Sawabini v. Branche, No. S0262-07 CnC (Katz, J., Aug. 11, 2008)

STATE OF VERMONT SUPERIOR COURT
Chittenden County, ss.: Docket No. S0262-07 CnC

WADI I. SAWABINI, JR., ET AL.

v.

DARYL R. BRANCHE, ET AL.

ENTRY

In August 2006, the then elderly, since deceased, Ms. Abbe Sawabini entered into a purchase and sale agreement with Defendant Daryl B. Branche to sell Ms. Branche a condominium. The parties simultaneously signed an addendum to the agreement that allowed Ms. Branche to move into the condominium before the closing in exchange for her payment of rent to Ms. Sawabini. Ms. Branche put down $10,000 as a deposit on the contract and the closing was set for September 15, 2006.

As sometimes happens, Ms. Branche was not able to close by September 15th because she could not secure financing. However, she was still living in the condominium and still wanted to buy it. In October, Ms. Branche became acquainted with Defendant Marvin Waldman, who at that point appears to have become her financial advisor of sorts. According to Ms. Branche, Mr. Waldman offered to finance her purchase of the property and substitute himself as the buyer. Sometime in October, Ms. Branche fell behind in her rent payments to Ms. Sawabini.

By December 15th, Ms. Branche and Ms. Sawabini came to an agreement that they would substitute Mr. Waldman as buyer and Ms. Branche would put down an additional $30,000 deposit. The new closing date of December 19th arrived and this time, Mr. Waldman was unable to close. Ms. Sawabini thereafter had Ms. Branche evicted and demanded that the escrow deposits be turned over to her, which Mr. Waldman and Ms. Branche have refused to authorize.

Plaintiff has filed a motion for summary judgment on the contract, seeking the release of the deposits, along with costs and attorney fees, and statutory penalties and interest. Ms. Branche does not dispute the existence of the contract, or the amounts of the deposits, but claims in her opposition that she lacked capacity to enter into this purchase agreement. She claims that, based upon a brain injury she sustained at some point in the past, after which she has had to undergo several brain surgeries, she did not understand the agreement she entered into with Ms. Sawabini.

When opposing a motion for summary judgment, the non-moving party must demonstrate admissible evidence that raises a genuine issue of material fact for trial, especially when seeking to substantiate an affirmative defense such as lack of capacity to contract. V.R.C.P. 56(e); Lussier v. Truax, 161 Vt. 611, 611 (1993). "Self-serving opinions," especially as to legal issues, are "wholly insufficient to survive [a] motion for summary judgment." Id. Here, Ms. Branche has submitted an affidavit along with her opposition brief, wherein she states that she is "disabled" as a result of her injuries, and that medication she was taking "interfered with [her] ability to understand the terms of the contract." (Aff. of Daryl. R. Branche, ¶¶ 23, 24.) She claims that, based upon these facts, she "may have" lacked capacity to enter into the purchase agreement. (Def.'s Opp'n at 7). However, Ms. Branche has not presented any expert testimony on the issue of her disability, nor have we seen any evidence, other than her own self-serving statements, of any lack of capacity. Moreover, Ms. Branche has not sought the appointment of a guardian ad litem pursuant to V.R.C.P. 17(b). Therefore, she has failed to demonstrate admissible evidence to meet her burden of going forward and thereby raise an issue of fact as to her alleged incapacity to contract.

With respect to the Ms. Sawabini's substantive claims, we are faced with the straightforward task of interpreting the real estate purchase agreement. What either party subjectively thought about that contract is irrelevant. O'Brien Bros.' P'ship, LLP v. Plociennik, 2007 VT 105, ¶ 4 (quoting KPC Corp. v. Book Press, Inc., 161 Vt. 145, 150 (1993) (if terms of contract are plain and unambiguous, "they will be given effect and enforced in accordance with their language")). Only the reasonable meaning of the contract language governs. O'Brien Bros., 2007 VT 105 at ¶ 4. With that in mind, the purchase agreement entered into by the parties in August 2006, and its subsequent modification in December 2006, are standard, unambiguous real estate purchase agreements, wherein Ms. Branche, and then Mr. Waldman, agreed to purchase Ms. Sawabini's condominium for $198,000. Ms. Branche's initial $10,000 deposit, according to the express terms of the contract she signed, became nonrefundable once she moved in, which happened sometime prior to September 15, 2006. When she failed to close by that date, she was in breach of the agreement. Although the parties later revived the agreement by Addendum executed in December 2006, with an additional $30,000 deposit, Mr. Waldman breached it by failing to close on time.

Plaintiff now seeks both deposits, totaling $40,000, as liquidated damages. Three factors we should consider in determining whether a liquidated damages clause is reasonable are whether:

> (1) because of the nature or subject matter of the agreement, damages arising from a breach would be difficult to calculate accurately; (2) the sum fixed as liquidated damages reflect[s] a reasonable estimate of likely damages; and (3) the provision [was] intended solely to compensate the nonbreaching party and not as a penalty for breach or as an incentive to perform.

Renaudette v. Barrett Trucking Co, Inc., 167 Vt. 634, 635 (1998) (quoting New England Educ. Training Serv., Inc. v. Silver Street P'ship, 156 Vt. 604, 613 (1991)). These factors must be analyzed as of the time the contract was signed, not with the benefit of hindsight. Renaudette, 167 Vt. at 635.

While liquidated damages of $40,000 might at first glance seem high, the amount alone does not render the clause unenforceable. See Troise v. United States, 21 Cl. Ct. 48, 70 (Cl. Ct. 1990) (affirming enforcement of

liquidated damages clause awarding plaintiff 25% of contract price due to defendant's construction delays). At the time the first agreement was made, Ms. Sawabini knew that Ms. Branche would be moving into the condominium and thus her potential damages would be greater (than in a standard purchase arrangement) should Ms. Branche breach and eviction become necessary. When Ms. Branche did in fact breach and the second addendum was eventually signed, Ms. Sawabini was at that point months into a tenuous situation, still trying to sell her condominium to a buyer who had already missed one closing deadline and fallen several months behind in rent. At that point, Ms. Sawabini's expected damages would be a good deal higher, and more easily ascertainable, than before, should Defendants fail to close. Those expected damages included expenses associated with the upkeep of the condominium, such as mortgage payments, taxes, condominium fees, and property management expenses, in addition to the potential cost of having to evict Ms. Branche from the premises, including reasonable attorney fees and costs related to the eviction proceeding. Given her age, Ms. Sawabini could do little to aid her own position, adding to the costs.

Finally, the fact that the second deposit was a significantly greater amount than the first does not automatically render it a "penalty or incentive to perform," as prohibited by Renaudette. 167 Vt. 634, 635. As the United States Supreme Court held in Wise v. United States, with respect to liquidated damages clauses, "[t]here is no sound reason why persons competent and free to contract may not agree upon this subject as fully as upon any other, or why their agreement, when fairly or understandingly entered into with a view to just compensation for the anticipated loss, should not be enforced." 249 U.S. 361, 365 (1919). The same reasoning holds true when parties to an agreement have increased the liquidated damages amount during the transaction due to one party's failure to perform. Troise, 21 Cl. Ct. at 70. Here, at the time the parties executed the second Addendum, in December, Ms. Sawabini was exposed to a much greater degree of financial harm than she had been at the time the initial agreement was executed, which is reflected in the amended liquidated damages provision. Although high, the second deposit of $30,000 is reasonable under the factors set forth in Renaudette.

For the foregoing reasons, Plaintiff's motion for summary judgment is GRANTED and Plaintiff is awarded $40,000 in liquidated damages, which shall include $11,202.00 in attorney fees and $375.51 in costs.

Dated at Burlington, Vermont, this ____ day of July, 2008.

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M. I. Katz, Judge