IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

ELIJAH M. WORD A/K/A GEORGE M. WORD, Plaintiff, v. BERNARD JOHNSON, Defendant.	))))))))))	C.A. No. 1004-N

MEMORANDUM OPINION

Submitted: October 12, 2005
Decided: October 28, 2005

Elijah M. Word, Newark, Delaware, *Pro Se Plaintiff.*

Stephen L. Nowak, Esquire, Smyrna, Delaware, *Attorney for the Defendant.*

LAMB, Vice Chancellor.

I.

In 2001, two men who were long acquainted with one another signed a contract purportedly relating to the purchase and sale of certain real property located in Newark, Delaware. The contract called for the party identified as the purchaser to make all monthly mortgage and utility payments on the property and further obligated him to pay off the mortgage within five years. The contract does not contain any express terms relating to conveyance of title. The purchaser and his family immediately began occupying the premises.

The party identified in the contract as the seller later became dissatisfied with the deal and initiated a series of actions to terminate the contract and remove the purchaser from the premises, including a number of letters from lawyers representing him threatening various actions, as well as three separate ejectment actions filed in the Justice of the Peace Court. To resolve this dispute, the purchaser filed an action in this court seeking an order of specific performance requiring the seller to appear at a closing of a refinanced mortgage and to convey legal title to the property.

Trial was held on October 5, 2005. This is the court's posttrial decision.

II.

On December 21, 2001, Bernard Johnson and George Word entered into a one-page written agreement purporting to sell Johnson's town home at 5 Ross Court, Newark, Delaware to Word for $69,495.00, a sum equal to the mortgage covering the property. The document was signed by Johnson as "Seller" and by Word as "Buyer" and was acknowledged by a notary public. By the terms of the document, Word agreed to pay the mortgage "each month beginning on January 1, 2002 and continuing until January 1, 2007." Word also undertook to either "refinance Mortgage or satisfy Mortgage" "[b]efore or at the end of the 60-month period." More or less contemporaneously with the execution of the contract, Word moved into the 5 Ross Court property with his family and has lived there since.

Word paid Johnson's mortgage payments in full until June 2005, although 19 out of 24 of those payments were late.[1] Word also attempted to fulfill his obligation to refinance the property in December 2004. Johnson refused to attend closing of the transaction, citing Word's alleged default.[2] At or about June 2005, Johnson placed a password on the mortgage company's electronic payment system, thus interfering with Word's customary method of making mortgage payments. Word did not, thereafter, take steps to make mortgage payments by some other

[1] Def.'s Ex. 2. Evidently, Word also paid any late fees assessed by the mortgage company during this time.
[2] Pl.'s Ex. 11.

means, such as simply mailing checks to the mortgage company. Word also has not made full or timely payment of the condominium fees required of those who live at the Brandywine Valley Properties, where 5 Ross Court is located. As of July 16, 2005, these fees were $1,643.74 in arrears.[3]

From these basic undisputed facts, the parties' understanding of events diverges dramatically. In Word's view, the contract is an agreement to sell the subject property to him that he has performed in all material respects. His tardy payment of the mortgage is inconsequential, he argues, since no default provision was included in the contract. Word testified that he now stands ready, willing, and able to satisfy Johnson's loan.[4] He therefore asks the court for specific performance of what he believes to be Johnson's obligation to appear at closing and convey legal title.[5]

Johnson's interpretation of the contract is markedly different. In court, most dramatically, Johnson argued that he did not even understand the agreement as a sale contract, rather viewing the deal as a rental agreement granting him an option

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[3] Def.'s Ex. 3.

[4] In addition to his sworn testimony, Word has submitted the first page of a mortgage loan pre-approval in support of his claim to be prepared to satisfy Johnson's mortgage. Pl.'s Ex. 15.

[5] Word also makes an ill defined claim of harassment against the defendant, arguing that Johnson's apparently vigorous efforts to get Word to pay the mortgage constitute a legally cognizable injury. Word's allegations of harassment simply do not state a cause of action. Johnson obviously had a right to talk to Word about the debt that Word indisputably owed. None of the evidence produced at trial suggests that Johnson did anything more than anyone is legally permitted to do in pursuit of his rights, and certainly do not allege a legally cognizable harm.

to sell the property to Word within the five-year period.[6] In his posttrial brief, however, Johnson concedes that the December 21 agreement was a sale contract, but argues that Word forfeited his right to purchase the property by his recent failures to make payment on Johnson's mortgage, and by his repeated late payments previously. Johnson further argues that Word's failure to pay the condominium fees breaches paragraph 4 of the agreement, which states, "Buyer shall pay all utilities on property from January 1, 2002, going forward." As a result, the defendant asks the court to deny the plaintiff's motion for specific performance, and to grant possession of the property to the defendant.

III.

The issue in this case is one of contract interpretation. The parties have varying explanations of the rights and duties arising out of this agreement–creating a need to survey the law governing the transfer of mortgaged real property.

The general rule governing the somewhat tangled situation presented in this case is that a mortgagor (here, Johnson) may always sell his interest in the mortgaged property, even without the consent of the mortgagee (i.e., the lender). Once this sale has taken place, the mortgagor "loses all control" over the

[6] Two letters were sent during 2003 informing Word that his "rent" was overdue. Pl.'s Ex. 6 ("Your rent is past due in the amount of $650.55, plus $52.04 in late fees representing non-payment of your rent."); Pl.'s Ex. 7 ("At this time please be advised that Mr. Johnson is terminating your landlord/tenant agreement 60 days from today's date.").

mortgaged property, and is thereafter treated as a "mere stranger" to the premises.[7] But by selling the mortgaged premises, the mortgagor does not relieve himself from personal liability on the mortgage or the underlying note.[8] Rather, if the grantee (here, Word) has agreed to assume the mortgage, the mortgagor then stands as surety to the grantee's primary obligation. Although in the absence of express language it is sometimes difficult to determine whether the grantee has assumed the mortgage or taken subject to it, the general rule is that a contract is read as assuming the mortgage when the grantee promises to pay the mortgagor's obligation to the mortgagee.

Both the seller (mortgagor) and the purchaser (grantee) have remedies available to enforce the other's promise. For example, where the grantee fails to pay the mortgage under the sale agreement, or has breached the agreement by late payment when the agreement so provides,[9] the mortgagor has a choice of possible remedies. He may, for example, sue for damages caused by the nonpayment of the mortgage debt.[10] He also may pay the debt to the mortgagee, and then foreclose against the grantee as an assignee of the mortgagee.[11] Finally, the mortgagor may bring suit in equity to compel the transferee to perform the obligation he

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[7] 59 C.J.S. *Mortgages* § 384.
[8] *Id.* at § 385.
[9] *Id.* at § 412.
[10] *Id.*
[11] *Id.*

assumed.[12] One remedy that is not available for the mortgagor in such a case, however, is ejectment. Once a sale contract has been entered into, the mortgagor is simply no longer the equitable holder of the property.

Similarly, the grantee has rights to enforce a sale contract transferring mortgaged property. At equity, this remedy is specific performance. To grant specific performance, there must be proof of a valid contract to purchase real property and proof that the plaintiff was ready, willing, and able to perform his contractual obligations.[13] In addition, the court must determine whether the balance of equities tips in favor of specific performance.[14]

In sum, both the seller and the purchaser in a transfer of mortgaged property have remedies at common law and equity independent of those established by the express terms of their contract. As a result, the court need not imply provisions defining a default where they do not exist: the common law has provided background provisions that come into effect in the absence of private contracting otherwise.

IV.

The defendant claims that the December 21, 2001 agreement represents a landlord/tenant agreement. This argument is flatly incompatible with the plain text

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[12] RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES) §5.1 (1997).
[13] *Bryan v. Moore,* 863 A.2d 258, 260 (Del. Ch. 2004); *Peden v. Gray*, 2005 Del. LEXIS 389, *9.
[14] *Morabito v. Harris,* 2002 Del. Ch. LEXIS 27, *5-6.

of the contract. The preamble unambiguously denominates Word as "Buyer" and Johnson as "Seller," and then explains that "Buyer wishes to purchase 5 Ross Court . . . from Seller." Furthermore, Johnson signed the document before a notary public under the designation "Seller." There is nothing in the simple, one-page agreement, therefore, that could have misled Johnson into believing that he was merely leasing the property to the plaintiff.

To the extent there is any lingering ambiguity in the writing, the evidence presented at trial amply explains what the parties had in mind. Johnson regarded the property as a financial burden with little or no equity value and was considering allowing it to go to foreclosure. Word wanted to buy the house, but was unable or unwilling to immediately produce the considerable sum needed to satisfy the mortgage. The deal as presented met both parties' needs by relieving Johnson of the obligation to pay the mortgage and the utilities on the property while giving Word time to secure financing. The contract thus represents an entirely understandable solution to a common problem.

The remaining questions, then, are threefold. First, did Word assume Johnson's mortgage responsibilities; second, did Word violate the terms of the assumption agreement; and third, if Word did satisfy his agreement with Johnson, is he now entitled to specific performance to compel Johnson to come to closing for the purpose of satisfying the old mortgage and transferring legal title to Word?

As to the first question, the agreement itself does not expressly indicate whether the plaintiff was meant to take subject to the mortgage, or whether he was committing to an assumption. But it is clear from the evidence adduced at trial that the parties meant for Word to assume the mortgage. By the plain text of the agreement, Word promised to make the monthly mortgage payments before seeking a novation from the lender or attempting to satisfy the loan. This type of commitment has long been thought to imply an assumption of the mortgage debt by the purchaser.[15] Had Word meant to take 5 Ross Court subject to the mortgage, furthermore, the sale agreement would likely have evidenced some intention to deduct the balance of the mortgage from the purchase money stated in the agreement.[16] Finally, if Word had failed to complete the agreement within five years, Johnson would have been justified in bringing an action to compel the plaintiff to satisfy his mortgage, or to pay damages.

Having assumed the mortgage, Word was obligated to pay according to its terms. Word failed to do so, repeatedly sending late payments to the mortgage lender. If the assumption agreement had contained some provision specifying that late payments constituted a default, then Johnson would have been able to immediately bring an action seeking a remedy for Word's breach. But the

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[15] 59 C.J.S. § 400 (b).

[16] *McCrery v. Nivin,* 38 Del. Ch. 92, 93-94 (Del. Ch. 1907).

assumption agreement is silent on this subject, and the court cannot imply any agreement between Johnson and Word that a mere late payment was to be treated as a material breach of the contract. Indeed, Johnson offered no proof that Word's habitually late payments ever amounted to a default under the terms of the mortgage. On the contrary, it appears from DX 2, which is a summary of activity in the mortgage account, that Word's late payments subjected him to late fees but never caused a default on the mortgage.

The defendant further argues that Word defaulted on the assumption agreement by failing to pay the condominium fees he was required to pay upon taking residence. Johnson is wrong, however, to say that a contract provision requiring Word to pay utilities also requires Word to pay the condominium fees. Although there is no Delaware case directly holding that the word "utilities" excludes condominium fees, there is ample authority demonstrating that the two words means different and distinct things. First, the Delaware Unit Property Act, which governs the organization of condominium communities,[17] makes clear that utilities are merely a *kind* of "common element" which is to be paid for by the residents of a community.[18] This court tacitly confirmed the point in *Alexander v. Petrey,* where a purchaser's obligations pursuant to a land sale agreement is

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[17] *Council of Dorset Condo. Apts. v. Gordon*, 801 A.2d 1, 3-4 (Del. 2002).
[18] 25 *Del. C.* § 2202.

described as including duties to "pay the mortgage, to pay the condominium fees, and to pay for utilities."[19] And in *Cloud v. Cloud,* the Family Court noted that one of the parties had "not seen fit to require a similar sharing of the other household expenses, such as the mortgage, condominium fees, utilities, and household items . . . ."[20] This is not to say that Word was relieved of his obligation to pay the condominium fees. They are an incident of ownership and constitute a lien against the property. But Word's failure to pay these fees cannot constitute a default of an assumption agreement that specifies only his obligation to pay utilities.

Word's failure to make any mortgage payments since June 2005 would certainly be a default of his express obligation under the agreement if it had occurred before Word attempted to satisfy Johnson's mortgage in December 2004. At that time, Johnson committed a material breach of the agreement by refusing to appear at closing. It is a basic tenet of contract law that a party is excused from performance under a contract if the other party is in material breach thereof.[21] Thus, Word's later failure to pay the mortgage, while he pursued this action, is not a breach of contract.

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[19] 2005 Del. Ch. LEXIS 84, *1.
[20] 1993 Del. Fam. Ct. LEXIS 123, *22.
[21] RESTATEMENT (SECOND) OF CONTRACTS, § 237 (1981); *Biolife Solutions, Inc. v. Endocare, Inc.*, 838 A.2d 268, 278 (Del. Ch. 2003).

Word, therefore, has shown the existence of a valid sale contract for land, satisfying the first prong of the test for specific performance. Word has further established through his testimony that he is ready, willing, and able to appear at closing and satisfy his duty to refinance or satisfy Johnson's mortgage. No consideration of equity tips the scales in Johnson's favor: Johnson will suffer no special hardship by being forced to fulfill a sale agreement he freely entered into for a property in which he no longer lives. Word is therefore entitled to specific performance of the agreement.

V.

For the reasons stated above, the plaintiff's motion for summary judgment is GRANTED IN PART, and DENIED IN PART. The parties are directed to present a form of order implementing this ruling on or before November 14, 2005, which order shall provide for a prompt closing on the proposed refinancing at which closing the defendant Bernard Johnson shall deliver a deed conveying title of the same kind and quality as was conveyed to him by his grantor in exchange for a satisfaction of the existing mortgage against the subject property and a discharge of the underlying note.