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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

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Eugene "Gene" Moore
Cook County Recorder of Deeds
Date: 12/21/2006 04:29 PM Pg: 1 of 6

Guadelupe Ayala and Martha Ayala,)
)
 Plaintiffs,)
)
 v.)
)
 John Kryziak and Paul Stevens,)
)
 Defendants.)

No. 04 CH 12596

Calendar 10

ENTERED
JUDGE STUART PALMER-1621
JUL 13 2006
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, ILL
DEPUTY CLERK

Memorandum Opinion and Order

This cause coming on to be heard for trial, the Court having considered the testimony of the witnesses, the exhibits and the oral and written arguments of the attorneys and further being fully advised in the premises finds as follows:

The evidence adduced at trial showed that on March 25, 2004 the parties entered into a real estate sales contract for the sale of the subject property at 2320 N. Hamilton, Chicago, IL 60647 (the "Chicago Property"). The sale price was \$395,000.00 and the contract provided for a closing date of June 10, 2004. The contract further provided that the Plaintiffs, the sellers, provide a Commitment for Title Insurance at least five days prior to closing date, and a survey prior to closing. The contract also provided that "Time is of the essence of this contract." Plaintiffs' Exhibit 6.

At the same time, the Plaintiffs were under contract to purchase a home in Berwyn at 2111 S. Wisconsin (the "Berwyn Property") for \$295,000.00 with a closing date set for June 11, 2004. The testimony established that the Plaintiff's were relying upon the sale of their home to the Defendants to finance the purchase of the Berwyn Property.

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As June 14, 2004 approached, the real estate attorneys for the parties had telephone contact. Ultimately the Plaintiffs' attorney, Anthony Panzica ("Panzica"), sent a facsimile correspondence on June 7, 2004 to the Defendants' attorney, Ira Kaufman ("Kaufman"). Plaintiffs' Exhibit 8. This letter advised that the Plaintiffs had another purchase scheduled to close on June 11, 2004 and requested a confirmation of the closing date of June 10, 2004 on the Chicago Property. Also, Panzica hand wrote on this typed facsimile, "Time is of the essence," with underlining and an exclamation point. Subsequent to the transmittal of Plaintiffs' Exhibit 8, Kaufman informed Panzica that his clients could not close on June 10, 2004 as they did not have the necessary funds to complete the purchase.

As a result, the transaction with regard to the Chicago Property did not close on June 10, 2004. Panzica testified that while he had procured a title commitment he had not delivered it to Kaufman. However, he also testified the commitment was readily available to Kaufman who was a frequent customer of the title company. Further, Panzica testified that he did not order a survey as he had been told by Kaufman that his clients did not have the funds to close the transaction. It was Panzica's practice not to order a survey when he was not sure that a closing would go forward so as to avoid inconvenience to his surveyors. He further testified that due to his relationship with certain surveyors, he could get a survey within one day.

The attorney for the seller of the Berwyn Property, James Zitzer ("Zitzer"), was made aware that the Chicago Property transaction did not close. On June 10, 2004, Zitzer wrote to Panzica by way of facsimile indicating his clients were ready to close the Berwyn Property on the scheduled date of June 11, 2004. He further indicated that his

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clients would only extend this date if the Plaintiffs put forward an additional \$20,000.00 earnest money by 5:00 p.m. on June 11, 2004 and pay a penalty of \$500.00.

On June 13, 2004, Panzica again corresponded by facsimile with Kaufman. The first facsimile sent at 7:00 a.m. was accompanied by the Zitzer letter. Plaintiffs' Exhibit 10. The letter further contained the following sentence, "Question to your buyer is, 'Can he close this week with his own funds?'" The second facsimile letter of that date was sent by Panzica to Kaufman at 11:30 p.m. This letter indicated that the Plaintiffs would extend the date of closing to June 18, 2004 only if the Defendants paid the additional deposit and penalty requested by the Zitzer letter. The letter further stated, if these conditions were not acceptable, the transaction would be canceled for failure to close. This offer was never accepted. Throughout this time period, Kaufman repeatedly told Panzica that the Defendants did not have the funds with which to close the transaction. The next day, June 14, 2004, Panzica sent another facsimile to Kaufman declaring that the contract was terminated for lack of closing. Plaintiffs' Exhibit 14. Additionally, as a result of all the above, the Plaintiffs were unable to go forward with the closing of the Berwyn Property.

On June 18, 2004, Kauffman sent a facsimile letter to Panzica which read as follows: "My client has recorded the contract for this property. Or close on June 30, 2004. Please contact my office to schedule." Plaintiffs Exhibit 8.

The Plaintiffs' failure to close on the Berwyn Property resulted in their forfeiture of \$9,000 of earnest money as evidenced by the Contract Cancellation and Release Agreement reached in that regard. Plaintiffs Exhibit 5.

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Plaintiffs seek rescission, return of their earnest money, and damages for breach of contract. The Defendants as Counter-Plaintiffs seek specific performance. There is no question that the Defendants failed to perform their obligations under the contract as they indicated through their attorney that they did not have the funds with which to close the transaction on June 10, 2004. While it has been established that the Plaintiffs did not deliver a title commitment and survey as provided in the contract, these were readily available and were not delivered only as a result of the Defendants' indication that they were not prepared to close. The Court finds therefore that the Plaintiffs were not in breach of the contract.

Defendants claim that the time of the essence clause was waived by the Plaintiffs and that they stood ready to close within a reasonable time, June 30, 2004. The Court finds that, based on the facts and circumstances of this case, the time is of the essence clause will not be waived for the following reasons:

- a. Defendants were aware that the Plaintiffs had another purchase scheduled the next day;
- b. Plaintiffs' attorney wrote "Time is of the essence" on the June 10, 2004 facsimile, thereby emphasizing the importance of a timely closing;
- c. The only offer to extend the closing date was conditioned upon the Defendants advancing \$20,000.00 as additional earnest money and \$500.00 in penalties as demanded by Zitzer for the Berwyn Property closing. This condition was never agreed to by the Defendants.

As a result of these facts, it would be inequitable to waive the time of the essence clause in favor of the Defendants.

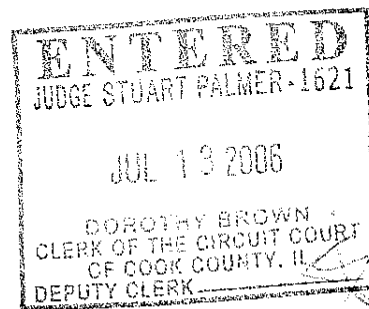
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As a result, the court finds that the contract for the purchase and the sale of the Chicago Property was effectively cancelled by the Plaintiffs on June 14, 2004 and is hereby rescinded. Pursuant to Provision 5 of the real estate sales contract, the earnest money currently held on deposit at Chicago Title and Trust shall be paid to the Plaintiffs as liquidated damages in the amount of \$10,000.00. Judgment is therefore entered in favor of the Plaintiffs in the amount of \$10,000.00. As to the counter-complaint, the Court having found that the Counter-Plaintiffs did not fulfill their contractual obligations, Counter-Plaintiffs are not entitled to specific performance, judgment is entered on behalf of the Counter-Defendants.

Enter:

Judge Stuart E. Palmer

Dated: July 13, 2006



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PROPERTY ADDRESS: 2320 N. HAMILTON, CHICAGO
ILL. 60647

LEGAL DESCRIPTION:

LOT 33 IN BLOCK A IN VINCENT SUBDIVISION
OF (EXCEPT THE RAILROAD) THE NORTHEAST $\frac{1}{4}$ OF
THE NORTHWEST $\frac{1}{4}$ OF SECTION 31, TOWNSHIP
40 NORTH, RANGE 14, EAST OF THE THIRD
PRINCIPAL MERIDIAN, COOK COUNTY, ILLINOIS

PIN #: 14-31-100-029

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