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NEW YORK

To obtain damages from seller in case of anticipatory repudiation, buyer must always prove to be ready, willing, and able to buy.

The law of New York on real property contracts was not clear on whether a buyer suing for damages (and not for specific performance) because seller repudiated the contract, had to prove that he was "ready, willing and able" to buy. The issue was not clear because while the Second Department had held that such proof was not required, the Third and Fourth Departments had held that it was. In *Pesa v. Yoma Development Group*, the Court of Appeals reconciles this conflict by holding that the correct rule is the latter: to recover on a breach of contract action, the buyer *does have* to prove that buyer was ready, willing, and able to close the transaction. *Pesa v. Yoma Development Group, Pesa v. Yoma Development Group, Inc.*, (2/9/12).

In March 2003, the seller sold properties under three separate contracts to four buyers and agreed to build dwellings thereon. The seller agreed to deliver certificates of occupancy for the future dwellings or to obtain "appropriate sign-offs" to demonstrate that the certificates were forthcoming. Further, each contract had a mortgage contingency clause that provided a right of cancellation if the buyers did not obtain a mortgage commitment within 60 days.

Three years later, the dwellings had not been built and the mortgage commitments had not been obtained. As such, the seller transferred the properties to an affiliated corporation. The buyers sued for breach of contract alleging that the transfer amounted to repudiation.

The seller argued that the mortgage contingency clause triggered the right of cancellation since the buyers did not obtain a mortgage commitment within 60 days. The buyers argue that it was impossible to obtain a mortgage commitment because the seller failed to build houses on the properties or to obtain certificates of occupancy. Both sides moved for summary judgment. The Supreme Court held that the seller anticipatorily breached the contract by transferring the title. The Appellate Division, Second Department affirmed.

On appeal, the Court of Appeals reversed holding that the non-repudiating buyers had to prove that they were "ready, willing, and able" to perform. Here, the

buyers only submitted evidence of their financial condition, which did not address the buyers' ability to make the purchase. That being the case, the buyers here could not recover.

Buyer's misrepresentation on her mortgage application does not preclude her from recovery of deposit.

In order to retain a down payment in a breach of contract claim, the seller must present *prima facie* evidence that the buyer forfeited his or her right to cancellation by non-performance of a material contract term. *Schramm v. Solow*, New York Appellate Division, Second Department (1/10/12).

Here, in November 2007, the plaintiff (buyer) and the defendant (seller) entered a contract for the purchase of real property. The buyer deposited \$30,600 into escrow as a down payment. The contract contained a mortgage contingency clause that conditioned the purchase upon issuance of a "firm" mortgage commitment in the amount of \$540,000. Being unable to obtain the financing, the buyer gave notice of her intent to cancel the contract and sought the return of her down payment, but the seller retained the down payment as liquidated damages. The buyer sued to recover her deposit, while the seller filed a counterclaim to retain it.

The seller alleged that the buyer inflated her income on her loan application. She received two conditional loan commitments for less than the amount stipulated by the mortgage contingency clause (one of these commitments was for \$535,000, only \$5,000 less than the stipulated amount). According to the seller, she could not obtain the mortgage because she lied in her application.

The seller moved for summary judgment based on the buyer's breach of the mortgage contingency clause. The buyer cross-moved for summary judgment alleging that she *did* try in good faith to obtain a mortgage and she had received a commitment of \$5,000 less than the amount agreed in the sale contract; her impossibility to close was unrelated to any misinformation about her income. The court granted the buyer's motion for summary judgment and awarded the recovery of the down payment.

On appeal, the court affirmed. The buyer wins because the seller has failed to establish that the buyer's inaccurate loan application was the cause of her failure to obtain the required commitment. Further, the court held that the seller failed to establish that the buyer forfeited the right to cancel the contract because the buyer accepted a conditional loan commitment. On the other hand, the

buyer met her burden of proof by proffering evidence that she attempted to secure the mortgage loan, but was unable to obtain the requisite "firm" commitment.

When the dead ones claim their rights from the tomb, i.e. the "Dead Celebrities Bill". If passed into law, it might trigger an issue of illegality or impracticability for existing contracts.

Under current New York law, celebrities' right of publicity ends with their death. However, in February 2011, New York State Senator Matrin Golden introduced the "dead celebrities bill," which would make it a criminal offense to use the image of any deceased New York celebrity for advertising, merchandising, or other commercial purposes without permission from their legal heirs. The ban would last 70 years after their death. The bill is retroactive.

Opponents criticize the Bill because of its retroactivity (i.e., the effect of the new statute would be to provide post-mortem rights to celebrities that died in the 1940s. They also criticize it because the bill is allegedly in violation of the First Amendment and would have a possible freezing effect on artistic freedom.

If the Bill is passed into law, it might raise an issue of illegality/impracticability for many existing contracts. Think about a contract calling for the printing of t-shirts with the likeness of the Yankee star Mickey Mental ... The seller may well be released from his contractual duty to perform because his performance would be rendered impracticable by the new statute.

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