

IN THE COMMON PLEAS COURT OF DARKE COUNTY, OHIO

ROBERT HIATT, et. al.	:	CASE NO. 04-CV-61470
		04-CV-61478
Plaintiffs,	:	
vs.	:	JONATHAN P. HEIN, Judge
JACK L. GILES, et. al.	:	
Defendants.	:	<u>JUDGMENT ENTRY</u> - Trial Decision

These matters came before the Court on the 11th day of March, in the year of our Lord, 2005, for purposes of a bench trial on the Plaintiffs' Complaints and the Answers by the Defendants. All parties were represented by counsel. [Post trial memoranda from both parties were considered, although they may not have been filed with the Clerk.]

Case Facts

Robert and Angela Hiatt were the owners of a home situated on approximately 14 acres of real estate located at 11219 U.S. Rt. 36, Newberry Township, Bradford, Miami County, Ohio. As a result of a change in employment, they decided to sell their home without the benefit of a realtor. [See Plaintiffs' Exhibit 1.] They advertised the property and eventually were contacted by Defendants Jack Giles and Joan Donnelly to negotiate the sale of this property.

Prior to looking for a home, the Defendants knew that they suffered credit problems and worked with All Credit Mortgage Bancorp, Inc. in Beavercreek to find a lender who would finance their purchase. All Credit Mortgage is a private company who brokers

mortgage loans between borrowers with credit problems and lenders willing to do business with people with “substandard” credit ratings. As a result of the dealings with All Credit Mortgage, the Defendants were approved for a loan of \$225,000, with the loan “being subject to all documents to be used in the Real Estate transaction.” [See Plaintiffs’ Exhibit 3.]

Eventually, a purchase agreement as prepared by Plaintiffs was signed wherein the home would be sold for the sum of \$225,000. [See Plaintiffs’ Exhibit 2.] The purchase contract was eventually modified – apparently on the advice of Deborah Eich of All Credit Mortgage – to include a contingency that the property must “appraise for the purchase price...” [See paragraph 28 of Exhibit 2.] Ultimately, the lender did not approve the appraisal. [Anecdotally, this contract review and the giving of specific advice regarding a binding contract appears to constitute the unauthorized practice of law by Ms. Eich, if she did in fact recommend the contract modification, contrary to R.C. 4701.01; see Land Title Abstract & Trust Co. v. Dworken (1934), 129 Ohio St. 23, defining the practice of law to include “the preparation of legal instruments of all kinds, and in general all advice to clients and all action taken for them in matters connected with the law.”]

Since the appraisal was not acceptable, the parties renegotiated their purchase contract so that the Plaintiffs would keep various items of personal property which resulted in the contract price being lowered to \$200,000. [See Plaintiffs’ Exhibit 5.] This amount was apparently agreed because the Defendants had been advised by All Credit Mortgage that this property would only be approved by the lender for purchase at the sum of \$200,000. An additional part of the purchase contract was that the Plaintiffs would carry a cognovit note for

\$14,000. [See plaintiffs' Exhibit 6.] In essence, the property would sell for a total amount of \$214,000. The parties signed both the purchase agreement and the promissory note. As consideration, the sum of \$100 was paid by Defendants for each agreement (\$200 total was paid).

With these documents signed, and with the goal of promptly closing the transaction, the Plaintiffs moved from their home into an apartment. However, the Defendants were eventually unable to close their loan and to complete the sales transaction because the lender was not satisfied. The precise reason for lender disapproval was not clear.

The Plaintiffs filed this action claiming damages as a result of the Defendants' breach of contract. On the other hand, the Defendants claim that the purchase contract was contingent on various conditions and that there was no consideration for the cognovit note.

Case Analysis

This Court must first determine whether the purchase contract and cognovit note are binding agreements. In determining whether there is an enforceable contract, the following legal principles apply, as taken from Section 253 of the Ohio Jury Instructions for purposes of simplicity:

"A 'contract' is an agreement or obligation, whether verbal or written, in which one party becomes (bound)(obligated) to another to pay a sum of money or to perform or omit to do a certain act or acts. It is not necessary that the parties use any particular words, perform any particular acts, or use any particular form of agreement in order to create a contract. Terex Corp. v. Grim Welding Co., (1989), 58 Ohio App. 3d 80

In order to form a contract the parties must mutually consent to the agreement(s) or obligation(s) undertaken by them. Mutual consent arises out of the intent of the parties as shown by the reasonable meaning of their words and conduct, and not from any unexpressed intention or understanding of either party. In deciding whether there was mutual consent, you should consider not only the words and conduct of the parties, but also the circumstances under which

the words were used and the conduct occurred. Ford v. Tandy Transp. Inc., (1993), 86 Ohio App. 3d 364

From the circumstances, it is clear that both agreements are a part of the same transaction and that there was an offer by the Plaintiffs to sell the house which was accepted by the Defendants. Further, based upon the payment of the \$100 on each agreement, the Court finds

that valid consideration was paid. Therefore, the Court finds that the purchase agreement and the cognovit note are valid contracts between the parties.

Next, the Court must determine whether these agreements were contingent upon financing. In this regard, the Plaintiffs claim that the purchase contract is unambiguous and that the Court should not consider an parol evidence (i.e. oral testimony to explain the meaning and circumstances surrounding the agreements). On the other hand, the Defendants claim that parol evidence is permitted to explain the contingency of financing. In this regards, the Court finds that parol evidence is permitted to explain the meaning (i.e interpretation) of the agreements, especially the relationship between the purchase contract and the cognovit note in the overall transaction of the real estate.

From the testimony, it is clear that the parties fully expected the transaction to be completed for the sum of \$214,000. After the first loan was not possible because of appraisal problems, the Defendants were assured by All Credit Mortgage that they would receive financing in the amount of \$200,000. This assurance was clearly written into the second purchase agreement which unequivocally stated that “Purchasers shall obtain financing...” If financing was intended to be a contingency, then such a common contingency would have been drafted

into the agreement. Instead, the contract plainly states what the Court finds to be the intentions of the parties – i.e. that the financing was the duty of the Defendants. While it is equally clear that the lender failed to complete the loan, the Defendants bore the responsibility to obtain financing. Also, this conclusion is supported by the dates of signing and performance, since the closing was required to be within 14 days after signing – surely too little time to clear any contingency of financing. If a financing contingency was expected, the parties would not have included such a short amount of time to clear the contingency and close the transaction.

Therefore, the Court finds that the Defendants breached the contract to purchase real estate owned by Plaintiffs. Based upon this finding, the Court must now determine what damages are due to the Plaintiffs.

In support of their claim for damages, the Plaintiffs' testimony indicates that the real estate was eventually sold for \$200,000. [See Plaintiffs' Exhibit 11.] Also, two itemized lists of damages were presented by Plaintiffs. [See Plaintiffs' Exhibits 7 and 8.] Essentially, the Plaintiffs argue that expenses incurred as a result of moving into an apartment until the house eventually sold to a third party should be included as their damages. While this argument has some merit, the argument runs afoul of the concept that an injured party has a duty to mitigate its damages.

In regards to mitigation, the Court finds that the Plaintiffs' decision to move into an apartment prior to the closing was a risk that they assumed; their storage costs, duplicate electric expenses, mortgage related expenses, mileage expenses and other expenses are not chargeable against the Defendants. [The customary – albeit not exclusive – practice in real estate sales of delivering possession of a property after the closing capably demonstrates the principle of mitigating damages if the closing does not occur.] However, Plaintiffs' are

entitled to damages directly related to the breach of contract, such as \$135 for attorney fees and the amortization schedule.

Conclusion

The Court finds that the Defendants breached the real estate purchase contract with Plaintiffs for the purchase of real estate located at 11219 U.S. Rt 36, Bradford, Ohio. As a direct and proximate result of the breach, Plaintiffs are entitled to judgment in the amount of \$14,135.00.

IT IS, THEREFORE, ORDERED AND DECREED that judgment is granted in favor of Plaintiffs against Jack L. Giles and Jean Donnelly, jointly and severally, in the amount of \$14,135.00 plus court costs in this matter. Interest shall accrue at the statutory rate from the date of this Entry. **FINAL APPEALABLE ORDER.**

Jonathan P. Hein, Judge

cc: Thomas L. Guillozet, Attorney for Plaintiffs
Stephen R. Bruns, Attorney for Defendants
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