

IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

FREDERICK W. ALLEN, JR. : C.A.#02-12-170
ELIZABETH R. ALLEN :
Plaintiff below/Appellant :

v. : Submitted: February 13, 2004
Decided: June 22, 2004

TERESA ROCK & LONG AND FOSTER :
REAL ESTATE INC. :
Defendant below/Appellee :

Richard E. Berl, Esquire, attorney for Plaintiff/Appellant.
Michael J. Goodrick, Esquire, attorney for Defendant/Appellee.

DECISION AFTER TRIAL

Plaintiffs Frederick W. Allen and Elizabeth R. Allen (Buyers) brought action against Defendant's Long & Foster, Inc. and Teresa Rock (Seller) for the return of deposit monies made pursuant to a contract for the sale of real property. The action was transferred to this Court, from Chancery Court per stipulation by the parties, approved by Chancery Court on October 24, 2002. Pursuant to the stipulation, Defendant, Long & Foster, Inc. was dismissed, from the action when the deposit monies in question were placed in escrow pending the outcome of the action in the Court of Common Pleas.

Buyers claim that they are entitled to have their deposit monies returned as they complied with their contractual obligation to use their best efforts to diligently pursue a financial commitment from Prosperity Mortgage (Prosperity). Seller claims entitlement to the deposit monies alleging that Buyers inability to secure financing was due to their

unreasonable delay and failure to cooperate with the financing application process.

The Court must decide based on the facts of the case whether Buyer's have shown by a preponderance of the evidence whether their actions constituted "their best effort" to obtain financing.

FACTS

Many of the facts of this case are in dispute. Clearly, the parties entered into a written contract for the sale of a condominium located in Millsboro, Delaware, on December 20, 2001 and tendered a \$5000.00 deposit. This contract was prepared by Seller's agent, Long & Foster, Inc. The provisions of the contract at issue here detail the Buyers' obligation to apply for financing and their obligation to use their best efforts to obtain financing by January 15, 2002. Specifically, paragraph eight reads:

FINANCING APPLICATION AND COMMITMENT: Buyer(s) agree(s) to make written application for the financing as herein described within FIVE (5) days from the date of Contract acceptance, and agree to use their best efforts to obtain financing and promptly file any supplemental information or paper later requested by the lender. If a written commitment for financing as set out above cannot be obtained by Buyer(s) on or before JANUARY 15, 2002, either Buyer(s) or Seller(s) may declare this Contract of Sale null and void and of no further legal effect. If Buyer(s) has complied with all obligations under this Contract, including those with respect to applying for financing and seeking to obtain financing, then all parties agree that the deposit monies shall be returned to the Buyer(s) in

accordance with the terms of paragraph #14 of this Contract. Buyer(s) will immediately deliver to all parties a copy of any financing approval or denial. If Buyer(s) claim the financing was denied, failure to produce a denial letter shall be a default by the Buyer(s).

Paragraph fourteen of the Contract outlines the remedies available to Seller in the event the Buyers default in their obligation to obtain financing and states:

DEFAULT/REMEDIES: Should the Buyer(s) fail to make payments and/or settlement as specified above, or knowingly furnish false or incomplete information to Seller(s), Agent(s) or the lender concerning Buyer(s) legal or financial status, or fail to cooperate in the processing of the mortgage loan application, or violate or fail to perform any of the terms or conditions of the Contract, then Seller(s) shall have the right and option to declare this Contract null and void and to retain and deposit money as liquidated damages for such default by Buyer(s), or to exercise any legal or equitable right or remedy to which Seller(s) may be entitled and, in connection therewith, to apply any deposit money either on account of the purchase price or on account of damages, as Seller(s) may elect. Formal tender of deed and tender of purchase money are waived. In the event of default by Buyer(s), the Seller(s) shall allow the Agent one-half of the deposit, but not more than the brokerage fee as compensation for professional services.

The Contract specifically states that time is of the essence and that failure of the Buyer's to obtain a commitment for financing by January 15, 2002, will render the contract null and void at the election of either party. If Buyer used their best efforts to obtain financing the deposit is to be returned.

The parties are in agreement that Buyer contacted Prosperity Mortgage on December 19, 2001 prior to the contract date to initiate the financing application process. Prosperity Mortgage is a subsidiary of Seller's Agent Long & Foster, Inc., and Buyers were referred to Prosperity by Long & Foster. Written loan application documents were prepared by a Prosperity loan officer on December 19, 2001 and Buyers supplied all information requested by Prosperity at that time. A credit approval was generated by the loan officer based on extensive financial information provided by Buyers on December 19, 2001, and her signature on the General Loan Acknowledgment (Exhibit I) supports this.

Buyers advised Prosperity that they would be out of town for the Christmas Holidays until 12/26/01. Upon Buyers return on 12/27/01, a flurry of activity occurred regarding the sale and the financing. As examples, the closing costs were negotiated down with both Seller and Prosperity (Exhibit C, D, I), the date of settlement was extended (Exhibit C), a home inspection was completed and a second deposit of \$14, 990.00 was paid on the contract (Exhibit J). Seller approved of the credits and modifications on January 3, 2002. (Exhibit C& D).

On January 5, 2002, Buyer Mr. Allen was hospitalized in Wilmington, due to serious health problems. Mrs. Allen called Long & Foster and Prosperity to advise them of the situation and potential delay. Mr. Allen was released from the hospital on January 9, 2002 and the Buyers returned to Sussex County on January 10, 2002. Buyer, Mrs. Allen, called Prosperity on January 9, 2002 to schedule an appointment with the loan officer on January 15, 2002. Buyer claims she met with the loan officer on January 15, 2002, and was advised at that time that due to Mr. Allen's health and uncertain employment, the loan would be denied. Prosperity denies this

meeting ever took place but acknowledges they somehow relayed to Buyer that a denial seemed certain based on the loss of Buyer's income.

On January 16, 2002 Buyer met with Seller's Agent at Long & Foster and advised him of the financing situation. Seller's Agent advised Buyer to send written notice that they needed an extension to obtain financing until February 1, 2002. Buyer alleges that Long & Foster assured her the deposit would be returned.

On January 17, 2002, Mrs. Allen met with Prosperity and signed Loan Application documents. On January 18, 2002, Buyer informed Long & Foster by letter that they didn't qualify for the loan and requested their deposit back.

On January 25, 2002, the Loan officer sent the file to Prosperity's Mortgage Specialist requesting a denial letter. According to the loan officer's testimony, both the Mortgage Specialist and an Underwriter reviewed the application and did not want to approve the loan. To the surprise of all, a second Underwriter reviewed the file and approved the loan on February 15, 2002, with conditions that had to be met before settlement.

The Court acknowledges that many of the facts above go beyond the pivotal date of January 15, 2002, when financing was to have been obtained. However, the business practices of Prosperity as they evolved after January 15, 2002, are necessary to explain some of the findings of fact required for disposition of the matter at hand.

ANALYSIS

Under Delaware Contract law parties are obligated to act in good faith in their performance of contractual obligations. *Rehoboth Beach Realty, Inc. v. Brittingham Enterprises, Inc.*, 1992 WL 207262 (Del. Super.). A breach

of duty to act in good faith may be evidenced by both overt conduct or inaction. Restatement (Second) Contracts §205 (1981). In the contract before the Court this duty is expressed through the contractual language that Buyers “use their best efforts” to obtain financing. Whether parties’ actions constitute good faith in the performance of their duties under a contract is a factual issue. *Smith v. Thomas*, 2001 WL 1729143 (Del. Super.).

Sellers claim that Buyer’s inaction and delay in the loan application process constituted bad faith under the contract. Specifically, Sellers claim that Buyers didn’t formally apply for a mortgage until after the January 15, 2002 deadline to obtain financing and also failed to provide a denial letter regarding financing. Sellers claim that Buyers failed to cooperate with Prosperity and were therefore in default of the contract justifying Sellers retention of the \$19,990.00 deposit as liquidated damages.

Buyers claim that they used good faith and their best efforts to obtain financing from Prosperity. Buyers allege that their actions up to and through the unexpected hospitalization of Mr. Allen clearly show good faith to fulfill their contractual obligations.

Upon consideration of the testimony presented and the credibility of the witnesses this Court finds that Buyers did use their best efforts and good faith in the performance of their duties under the contract. In support of this legal conclusion, the Court’s factual findings are that Buyers contacted Prosperity to obtain financing the day before the contract was signed. The loan officer testified that she took the loan application over the phone on December 19, 2001 and ran a credit check on Buyer at that time. The loan officer testified that she received all information she needed at that time to process the application. Prosperity claims that the loan application was mailed to Buyer on December 19, 2001 under cover letter requesting

signature on the application of both Buyers and financial and employment documents. The General Loan Acknowledgement (Exhibit I) contains a certification by the loan officer that the documents were mailed to Buyers, purportedly at their residence.

Prosperity's loan officer prepared a "time line" of the events at the direction of her manager on February 13, 2003. The loan officer used this time line and Prosperity's file (Exhibit M) extensively to refresh her recollection. Contrary to her in Court testimony, the time line reveals that the loan application and mortgage credit approval were not sent to Buyer, but were sent to Prosperity's Rehoboth Office for pick up. There was no testimony that Buyers were aware of these documents or their necessity for loan approval. Buyers' testimony was that she supplied everything requested when it was requested. Prosperity's loan officer acknowledges that she received all information requested from Sellers, but that she could not remember when.

The numerous events that took place between December 27, 2001 and Buyer Mr. Allen's hospitalization confirms that Buyers were diligently pursuing their contractual commitments. Negotiations on closing dates, home inspections and closing costs all took place at this time. Most significantly, a \$14,990.00 payment was tendered by Buyer on the contract, which undermines Seller's assertion that Buyers were delaying the financing process in bad faith. In fact, the financing process did not "slow down" until Buyer's heart condition resulted in a lengthy hospital stay out of county. Even during this period of time, Buyer was in frequent contact with both Long & Foster and Prosperity advising them of the situation. Due to Buyer's health and follow-up medical care after being discharged from the hospital, Buyer was unable to meet with Prosperity until either January 15 or 16,

2002, which was the deadline for obtaining a written commitment for financing.

At the January 15, 2002 meeting with Prosperity, Buyer advised the loan officer that due to Mr. Allen's health, he would not be able to return to work for a minimum of four to six weeks and that there was a good possibility that he would be out of work permanently. Prosperity advised Buyer that due to a \$20,000.00 decrease in income, their loan request would be denied.

Buyer advised Long & Foster of the events in a phone conversation on January 16, 2002. Buyer claims that Long & Foster advised her to send a letter requesting an extension of the January 15, 2002 financing commitment deadline to February 1, 2002, which she did. While Buyer questioned why they would seek an extension since Prosperity was denying their loan, Buyer testified that Long & Foster advised her to do so in order to obtain a denial from Prosperity. Long & Foster agent Hudson's testimony that he did not advise Buyer in this manner is not credible. Agent Hudson could not remember if he forwarded the extension request to Seller, but Seller testified she never received it. In short, the Seller did not agree to the extension of time for Buyers to obtain financing beyond the contract date of January 15, 2002.

On January 18, 2002 Buyers by letter to Long & Foster notified Sellers that they could not obtain financing, declared the contract null and void and requested the return of their deposit. After January 18, 2002 Buyers diligently pursued trying to obtain a denial letter from Prosperity, as the contract required them to "immediately" deliver the denial of financing to Seller.

Buyer's inability to produce a denial letter from Prosperity cannot be attributable to them. Prosperity's loan officer, mortgage specialist and first underwriter all recommended loan denial. It was not until February 15, 2002 that Prosperity's second underwriter purportedly approved the loan. It is questionable whether Prosperity's letter of February 15, 2002 is a commitment as it was unsigned and included a laundry list of conditions to receive "approval" (Exhibit H). The record is silent as to what occurred between Buyer and Prosperity after that except to note that Buyer formally withdrew their application on May 29, 2002. In the end, Buyers found themselves unable to obtain either a formal commitment for financing or a formal denial from Prosperity by January 15, 2002.

The terms of this contract state that time is of the essence. The parties clearly intended that a financing commitment was to be obtained by January 15, 2002. (See *Silver Properties L.L.C. vs. McGee*, 2000 WL 567870 (Del. Ch.). Despite Buyer's offer to modify the contract by extending the commitment date, Seller did not agree to this modification. Buyers were entitled by the contract to declare it null and void, at that time. Buyers have shown by a preponderance of the evidence that their actions throughout this unfortunate transaction were performed in good faith. Under the terms of the contract they are entitled to a return of their deposit monies.

CONCLUSION

Judgment is entered in favor of Plaintiffs in the amount of \$19,990.00 with interest from January 18, 2002 at the legal rate.

SO ORDERED this _____ day of June, 2004

Judge Rosemary B. Beauregard

