[Cite as *David Moore Builders, Inc., v. Hudson Village Joint Venture*, 2004-Ohio-4950.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

DAVID MOORE BUILDERS, INC. Appellee v. HUDSON VILLAGE JOINT VENTURE Appellant	C.A. No. 22118 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV 2000-03-1260

DECISION AND JOURNAL ENTRY

Dated: September 22, 2004

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

SLABY, Judge.

{¶1} Appellant, Hudson Village Joint Venture, appeals the decision of the Summit County Court of Common Pleas granting specific performance to Appellee, David Moore Builders, Inc. We affirm.

{¶2} This case involves parcels of land in Hudson, Ohio. Originally, Reserve Development, Inc. owned the property in question. In October of 1990, Reserve Development Inc. contracted with David Moore Builders, Inc. ("Appellee") for the sale and purchase of five sublots in a proposed subdivision in

the Village of Hudson. Appellee paid to Reserve Development Inc. ("Reserve") the agreed upon down payment. The purchase agreement contract stated that "the balance of the [p]urchase [p]rice *** shall become due and payable when the [s]ubdivision is [c]ompletely [d]eveloped and building permits are available." When Appellee entered into the contracts the land was completely undeveloped. Under the terms of the contracts, Appellee would pay the balance when the property was developed and ready to be built on.

{¶3} In 1991, after the contracts with Appellee, Reserve conveyed all of the undeveloped parts of the proposed subdivision to Village West Limited Partnership. The conveyance included the sublots that Reserve had previously contracted to sell to Appellee.

{¶4} The next contract dealing with the sublots came in 1992. In that contract Village West Limited Partnership agreed to convey the property to Appellant, Hudson Village Joint Venture. That contract provided:

> "[s]eller has entered into Agreements with [Appellee] for the sale of 5 sublots. *** Copies of these Agreements have been delivered to Buyer, and at [c]losing, these contracts will be in full force and effect. *** Buyer shall have the right to secure in writing, prior to closing, and acknowledgment from *** [Appellee] that the contracts are in full force and effect."

{¶5} Before closing on the contract, Mr. Mays, who was closely involved in the transaction on behalf of Appellant asked Mr. David Moore (of Appellee, David Moore Builders, Inc.) to meet with him. At that meeting, Mays had asked Moore if he planned to honor the contracts to purchase the sublots. Moore

responded that he did intend to honor the contracts for the purchase of the five lots in question. When it looked to Moore that the lots were developed, he called Mays to state his readiness to perform on the contracts and pay the balance due on the purchase agreement. It then became clear that Appellant was not going to honor the contracts. Appellant maintained that it was not bound by the contracts Appellee had entered into with Reserve.

{¶6} Appellee commenced the instant lawsuit on March 17, 2000. The action proceeded to trial on June 12, 2003. The trial court issued Findings of Fact and Conclusions of Law on July 9, 2003, and a final judgment on July 31, 2003, granting specific performance in favor of Appellee. Appellant appealed raising four assignments of error for our review.

ASSIGNMENT OF ERROR I

> "The trial court erred by holding that [Appellant] was a successor to the contracts between [Appellee] and Reserve Development Company, Inc. and, therefore, required to perform the contracts.

{¶7} In its first assignment of error, Appellant states that it is not required to perform on the contract between Reserve and David Moore because it was not a party to the original contract and Appellant did not contract with Appellee. This Court disagrees.

{¶8} A purchaser of land who has notice that his grantor has contracted with a third party for the sale of such property or a part thereof takes subject to that contract or option to buy. *Dunlap v. Ft. Mohave Farms* (1961), 89 Ariz. 387,

391; *Blondell v. Turover*, 195 Md. 251; *Fargo v. Wade*, 72 Or. 477; *Texas Co. v. Aycock*, 190 Tenn. 16. "A grantee *** who acquires legal title with notice of a former contract by the vendor to convey the land is subject to the rights of the former purchase, including the latter's right to obtain a decree for a conveyance upon the payment of the purchase price[.]" 80 Ohio Jurisprudence 3d (1988) 278-79, Real Property Sales and Exchanges, Section 228, See also, *Mutual Aid Bldg. & Loan Co. v. Gashe* (1897), 56 Ohio St. 273, 299. A subsequent purchaser of real estate is bound by a prior contract to sell the same property unless he can prove that he was a bona fide purchaser and took without notice of the existence of the prior contract. *Clotfeller v. Telker* (Ohio App. 1947),83 N.E.2d 103.

{¶9} In the case at hand, there can be no doubt that Appellant took the property in question with notice that Appellee previously contracted to purchase the property upon development and availability of the building permits. Appellant's contract to purchase specifically references Appellee's interest in the property. "Seller has entered into Agreements with [Appellee] for the sale of 5 sublots[.]"

{¶10} Appellant was not only made aware of the existence of a contract to sell to Appellee, but it was even given a copy of the contracts. The purchase agreement that Appellant signed stated that the contracts with Appellee, upon closing, "will be in full force and effect." There can be no argument that Appellant was a bona fide purchaser who took without notice of Appellee's prior

contract. Appellant took the property subject to Appellee's rights to it, and as such is required to perform under the terms of the contract. Appellant's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

> "The trial court erred by finding that [Appellee] was a third-party beneficiary of the contract between [Appellant] and Village West Limited Partnership."

{¶11} In its second assignment of error, Appellant claims that the trial court erred in finding that Appellee was a third-party beneficiary. We agree. Appellee was not a third party beneficiary to the contract. In order for a party to be a third-party beneficiary, the contract must show that the contracting parties intended to benefit the third party. *Laurent v. Flood Data Serv., Inc*. (2001), 146 Ohio App.3d 392, 397. An action on a contract may be brought by an intended third party beneficiary, which this court agrees Appellee is not, or a party to the contract. *Grant Thorton v. Windsor House, Inc*. (1991), 57 Ohio St.3d 158, 161. Appellee was a party to the original contract with Reserve. As established above, Appellant is bound to perform on the original contract.

{¶12} While the trial court may have erred in finding that Appellee was a third party beneficiary, the outcome of this case remains the same. Appellant still must perform under the terms of the contract, and Appellee is within his rights to request specific performance. "Specific performance of a contract may be decreed not only between the parties, but between all those claiming under them in

privity." American Jurisprudence 2d (2001) 197, Specific Performance, Section 187; See, also, *Gramann v. Borgmann* (1913), 31 Ohio Dec. 668, 677; *Lasich v. Ohio Sav. Bank & Trust Co*. (1925), 20 Ohio App. 400, 409-411; *McGilvery v. Shadel* (1949), 87 Ohio App. 345.

ASSIGNMENT OF ERROR III

> "The trial court erred by determining that specific performance was an appropriate remedy when [Appellee], seeking performance, had failed to tender performance."

{¶13} In Appellant's third assignment of error, it complains that the remedy of specific performance was inappropriate. Specifically, Appellant claims that the trial court erred in granting specific performance because Appellee had failed to tender the purchase price.

{¶14} An appellate court reviews a lower court's decision to grant specific performance under an abuse of discretion standard. *Sandusky Properties v. Aveni* (1984), 15 Ohio St.3d 273, 275. The Ohio Supreme Court has defined "abuse of discretion" as a decision which is "unreasonable, arbitrary, or unconscionable[.]" *Dayton ex rel. Scandrick v. McGee* (1981), 67 Ohio St.2d 356, 359. An abuse of discretion is more than an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. It results "only when no reasonable man would take the view adopted by the trial court." *Pembaur v. Leis* (1982), 1 Ohio St.3d 89, 92. We find that the trial court did not abuse its discretion in granting specific performance.

{¶15} In Appellant's third assignment of error, he states that specific performance was improperly granted because Appellee had not paid the agreed upon purchase price. We do not agree.

{¶16} The Supreme Court of Ohio has held:

> "when the other party repudiates and makes it certain that he does not intend under any circumstances to comply, a showing of readiness and ability on the part of the complaining party to then and there perform his part communicated to the other party and accompanied with demand of compliance by such other party, is sufficient compliance without an actual formal tender." *LRL Properties v. Rodriguez* (April 15, 1992), 9th Dist. No. 15259, at 8, citing *The George Wiedemann Brewing Co. v. Maxwell* (1908), 78 Ohio St. 54, at 67.

{¶17} Under the terms of the Purchase Agreement, Appellee's obligation to purchase the sublots was conditioned upon the subdivision being completely developed and building permits being available. When Mr. Moore had noticed that the sublots were being developed and roads were being built, he called Appellant to inform them that he intended to perform on his part of the contract.

{¶18} The evidence and testimony show that Appellee was ready to perform its part of the contract, and it had communicated his intent to perform to the Appellant. This is evidenced by an affidavit and a letter to Appellant dated April 17, 2001, from Appellee's attorney. The letter stated: "[m]y client, as always, is ready, willing and able to perform. Where do you wish for him to deposit the monies in escrow for the closing of his lots pursuant to the contracts[.] *** Please advise."

{¶19} At trial, Mark Wacher, Appellant's attorney stated that he was not sure if he had responded to April 17, 2001, letter or a subsequent one, but he knew that he responded. He testified that "the response was that [his] client [Appellant] doesn't believe that he's bound by the contract, and [he] can't advise [Appellee] as to where to deposit the funds." In such a situation, where the seller clearly states that he does not believe that he is bound by the contract and will not advise buyer where to deposit the funds, a formal tender of performance is not necessary to support a decree of specific performance. G.*H. & M. Devt. & Constr. Co. v. Walter* (Dec. 16, 1981), 9th Dist. No. 1073 at 6-7.

{¶20} Since Appellant made it clear that it will not perform on the contract, Appellee was not required to make a formal tender of the purchase money in this case. See Id. Appellee showed that it was ready and willing to pay the balance owed, but Appellant would not tell Appellee where to deposit the funds. A formal tender was not required under these circumstances. Appellant's third assignment of error is overruled.

ASSIGNMENT OF ERROR IV

> "The trial court erred by applying a remedy of specific performance when the contract dictated a remedy for default."

{¶21} In Appellant's fourth assignment of error, he claims that specific performance as a remedy was incorrect because the contract set forth a remedy in the event of default. This court holds that while the contract did provide a remedy

in the event of default, it was not an exclusive remedy. Thus, Appellee was not precluded from pursuing specific performance.

{¶22} An appellate court applies a de novo standard of review in the interpretation of written contract. *Lovewell v. Physicians Ins. Co. of Ohio* (1997), 79 Ohio St.3d 143, 144. The purchase agreement in question did state that upon a breach, Appellee would be entitled to a return of its down payment. Appellant claims that this is the exclusive remedy for breach of the contract. However, nowhere on the contract does it state that return of the down payment is the exclusive remedy. In fact, the contract provides additional remedies in the event of other problems.

{¶23} RC 1302.93(A)(2) provides that "[r]esort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy." See, also, *Cannon v. Neal Walker Leasing, Inc.* (June 28, 1995), 9th Dist. No. 16846, at 9. "[T]he Uniform Commercial Code disfavors limitation of remedies and a presumption arises that a limiting clause provides a cumulative remedy rather than an exclusive one, unless it clearly states otherwise." *M.G.A., Inc. v. Amelia Station, Ltd.*, 1st Dist. No. C-010606, 2002-Ohio-5091, at ¶13, citing *Goddard v. General Motors Corp*. (1979), 60 Ohio St. 2d 41.

{¶24} The contract provided one remedy, the buyer's right to have his down payment returned. That remedy does not necessarily exclude other possible remedies. *Forest Park Partners Ltd. Partnership v. Ponderosa, Inc*. (Oct. 18,

1996), 2nd Dist. No. 15688. The fact that one "remedy was available did not, without more, necessarily preclude the parties from pursuing other remedies." Id.

{¶25} Upon reviewing the contract, we find no clear indication that the parties intended that the remedy stated was to be the exclusive remedy in the event of default. There is no language in the contract supporting Appellant's contention that the remedy mentioned in the contract was to be the only remedy available or the exclusive remedy. Therefore, we hold that Appellee was not precluded from pursuing other available remedies, including the equitable remedy of specific performance. Appellant's fourth assignment of error is overruled.

{¶26} We overrule Appellant's assignments of error and affirm the judgment of the Summit County Court of Common Pleas.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of

Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

Exceptions.

LYNN C. SLABY
FOR THE COURT

WHITMORE, P. J.
BATCHELDER, J.
CONCUR

APPEARANCES:

ROBERT B. LAYBOURNE, Attorney at Law, Key Building, Suite 900, 159 South Main Street, Akron, Ohio 44308-1383, for Appellant.

JOHN D. FRISBY, Attorney at Law, 135 Portgae Trail, P. O. Box 374, Cuyahoga Falls, Ohio 44222, for Appellee.