Third District Court of Appeal

State of Florida, July Term, A.D. 2011

Opinion filed October 19, 2011.
Not final until disposition of timely filed motion for rehearing.

No. 3D10-1204
Lower Tribunal No. 08-51906

BLT Now, LLC,
Appellant,

vs.

Coldwell Banker Residential Real Estate, & Sewnarainsing Jankipersadsing
Appellees.

An Appeal from the Circuit Court for Miami-Dade County, Ronald M. Friedman, Judge.

Roy D. Wasson, for appellant.

No appearance for appellee.

Before RAMIREZ, SALTER, and EMAS, JJ.

EMAS, J.

BLT Now, LLC ("BLT"), the seller, appeals the trial court's entry of summary judgment in favor of Appellee, Sewnarainsing Jankipersadsing (Dr.

Sing), the buyer. We reverse, holding that a genuine issue of material fact exists, precluding the trial court's entry of summary judgment in Dr. Sing's favor.

FACTUAL BACKGROUND

In November of 2004, Betsy Lee Turner ("Turner"), managing partner for BLT, contracted with WCI communities to purchase a condominium unit (the "Unit") in Miami Beach. BLT was required to provide a $236,000 deposit on the Unit, and closing was contingent on BLT obtaining financing. BLT was unable to obtain the requisite financing and failed to close on the Unit. In an effort to avoid losing its deposit, BLT requested that WCI allow BLT to obtain another purchaser and assign its interest in the contract. WCI orally agreed to such an assignment but did not provide written consent as required under the contract between WCI and BLT.

BLT was subsequently introduced to Dr. Sing. In June of 2008, Dr. Sing signed a Residential Sale and Purchase Contract with BLT for the Unit. The contract required Dr. Sing to provide a $250,000 down payment on the property, which was deposited in escrow with Coldwell Banker. Additionally, as with the contract between BLT and WCI, Dr. Sing's contract with BLT was contingent on Dr. Sing's ability to obtain financing within five days of the effective date of the contract. The contract allowed either party to cancel the contract "[i]f after using diligence and good faith, Buyer is unable to provide the Commitment and provides

Seller with written notice that Buyer is unable to obtain a Commitment within the Commitment Period."

After executing the contract, Dr. Sing utilized the services of Audrey Rosenbaum, a mortgage broker with Southeast Capital Group, Jason Schoen, the branch manager for IndyMac, and Marc Hameroff, a loan officer for Mortgage Network Solutions, to assist him in his efforts to obtain a financing commitment.

According to Hameroff's affidavit, Hameroff pre-approved Dr. Sing for the requested financing at an interest rate of 8.5 percent. Displeased with the high interest rate, however, Dr. Sing, with the assistance of Ms. Rosenbaum, applied for loans with several other lenders in an effort to obtain a more acceptable interest rate. According to Rosenbaum's affidavit, she was unable to obtain financing from any of the lenders she contacted on Dr. Sing's behalf. Dr. Sing also applied for a loan with Citi Mortgage, Inc., but Citi Mortgage similarly failed to approve Dr. Sing's application.

As a result, Dr. Sing sent a letter to BLT to advise that he was canceling the contract due to his inability to acquire financing. Thereafter, Dr. Sing and BLT disagreed as to which party was entitled to Dr. Sing's deposit. Because Dr. Sing and BLT were unable to reach an agreement, Coldwell Banker instituted the current interpleader action against Dr. Sing and BLT. Dr. Sing answered the complaint for interpleader, asserting his entitlement to the interpleaded funds by

virtue of having been unable to obtain financing in the exercise of due diligence. He also cross-claimed against BLT. Turner subsequently intervened in the lawsuit, alleging that Dr. Sing forfeited the deposit on the property by failing to exercise diligence in seeking financing. Turner claimed Dr. Sing was offered financing to purchase the Unit but chose to reject that offer.

In support of his motion for summary judgment, Dr. Sing provided the affidavit of Audrey Rosenbaum and the affidavit from the real estate broker for Coldwell Banker. Both supported Dr. Sing's assertion that he exercised good faith and due diligence in attempting to acquire the financing, but was unable to secure a letter of commitment or pre-approval.

Both parties also relied upon the testimony of Marc Hameroff. BLT relied on Hameroff's affidavit, through which Hameroff attested that Dr. Sing qualified for a loan with an 8.5 percent interest rate. Hameroff further attested that Dr. Sing did not like this interest rate and that he therefore turned it down, believing he could obtain a better rate. Dr. Sing, on the other hand, relied on a portion of Hameroff's deposition in which Hameroff stated he was unaware that Dr. Sing's contract was not directly with the developer, and that very few lenders would consider financing a contract that was not entered into directly with the developer.

Dr. Sing contended that had Hameroff known the intricacies of the deal, Hameroff would have had a new contract drawn up between BLT and WCI.[1]

ANALYSIS

"The issue of whether a purchaser exercises due diligence and makes a good faith effort to secure the requisite financing is ordinarily a question of fact for the trier of fact." Quirch v. Coro, 842 So. 2d 184, 186 (Fla. 3d DCA 2003). See also Fieldstone v. Chung, 416 So. 2d 11, 12 (Fla. 3d DCA 1982). This case falls squarely within the rule established in Quirch and Fieldstone. Dr. Sing received pre-approval for a loan at an interest rate of 8.5 percent. The only reason Dr. Sing did not pursue a commitment on this loan was because he was not pleased with the

[1] The dissent concludes that Hameroff testified in deposition that there would have been no financing because of the assignment issue. However, a careful reading of the deposition reveals this is not the case. In Hameroff's affidavit he described the terms of this pre-approved loan and averred Dr. Sing "was perfectly qualified for financing of a hotel/condominium development unit and I was certain I could obtain financing for him."

Hameroff was asked in deposition to assume the contract between WCI and BLT prohibited an assignment. Dr. Sing's counsel posed this question: "If the contract from WCI stated this contract cannot be assigned and Dr. Sing was not purchasing directly from WCI, would you change your statement [in your affidavit]?" In answer to that question, Hameroff stated, "we would have to restructure the contract to obtain a firm commitment." However, Hameroff also stated in his deposition (correctly) that there was an assignment clause in the contract, and it is undisputed that WCI had agreed to BLT's assignment of the contract to Dr. Sing. Thus, Hameroff's answer to this hypothetical question (which was based upon an incorrect assumption) did not change the position Hameroff took in his earlier affidavit – that Dr. Sing qualified for financing at 8.5%. At best, Hameroff's statements in deposition created a genuine issue of material fact to be resolved by the trier of fact.

interest rate and thought he could obtain a lower rate. Whether this constitutes due diligence and good faith is for the jury to determine.

The dissent indicates that the transaction was complicated by the fact that the assignment—orally agreed upon between WCI and BLT at the time Dr. Sing applied for financing—had not yet been reduced to writing. The dissent describes this situation as requiring a "restructuring" of the transaction. This is an inaccurate characterization. The terms of the contract between WCI and BLT provided for its assignment with the written approval of WCI. The contract between Dr. Sing and BLT also provided that it was subject to WCI assignment. That BLT and WCI had not yet reduced to writing the agreed-upon assignment of the contract to Dr. Sing is of no moment, as it does not pertain to Dr. Sing's efforts to obtain financing.[2]

CONCLUSION

Dr. Sing failed to conclusively establish he could not obtain financing after exercising due diligence and good faith; thus, there remains a genuine issue of disputed material fact, subject to resolution by the trier of fact.

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[2] The dissent suggests that the written approval of the assignment between WCI and BLT also required Dr. Sing's signature, and that "due diligence would not require that Dr. Sing agree to the new terms." The assignment by WCI to BLT – and Dr. Sing's signature approving it – do not constitute "new terms." If the dissent's statement is correct, Dr. Sing could have unilaterally prevented the closing (even if he had obtained more favorable financing) by simply refusing to affix his signature to a document approving the assignment. How would Dr. Sing be able to take the position that he was exercising due diligence and good faith while refusing to sign the very document that granted BLT the right to sell the condominium to him?

Reversed and remanded.

SALTER, J., concurs.

RAMIREZ, J. (dissenting).

Respectfully, I do not see any genuine issue of material fact that precluded the trial court's entry of summary judgment in favor of Dr. Sing. I do not see that BLT ever showed that the pre-approval obtained through Hameroff was a viable offer to provide financing.

The contract between Dr. Sing and BLT was contingent on Dr. Sing obtaining 50% financing for a $625,000 loan at prevailing rates. Dr. Sing was required to apply for financing within five days of the effective date of the contract and furnish BLT with either a loan commitment, approval letter, or, alternatively, written notice that he was unable to obtain the commitment within the earlier of thirty days or five days prior to closing. The contract allowed either party to cancel the contract "[i]f, after using diligence and good faith, Buyer is unable to obtain a Commitment within the Commitment Period." The Commitment period was to end July 8.

Because condominium hotel units present unique financing challenges, BLT provided Dr. Sing contact information for Marc Hammeroff, loan officer for Mortgage Network Solutions, and Jason Schoen, branch manager for IndyMac,

both of whom had experience in obtaining lending for condominium hotel buyers. Following execution of the contract, Dr. Sing met with Hammeroff, Schoen, and Audrey Rosenbaum, a mortgage broker with Southeast Capital Group.

It was undisputed that Hammeroff's affidavit states that Dr. Sing was pre-approved for financing at a rate of 8.5% and that Dr. Sing was displeased with the high interest rate. Subsequently, Dr. Sing, with the help of Rosenbaum, applied for loans with at least five other lenders in an effort to obtain a rate of about 5%. He was unable to obtain financing from any of the five other lenders. According to Rosenbaum, the lenders refused to originate a loan where a condominium hotel unit was not being purchased directly from the developer. It appears from the record that the transaction was further complicated because there was no documentation regarding the assignment arrangement between WCI and BLT at the time Dr. Sing applied for the financing. BLT was not the developer of the condominium hotel property, but had received the unit at issue through contract.

It is undisputed the documentation issue, which was not corrected until after Dr. Sing's cancellation, interfered with Dr. Sing's diligent efforts to obtain financing. On June 26, Rosenbaum sent Dr. Sing a Statement of Credit Denial, Termination, or Change stating "[n]o loan programs available for contract as submitted." That same day, Dr. Sing sent a letter notifying BLT he was canceling

the contract due to his inability to acquire financing. Dr. Sing also requested that his deposit be released within five days.

Following Dr. Sing's cancellation, a dispute arose regarding release of the deposit, which resulted in attempts to correct the documentation issue. BLT asserted that Dr. Sing forfeited the deposit because he failed to exercise due diligence and good faith in acquiring the necessary financing. Specifically, BLT focused on the June 11 pre-approval letter from Hammeroff. Apparently realizing that the assignment arrangement had posed a significant obstacle in Dr. Sing's efforts to obtain financing, BLT contacted WCI and requested they draft a formal assignment. According to the affidavit of WCI employee Kristen Fazio, WCIs management team formally consented to the assignment sometime in July, 2008. Thereafter, the assignment form was sent to Dr. Sing, who received it twenty days after he had canceled the contract.

Because the parties were unable to reach an agreement regarding the deposit, Coldwell Banker instituted the current interpleader action against Dr. Sing and BLT. Dr. Sing answered and asserted that, having exercised good faith in attempting to acquire financing, he was entitled to the deposited funds. Dr. Sing also filed a cross-claim joining Turner and claiming breach of contract against BLT and Turner on the basis that they failed to provide Dr. Sing access to the condominium as was required under the contract. In response, Turner reasserted

that Dr. Sing failed to act in good faith, and denied Dr. Sing's claim that he was foreclosed from accessing the property in accordance with the contract.

In support of his motion for summary judgment, Dr. Sing provided an affidavit from Rosenbaum, as well as the affidavit of Darrell Burks, the real estate broker for Coldwell Banker who was Dr. Sing's agent on the Unit 1610 contract. Both affidavits support Dr. Sing's assertion that he exercised good faith and due diligence in attempting to acquire the financing. It is undisputed that Rosenbaum contacted at least five lenders on Dr. Sing's behalf and was unable to secure a letter of commitment or pre-approval.

Dr. Sing also relied on Marc Hammeroff's deposition regarding the June 11 pre-approval offer for 8.5%. Hammeroff initially provided an affidavit in support of BLT in which he stated, "[b]ased on the information [Dr. Sing] provided, he was perfectly qualified for financing of a hotel/condominium development unit and I was certain I could obtain financing for him." However, in his deposition, Hammeroff testified that he was unaware that Dr. Sing's contract was not directly with the developer, and very few lenders would consider financing a contract that was not entered into directly with the developer. If he had known that was happening, he would have had a new contract drawn up, particularly when the contract between BLT and the developer had a clause stating that it could not be assigned. The pre-approval he gave Dr. Sing was not a firm commitment.

BLT did not have the necessary written approval for the assignment at the time Hammeroff pre-approved Dr. Sing. This is reflected both in the contract itself, and in Fazio's affidavit wherein she states, "WCI consented to the assignment in July, 2008." The record shows BLT attempted to remedy the assignment problem after Dr. Sing had canceled the contract. The assignment was not obtained until July 28, long after the financing period had run.

In the summary judgment hearing below, Dr. Sing averred cancellation was proper because the pre-approval Hammeroff provided was contingent on a restructuring of the contract, to which Dr. Sing was neither obligated nor inclined to agree. Accordingly, Dr. Sing argued that he fulfilled his good faith obligation in filing at least six applications with the additional lenders. Notwithstanding, BLT argued Dr. Sing exercised bad faith in canceling the contract prior to revisiting Hammeroff's offer. It was BLTs position that had Dr. Sing returned to Hammeroff prior to canceling the contract, the problem with the assignment would have been discovered and possibly rectified before closing. Thus, BLT argued that with the possibility of proper assignment looming, good faith would require Dr. Sing consult Hammeroff again before canceling the contract.

The issue of whether a purchaser exercises due diligence to secure the requisite financing is ordinarily a question of fact. See Quirch v. Coro, 842 So. 2d 184, 186 (Fla. 3d DCA 2003); Fieldstone v. Chung, 416 So. 2d 11, 12 (Fla. 3d

DCA 1982). Here, however, Dr. Sing conclusively established that in the exercise of due diligence and good faith, he would not have received financing for the unit pursuant to the existing contract. See Meyers v. Cunningham, 415 So. 2d 802, 802 (Fla. 3d DCA 1982) (holding the purchaser was entitled to return of his deposit where he was rejected for financing after submitting all documents and information available to him). I do not believe this record shows Dr. Sing was required to take steps to overcome lenders' reservations about financing his purchase, and accept a bad deal, when the lenders' reservations arose because of the seller's failure to properly document its interest in the property. Neither good faith nor due diligence requires that a purchaser restructure the transaction. See Merritt v. Davis, 265 So. 2d 69, 70 (Fla. 3d DCA 1972) (affirming summary judgment for the purchaser, who was unable to secure financing as originally contemplated in the sale agreement, and rejecting the seller's contention that the purchaser was required to accept a modified financing proposal the seller obtained).

The written approval for assignment and related forms WCI eventually sent BLT required Dr. Sing's signature. However, I agree with the trial court's reasoning that, as a matter of law, due diligence would not require that Dr. Sing agree to the new terms. Thus, because Dr. Sing satisfied his burden by showing that no genuine issue of material fact existed here, we should affirm the trial

court's order granting Dr. Sing's motion for summary judgment. See Holl v. Talcott 191 So. 2d 40, 43 (Fla. 1966). See also Quirch, 842 So. 2d at 186.