to the suit, the

Hoefers filed an Answer and Reconventional Demand. REMAX filed a consursus proceeding in First City Court in which it deposited the $10,000 deposit. The concursus proceeding was later transferred to Civil District Court and consolidated with the Teichgraebers' suit. The funds were transferred to the Clerk of Civil District Court to be held pending disposition of the case.

The Teichgraebers filed a Motion for Summary Judgment. The Hoefers filed an opposition and a Cross Motion for Summary Judgment seeking a judgment declaring that the suspensive condition was fulfilled and that the Teichgraebers breached the Agreement. After considering the briefs, the exhibits and the arguments of counsel, the trial court granted the Teichgraebers' Motion for Summary Judgment and denied the Hoefers' Cross Motion for Summary Judgment. It is from this judgment the Hoefers appeal.

STANDARD OF REVIEW

Appellate courts review summary judgments *de novo* under the same criteria that govern the district court's consideration of whether summary judgment is appropriate. *Schroeder v. Board of Supervisors of Louisiana State University,* 591 So.2d 342, 345 (La.1991).

DISCUSSION

The Hoefers argue that the trial court erred in granting the Teichgraebers' Motion for Summary Judgment finding that the Chestnut Agreement's suspensive condition of obtaining financing was unfulfilled.

Louisiana Civil Code article 1767 provides in pertinent part:

> A conditional obligation is one dependent on an uncertain event.
> If the obligation may not be enforced until the uncertain event occurs, the condition is suspensive.

In *Merrill Lynch Realty v. Williams*, 526 So.2d 380 (La.App 4 Cir. 1988), this Court declared a purchase agreement unenforceable and ordered the buyer's deposit returned because of the buyer's inability to obtain financing. The Second Circuit in *Garsee v. Bowie*, 37,444 (La.App.2 Cir. 08/20/03), 852 So.2d 1156, held that a purchase agreement is null and void and unenforceable where a purchaser, through no fault of his own is unable to obtain the requisite financing as provided in the agreement.

In the present case, the Teichgraebers securing a loan is the suspensive condition. The Chestnut Agreement clearly provides that the Teichgraebers' obligation to purchase is contingent upon their obtaining a loan according to specified terms. Hibernia expressly conditioned the Teichgraebers' loan upon the sale of their home at 1526 Henry Clay Avenue and use of the sale proceeds to pay off the

first and second mortgages totaling $230,181. The Teichgraebers were unable to sell their Henry Clay home and thus could not satisfy Hibernia's requirements for obtaining the loan.

The Hoefers further allege that the failure of the financing was due solely to the Teichgraebers failure to make a good faith effort to sell their house. There is no evidence that the Teichgraebers failed to market their home or that they received any other offers up to June 16, 2003. The Teichgraebers were also under no obligation to apply elsewhere for the loan. *Merrill Lynch*, 526 So.2d at 382, 383. Moreover, the Chestnut Agreement gave the Hoefers the express right, which they chose not to exercise, to provide all or part of the financing and ensure that the Chestnut Agreement was enforceable regardless of the Teichgraebers' ability to secure conventional financing.

Next, the Hoefers assert that the commitment by Hibernia to make a loan satisfied the suspensive condition of obtaining a loan. This argument is without merit. The clause the Hoefers mistakenly rely on reads:

> Commitment by lender to make loan(s), subject to approval of title, shall constitute obtaining loan(s).

Hibernia's commitment to the Teichgraebers was not "subject to

approval of title". Hibernia's commitment was subject to sale of the Teichgraebers' home and satisfaction of the first and second mortgages.

As to the Hoefers' procedural argument that the funds were deposited in connection with a separate proceeding, we find that the trial court properly ordered payment. The consolidation of cases for trial is a procedural convenience and does not merge the actions unless the records clearly reflect an intention to do so. *Voth v. American Home Assurance Co*, 219 So.2d 236 (La.App. 4 Cir.1969). All parties consented to REMAX's motion to transfer and consolidate its concursus proceeding with the Teichgraebers' civil case and, to transfer the funds from First City Court to Civil District Court pending disposition of this suit. Both First City Court and Civil District Court ordered that the cases be transferred and consolidated. Thereafter, the parties filed their pleadings under the consolidated caption. The record in the instant matter clearly reflects an intention to merge the proceedings.

Finally, and contrary to the Hoefers' argument, the trial court's granting of summary judgment and ordering return of the deposit was a final judgment. The judgment disposed of the Teichgraebers' entire

claim and the Hoefers' principal demand. The judgment is a final judgment disposing of a principal action properly rendered pursuant to Louisiana Code of Civil Procedure article 1915(A)(4), notwithstanding that the Hoefers' reconventional demand has not been resolved.

The trial judge was correct in finding that the Chestnut agreement was null and void and that the Teichgraebers were entitled to a return of their $10,000 deposit. Accordingly, the summary judgment was properly granted.

For the foregoing reasons, the trial court judgment is affirmed. Costs of this appeal are assessed against the Hoefers.

AFFIRMED