

Appeal Affirmed in Part, Reversed and Remanded in Part, and Memorandum Opinion filed October 14, 2010.



In The

Fourteenth Court of Appeals

NO. 14-09-00459-CV

**BLUE MOON VENTURE, L.L.C., AND JME PROPERTIES, L.L.C., Appellants
V.**

BARRY HORVITZ, Appellee

**On Appeal from the 215th District Court
Harris County, Texas
Trial Court Cause No. 2006-15995**

MEMORANDUM OPINION

This appeal arises from a suit filed by Barry Horvitz against Blue Moon Venture, L.L.C., for specific performance and breach of contract concerning the purchase of real property for \$125,000. JME Properties, L.L.C., intervened to establish it owned an undivided one-half interest in the property and to enforce its agreements with Blue Moon. Horvitz counterclaimed against JME for declaratory relief to cancel a notice of lis pendens.

Horvitz moved for summary judgment against Blue Moon for specific performance and against JME to cancel the lis pendens. JME moved for summary judgment against Blue Moon and Horvitz. The trial court granted Horvitz's motion for summary judgment,

ordering Blue Moon to convey the property to Horvitz and cancelling the notice of lis pendens filed by JME. The trial court denied JME's motion for summary judgment.

The trial court denied a motion for new trial filed by JME and Blue Moon. JME and Blue Moon ("appellants") timely filed a notice of appeal. Horvitz then timely filed his notice of appeal.

I

Appellants raise two issues. First, they assert the trial court erred in granting Horvitz's motion for summary judgment. Appellants claim Horvitz was not entitled to specific performance because he was required to plead and prove he was a bona fide purchaser for value, in good faith, and without notice of JME's claim. Appellants' arguments are based upon Horvitz having notice of JME's interest in the property. However, as evinced by its denial of JME's motion for summary judgment, the trial court determined JME has no interest in the property. Thus there was no interest of which Horvitz had notice. (The question of JME's interest in the property is addressed below.)

"A bona fide purchaser is one who acquires (apparent) legal title to property in good faith for a valuable consideration without actual or constructive notice of an infirmity in the title." *Williams v. Jennings*, 755 S.W.2d 874, 881 (Tex.App.-Houston [14th Dist.] 1988, writ denied). A party suing for specific performance of a purchase contract has not acquired title to the property, apparent or otherwise, and therefore is obviously not a bona fide purchaser. Appellants cite no authority which supports their position that a party seeking specific performance of a real-estate-purchase contract must be a bona fide purchaser.

The equitable remedy of specific performance may be awarded upon a showing of breach of contract. *Stafford v. S. Vanity Magazine, Inc.*, 231 S.W.3d 530, 535 (Tex.App.-Dallas 2007, pet. denied). A party seeking specific performance must plead and prove (1) compliance with the contract including tender of performance unless

excused by the defendant's breach or repudiation and (2) the readiness, willingness, and ability to perform at relevant times. *DiGiuseppe v. Lawler*, 269 S.W.3d 588, 593-94, 601 (Tex.2008); *see also 17090 Parkway, Ltd. v. McDavid*, 80 S.W.3d 252, 258 (Tex.App.-Dallas 2002, pet. denied).

Appellants only challenge as to whether Horvitz met these requirements is to assert that because his affidavit is dated June 16, 2006, it does not establish he was ready, willing, and able to perform at the time of the summary-judgment hearing in March 2009. The contract was entered into in February 2006 and was to be performed in March 2006. Appellants cite no authority for their position that the “relevant time” was the date of the summary-judgment hearing rather than when the contract was to be performed. *See Tex. R. App. P.38.1(i)*. Accordingly, appellants have not shown the trial court erred in finding Horvitz was entitled to specific performance. Accordingly, we overrule appellants’ first issue.

In their second issue, appellants claim the trial court erred in denying JME’s motion for summary judgment because JME proved it owns an undivided one-half interest in the property. JME relies upon the fact that it paid part of the purchase price for the property. However, Randy Williams stated in his affidavit that Blue Moon and JME purchased the property pursuant to an unwritten joint-venture agreement. According to Williams’ affidavit, it was their custom and course of dealing for either party to sell property jointly purchased without consent of the other party. JME fails to refer this court to any evidence controverting Williams’ affidavit that Blue Moon had full authority, regardless of whether JME contributed funds to the purchase, to contract to sell the property. *See Tex. R. App. P. 38.1(i)*. Accordingly, JME has not demonstrated on appeal that the trial court erred in failing to find as a matter of law JME owns an undivided one-half interest in the property. Issue two is overruled.

JME also claims Horvitz was not entitled to cancellation of the notice of lis pendens because its trespass-to-try-title action against Blue Moon has yet to be decided. However,

in its brief JME concedes that the trial court's final judgment disposed of its claim of an undivided one-half interest in the property. JME fails to explain how its title action survives when it has no interest in the property. We find this argument to be without merit.

JME further asserts the trial court erred in ordering specific performance without requiring Horvitz to satisfy the terms of the contract. In its judgment, the trial court orders Blue Moon to convey the property as set forth in the contract. The judgment does not alleviate Horvitz's duty to also perform as set forth in the contract.

II

In his cross-appeal, Horvitz complains only that the trial court erred in failing to award him attorney fees. Appellees concede that “[u]nder the terms of the contract between Horvitz and Blue Moon, the prevailing party is entitled to recover attorney fees.” Further, appellees do not dispute that Horvitz was the prevailing party under the trial court's judgment. Having found no error in the trial court's judgment, we sustain Horvitz's sole issue and hold the trial court erred in failing to award attorneys' fees. Accordingly we reverse the trial court's judgment in part, and remand the attorney's-fees claim to the trial court for further proceedings. In all other respects, the judgment of the trial court is affirmed.

/s/ Jeffrey V. Brown
Justice

Panel consists of Justices Brown, Sullivan, and Christopher.