DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
*July Term 2009*

**HOME DEVCO/TIVOLI ISLES LLC,** a Florida Limited Liability Company,
Appellant,

v.

**DONNA SILVER,**
Appellee.

No. 4D08-3500

[ September 23, 2009 ]

TAYLOR, J.

The developer appeals from a final judgment, asserting that it was exempt from provisions of the Interstate Land Sales Full Disclosure Act (ILSA), 15 U.S.C. § 1701 et seq., because it was obligated to complete construction of the residence within two years of the real estate sales contract. Because the two-year completion provision in the contract was illusory, the developer was not exempt from the ISLA disclosure requirements. We thus affirm the final summary judgment, which rescinded the sales contract and required return of the buyer's deposit.

The buyer, Donna Silver, sued the developer, Home Devco/Tivoli Isles LLC (Home Devco), to rescind a contract for the sale of real property. The buyer alleged that the developer violated ILSA by failing to deliver a copy of the property report to her before she signed the purchase contract. She alleged that she timely notified the developer that she wanted rescission of the transaction and return of her $50,990.00 deposit. In response, the developer conceded that it did not provide the buyer with a property report but contended that it was exempt from ILSA requirements because the purchase and sale agreement expressly provided for completion of construction within twenty-four months.

The trial court granted the buyer's motion for summary judgment, finding that the contract did not contain an unconditional commitment to complete construction within twenty-four months and that the developer was therefore not exempt from ILSA requirements. The trial

court rescinded the contract and ordered refund of the $50,990 deposit, plus prejudgment interest and court costs.

The issue on appeal is whether the sales contract contained an unconditional commitment by the developer to complete construction of the residence within two years so as to exempt the developer from ILSA requirements to provide a property report to the purchaser. Paragraph 13 of the agreement contains the language pertinent to this issue. It states:

> Notwithstanding the foregoing or any other provision contained in this Agreement, the Seller agrees that it is unconditionally obligated to complete and to deliver the Residence to buyer no later than twenty-four (24) months from the date of the execution of this Agreement, however, said twenty-four (24) month period shall be extended by any time lost to Seller as a result of delays caused by *acts of God, acts of governmental authority, flood, hurricane, strikes, labor conditions beyond Seller's control, or any other similar causes not within Seller's control.*

(emphasis added).

Congress passed ILSA in 1968 to protect purchasers against unscrupulous sales of undeveloped home sites, frequently involving out-of-state sales of land purportedly suitable for development but actually under water or useful only for grazing. *Winter v. Hollingsworth Props.*, 777 F.2d 1444, 1447 (11th Cir. 1985). Among other things, ILSA makes it unlawful to sell or lease non-exempt lots without furnishing the purchaser or lessee with a printed property report meeting statutory standards in advance of the signing of the contract to purchase or lease the property. 15 U.S.C. § 1703 (a)(1)(B). Failure to provide the report as required permits the buyer or lessee to revoke the contract at any time within two years of the date of signing the contract. 15 U.S.C. § 1703 (c). In the event of revocation, the buyer or lessee is entitled to refund of any deposits paid. 15 U.S.C. § 1703(e).

ILSA provides an exemption for "the sale or lease of land under a contract obligating the seller or lessor to erect such a building thereon within a period of two years." 15 U.S.C. § 1702(a)(2). Entitlement to this "two-year" exemption is the crux of this appeal.

On March 27, 1996, the Department of Housing and Urban Development (HUD) issued new guidelines which attempted to better define the "two-year exemption." It stated, in pertinent part:

> Contract provisions which allow for non-performance or for delays of construction completion beyond the two-year period are acceptable *if such provisions are legally recognized as defenses to contract actions in the jurisdiction where the building is being erected.* For example, provisions to allow time extensions for events or occurrences such as acts of God, casualty losses or material shortages are generally permissible…
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> Although the factual circumstances upon which nonperformance or a delay in performance is based may vary from transaction to transaction, *as a general rule delay or nonperformance must be based on grounds cognizable in contract law such as impossibility or frustration and on events which are beyond the seller's reasonable control.*

Guidelines for Exemptions Available Under the Interstate Land Sales Full Disclosure Act, 61 Fed. Reg. 13596 (Mar. 27, 1996) (emphasis added).

The developer relies on the above emphasized clause of the guidelines to argue that it based its contractual exceptions to the two-year completion requirement only on reasons which were beyond its control. However, the contract contained overbroad, catch-all language which sought an exception for *any* matters beyond its control, many of which would not necessarily rise to contract defenses under Florida law. The majority view appears to be that by seeking such a broad exception to the "two-year rule" the developer loses its exemption.

ILSA is interpreted under federal law. *Pilato v. The Edge Investors, L.P.*, 609 F. Supp. 2d 1301, 1307 (S.D. Fla. 2009). However, whether a contract "obligates" a seller to erect a building within two years is a question of state contract law. *Id.* Before issuance of the current HUD guidelines, the Florida Supreme Court decided *Samara Development Corp. v. Marlow*, 556 So. 2d 1097 (Fla. 1990). The court relied, in part, on prior HUD guidelines issued in 1979 and 1984. It explained that the "administrative interpretations of a statute by the agency required to enforce that statute are entitled to great weight." *Id.* at 1099. It also stated that because ILSA was intended to protect the public and the subject provision was in the nature of an exception, it should be liberally construed in favor of the public, that is, narrowly construed against the

exception. *Id.* at 1100. The court also stated that to be exempt from ILSA "the contract must *unconditionally* obligate the developer to complete construction within two years and must not limit the purchaser's remedies of specific performance or damages." *Id.* at 1098 (emphasis added). However, since the issuance of the new HUD guidelines, federal courts have disagreed with the suggestion in *Samara* that performance must be unconditional for the exemption to apply. *See e.g., Stein v. Paradigm Mirsol, LLC*, 551 F. Supp. 2d 1323, 1329 (M.D. Fla. 2008).

Recently, we ruled in favor of a developer despite conditional language in the agreement. *See Mailloux v. Briella Townhomes, LLC*, 3 So. 3d 394 (Fla. 4th DCA 2009). In *Mailloux,* we relied on the current HUD guidelines cited above. Although the opinion does not quote the language of the contract at issue, it appears from the opinion and our own files that the contractual language in that case was much narrower than the language at bar, confining its conditional language to acts of God, impossibility of performance, and frustration of purpose as grounds for extending the two-year time-frame. This court pointed out that these were well-recognized defenses to non-performance of a contract under Florida law and thus did not render the two year time-frame for performance "illusory." *Id.* at 396. This case is distinguishable because our contractual language includes virtually *anything* causing delay beyond the developer's control, which would seemingly include many occurrences which would go beyond recognized contractual defenses under Florida law.

The fifth district recently addressed the issue of the proper standard to apply in ascertaining the validity of a two-year completion clause in an ILSA contract. *See Plaza Court, L.P. v. Baker-Chaput*, ___ So. 3d ___, 34 Fla. L. Weekly D1305, 2009 WL 1809921 (Fla. 5th DCA June 26, 2009). There, the court agreed with federal district decisions that the test is whether the contractual provisions are recognized under Florida's doctrine of impossibility of performance. *Id.* at *7-8 (citing *Jankus v. Edge Investors, L.P.,* 609 F. Supp. 2d 1328 (S.D. Fla. 2009)). Under that test, the contractual provision at bar fails.

Among the many recent federal decisions in Florida on this subject, there appears to be wide agreement that a developer may place some conditions on an obligation to build yet still qualify for the statutory exemption. *See, e.g., Pilato*, 609 So. 2d at 1307-08 (and cases cited therein). The question is how broad can those conditions be before they render the two-year obligation to build "illusory."

In *Stein*, the closest case to ours factually, the court framed the issue as whether the clause "so undermines the two-year requirement that it renders the provision illusory." *Stein*, 551 F. Supp. 2d at 1330. In finding the provision illusory, the court addressed issues at the heart of the current appeal:

> The provision in the Agreement provides that the two year period is extended "for any delay caused by acts of God, weather conditions, restrictions imposed by any governmental agency, labor strikes, material shortages or other delays beyond the control of the Seller ... ." Not all of these delay exclusions render the completion time illusory. For example, delay for acts of God has a well established and limited definition that does not render the Agreement illusory. The other exclusions, however, are broad enough to seriously undermine the obligation to complete the condominium within two years. This provision does not limit the permissible delays to those justifiable under an impossibility of performance, but allows exclusions for far less compelling reasons, culminating in the catchall "other delays beyond the control of the Seller."
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> ...
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> In the Agreement in this case, none of the exclusions are required to satisfy impossibility standards, and the catchall "other delays beyond the control of the Seller" is certainly broad enough to allow the Seller to excuse completion on a wide variety of events. The Court concludes that the provision in the Agreement extending the completion period for delays not qualifying under Florida's impossibility of performance principles renders the obligation to complete the condominium within two years illusory. Therefore the Agreement is not exempt from the ILSFDA because it does not "obligate" completion of the condominium within two years.

*Id.* at 1330 (footnotes omitted); *see also Harvey v. Lake Buena Vista Resort LLC*, 568 F. Supp. 2d 1354 (M.D. Fla. 2008) (following *Stein* despite a clause even narrower than the one in the present case).

By contrast, in *Pilato,* the federal district court for the Southern District of Florida ruled for the developer. But in that case, by its terms, the contractual exception was only for "delays caused by matter which are legally recognized as defenses to contract actions" in this state. Two different judges also sitting in the Southern District of Florida reached

the same result as to the same contract language in *Stefan v. Singer Island Condominiums Ltd.,* 2009 WL 426291 (S.D. Fla. 2009) and *Gentry v. Harborage Cottages-Stuart, LLP*, 602 F. Supp. 2d 1239 (S.D. Fla. 2009); *see also Maguire v. S. Homes of Palm Beach, L.L.C.*, 591 F. Supp.2d 1263 (S.D. Fla. 2008); *Rondini v. Evernia Props., LLLP*, 2008 WL 793512 (S.D. Fla. Feb. 13, 2008); *Kamel v. Kenco/The Oaks at Boca Raton*, LP, 2008 WL 2245831 (S.D. Fla. May 29, 2008), *affirmed,* 321 Fed. Appx. 807 (11th Cir. 2008), *but see Disimone v. LDG S. II, LLC*, 2009 WL 210711(M.D. Fla. Jan. 28, 2009); *Van Hook v. Residences at Coconut Point LLC*, 2008 WL 2740331 (M. D. Fla. 2008).[1] However, the language in these cases is significantly different than the contract language at bar.

The best case for the developer is *Caswell v. Antilles Vero Beach, LLC*, 2008 WL 4279555 (S.D. Fla. 2008). There, Judge Middlebrooks was presented with a contract provision similar to the one at bar. It provided that construction had to be completed within 24 months:

> … subject, however, to delays resulting from Seller's implementation of Approved Upgrades and Approved Change Orders, lack of timely decisions from Buyer regarding any required finish selections, acts of God, adverse weather conditions, unavailability of materials, strikes, other labor problems, governmental orders, local ordinances and restrictions, interference by Buyer or agent of Buyer with Seller, and any other similar events beyond seller's reasonable control, which shall extend the Closing for a reasonable period.

Notwithstanding the great breadth of this language, Judge Middlebrooks concluded that this clause "contemplates only legally-recognized defenses in Florida and in this case, does not expand the definition of the defense such that it made defendant's obligation to finish illusory." *Id.* at *3. *Caswell* conveys the minority view, with which we disagree. We follow the reasoning in *Stein* that broad clauses of this type go well beyond recognized defenses. We conclude that the developer's sales contract in this case did not contain an unconditional commitment to complete construction within two years. The developer thus was not exempt from the provisions of ILSA.

*Affirmed.*

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[1] The developer places great reliance on *Kamel* in its brief, despite the fact that it was centered on impossibility of performance language which is not present at bar.

WARNER and POLEN, JJ., concur.

* * *

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; John J. Hoy, Judge; L.T. Case No. 07-13658 CAAG.

Robert M. Weinberger of Cohen, Norris, Scherer, Weinberger & Wolmer, North Palm Beach, for appellant.

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***Not final until disposition of timely filed motion for rehearing.***