NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
MONMOUTH COUNTY
DOCKET NO. MON-C-195-22

ROBERT GAVIN,

Plaintiff,

v.

DOROTHY LOMACK,

Defendant.

OPINION

Decided April 16, 2024.

Paul R. Edinger, Esq., for plaintiff.

Robert F. Schillberg, Jr., Esq. (Schillberg Law LLC, Hanlon, attorneys) for defendant.

FISHER, P.J.A.D. (t/a, retired on recall).

Plaintiff Robert Gavin filed this action for specific performance of a contract that memorialized defendant Dorothy Lomack's agreement to convey

to him 400-402 Fisher Avenue, Neptune, in exchange for his payment of $170,000. The court heard the testimony of the parties and five other witnesses during a trial that took place on April 1, 2024.[1] The testimony revealed no significant dispute about any material fact but instead posed an equitable question about what should be done about the well-established facts and circumstances.

To put the facts and the parties' contentions in context it is helpful to consider the principles that guide a court of equity in determining whether to compel the performance of a contract. To begin, a plaintiff seeking specific performance must demonstrate "the contract is valid and enforceable at law," Marioni v. 94 Broadway, Inc., 374 N.J. Super. 588, 598 (App. Div. 2005), and the contractual terms are "expressed in such fashion that the court can determine, with reasonable certainty, the duties of each party and the conditions under which performance is due," Salvatore v. Trace, 109 N.J. Super. 83, 90 (App. Div. 1969), aff'd o.b., 55 N.J. 362 (1970). There is no dispute about the terms of the contract here or what it is that the court would compel if the decree was to issue. The contract was prepared by defendant's attorney, approved by plaintiff's attorney after a brief disagreement about the purchase price, and called for a conveyance by defendant of defined property for a certain price.

[1] Counsel provided their timely written summations on or before April 15, 2024.

The circumstances also support the remedy sought. Plaintiff credibly testified that in the summer of 2022 he was looking to purchase a vacant lot in Neptune suitable for the construction of a modular home. In furtherance of that plan, plaintiff obtained a copy of the municipality's roll of vacant lots and eventually went looking for 400 Fisher Avenue. The presence of that vacant lot not being readily apparent with the naked eye, plaintiff sought out and approached defendant, who was listed on the roll as the owner, to ask her about it. Defendant did not live on Fisher Avenue but in another location in Neptune. She was then over 80, and plaintiff was then about 70 years old.

Plaintiff asked defendant about the vacant lot, and she told him the lot was alongside the lot on which sat a single-family home. Both a survey admitted into evidence (P-9), as well as two appraisals admitted into evidence (D-a and D-b), reveal that the lot on which the home sits is approximately 53 feet wide and 150 feet long, while the vacant lot is also approximately 150 feet long but only 24 feet wide. The survey (P-9) reveals that the driveway utilized by the structure's residents sits mostly on the vacant lot, as does a masonry shed toward the back of the lot. It would seem, because of its narrowness, the vacant lot was not a buildable lot.

The parties' discussion started casually with some talk about whether defendant knew plaintiff's mother.[2] Even though plaintiff was only looking to purchase the vacant lot, it was defendant who opened up discussions about a sale of both lots. Plaintiff had a particular concern about the price because of the budget he planned for this project. He had gone about seeking a vacant lot because he believed his price range would only allow for his purchase of a lot on which he could construct a modular home, as noted above. Nevertheless, defendant offered to sell to him both lots for $185,000, which exceeded plaintiff's price range. Plaintiff counteroffered with $160,000, which was rejected, but they soon compromised and agreed on $170,000.

Plaintiff checked with his mortgage agent, John Krilla, to see if he would still be able to obtain a mortgage in light of the higher-than-anticipated price he had agreed on, and he was assured it could be done. Plaintiff then retained Meryl Polcari, Esq., to represent him in this transaction. Because defendant was unrepresented, Krilla reached out for an attorney who might be willing to represent defendant; Linda Diaz, Esq., was referred to defendant, and she retained her.[3]

---

[2] Plaintiff's mother and a close friend of defendant's had the same or similar name.

[3] Krilla, Polcari, and Diaz all testified at trial.

Diaz was asked to prepare a written contact and, with the information provided to her by defendant, she drew up a contract, in standard form, with a purchase price of $180,000. This document was sent to Polcari, who added a few things in her own handwriting while objecting to the purchase price, asserting that the parties had already agreed on $170,000, which constituted plaintiff's limit. According to their credible testimony (both attorneys testified consistently), as well as their contemporaneous emails (see P-11, P-12, and P-13), which also support their testimony, Diaz advised Polcari that defendant had agreed to honor the $170,000 on which she and plaintiff had orally agreed when they first met (P-12[4]). There is no dispute that the result of all this was their execution of a written contract, dated August 23, 2022, containing defendant's agreement to sell the two lots to plaintiff for $170,000 (P-1). Defendant does not dispute that she signed the contract.

For these reasons – again all undisputed – the terms of the contract are clear and the performances that the court would be compelling, if all other circumstances warrant the relief sought, expressed with more than "reasonable

[4] In an August 23, 2022 email (P-12), Diaz advised Polcari that she had "[j]ust called [defendant] who states she will agree to the $170k, as your client says he can't pay 180k."

certainty" the duties of the parties, Salvatore, 109 N.J. Super. at 90.[5] There are, in fact, few other contractual obligations and conditions – none of which stand as an obstacle to the remedy sought – beyond the duty of plaintiff to pay and the duty of defendant to convey the property.

As also already noted, plaintiff was required to show that the contract is valid and enforceable. Marioni, 374 N.J. Super. at 598. This concept, to be sure, allows for consideration of notions of unconscionability, fraud or mistake – and so may warrant consideration of the contract's legal enforceability – but the concept is also considered broad enough to encompass questions of fairness when "apprais[ing] the respective conduct and situation of the parties," Friendship Manor, Inc. v. Greiman, 244 N.J. Super. 104, 113 (App. Div. 1990). That is, a court of equity has leeway to consider withholding its imprimatur on an otherwise legal agreement.

The court finds nothing about the contract that would suggest it is unenforceable. Defendant has offered evidence suggesting an appraised value of the lot with the structure and the vacant lot of $285,000, and $95,000 (D-a and

---

[5] Even though the need for "reasonable certainty" is the traditional approach, courts have also recognized that this requirement has often been "overemphasized." See Marioni, 374 N.J. Super. at 599 n.4. The Supreme Court, in Barry M. Dechtman, Inc. v. Sidpaul Corp., 89 N.J. 547, 552 (1982), recognized that "[a]pparent difficulties of enforcement that arise out of uncertainties in expression often disappear in the light of courageous common sense and reasonable implications of fact."

D-b), respectively, and Krilla testified that the lender had obtained an appraisal that suggested the value of both lots was about $270,000. But a comparison of these assessed values with the contract price does not lead to or compel a conclusion that the contract is unenforceable. Far from it. Armlength negotiations often produce agreements to sell that are not necessarily consistent with appraisals; indeed, the marketplace would function poorly indeed if every contract of sale could be upset by a difference between the purchase price and an appraiser's view of the value of the thing sold.

The evidence reveals, and the court so finds, that neither party was aware of the appraised values revealed in either D-a or D-b, or as suggested in Krilla's testimony, or otherwise. As already explained, the negotiations occurred without either party seeking additional time to investigate. Defendant named the price at which she was willing to sell, plaintiff responded with the price he was willing to buy, and they compromised somewhere in between. Moreover, the evidence revealed that this negotiation was briefly replayed when the parties' attorneys became involved, with defendant's attorney including $180,000 in the draft contract and plaintiff's attorney rejecting it and explaining and insisting that plaintiff was only willing to pay $170,000, to which defendant acceded. Defendant was under no legal or moral obligation to sell at that point. No one ever stopped and suggested that further inquiry should be made about the

property's true value, and defendant never cancelled the contract, as was her right until the contract was out of attorney review. In short, there was no mistake about what it was that defendant was willing to accept and there is nothing about the difference between the contract price and an appraised value later secured for purposes of this litigation that would suggest unconscionability or form the basis for withholding the remedy sought by plaintiff.

And there is nothing about plaintiff's pursuit of this contract that would stand as an obstacle to specific performance. The Supreme Court has directed in this regard that a party seeking specific performance "must stand in conscientious relation to his adversary; his conduct in the matter must have been fair, just and equitable, not sharp or aiming at unfair advantage." Stehr v. Sawyer, 40 N.J. 352, 357 (1963). The court is overwhelmingly satisfied that plaintiff acted equitably, honorably, and fairly in all respects. His conduct was far from "sharp"; he approached defendant with questions about her property and she readily proposed a sale and demanded the price she desired, ultimately leading to a brief negotiation that produced the purchase price contained in the contract. The principles discussed in Stehr have more in mind a buyer taking advantage of an unwitting seller. The evidence does not support such a conclusion. Here, plaintiff was looking for an appropriate property in his price range, and defendant was willing to sell in that general range and extracted

during their negotiations a price greater than what plaintiff had in mind. The contract was clearly a product of armslength negotiations and resulted in a fair price acceptable to both. Despite her age and physical infirmities, defendant's testimony and presentation at trial – nearly two years after her negotiations with plaintiff – revealed her to be an intelligent individual not easily fooled and willing to stand her ground. This was hardly a case where someone with greater knowledge not only of the property but other relevant factors, arrived and pressured the owner to sell. Plaintiff knew nothing more – in fact far less – about the property than defendant.

In truth, while her able counsel has forcefully presented arguments along the lines already discussed, it seems clear that defendant's position rises and falls on whether performance of the contract would cause her a hardship. It is of particular note that this is not a situation where defendant would be required to move from her home. She had not resided in the property for many years. While the property had been in defendant's family for years, the record suggests only that at the time of the events in question, the property constituted only an investment property and had been leased by defendant to others. So, the court is not being asked to compel a transaction that would put defendant out of her home.

Instead, the hardship that is urged is one that would take into consideration what was defendant's unshared intent about her desire to sell. At trial, defendant testified that, when the negotiations took place, she had only recently been released from the hospital, having been put through some serious health problems. She testified that she was of a mind to rid herself of things and that plaintiff's desire to purchase her Fisher Avenue property conveniently fit into that plan. There was no testimony, either from defendant or plaintiff, that defendant ever shared with plaintiff that state of mind. While there is no reason to doubt the truth of what defendant has said about what was going through her mind at the time, the court views defendant's later change of mind as nothing more than "seller's remorse" that shouldn't stand in the way of the contract's enforcement.[6]

Lastly, the court rejects the argument that specific performance should be withheld because plaintiff has an adequate remedy at law. See Fleischer v. James Drug Stores, Inc., 1 N.J. 138, 146-47 (1948); Marioni, 374 N.J. Super. at 600.

---

[6] Defendant also claims as a reason to withhold specific performance her concern that selling the property would cause a hardship to her tenants. The record includes evidence about what the parties may or may not have agreed about the tenants who then and still occupy the property. The contract (P-1), however, has a provision (paragraph 32) about the tenancy and there is nothing about plaintiff's request for relief that would suggest that whatever that provision requires stands in the way of his desire to close the transaction. The court, therefore, need not decide what actions plaintiff may or may not take with respect to the tenants.

To start, the appropriate remedy for a breach by a seller of real property has traditionally been understood to be specific performance because real property is viewed as unique. Marioni, 374 N.J. Super. at 600 n.5; Friendship Manor, 244 N.J. Super. at 113. Even if that were not so, it is difficult to imagine how a damage award could be crafted that would alone adequately compensate plaintiff for defendant's breach. Plaintiff has been without the property he has rightfully sought for nearly two years,[7] while defendant has retained his $5,000 deposit. Plaintiff also testified that he performed work on the property so that a certificate of occupancy could be issued. While there was a factual dispute about how much work he did in that regard, an award of damages would have to include fair compensation for that work or the expenditure of any money to accomplish those tasks and the evidence was far from clear about that. More importantly, plaintiff has been placed in limbo, neither having that for which he bargained nor in a position to replace it or mitigate it in the meantime. To be adequate, a remedy at law would have to compensate plaintiff for the delay and all the inconvenience and uncertainty that defendant's change of mind has caused. These are things not easily quantified and, in the final analysis, would not provide as fair a remedy as would a decree of specific performance.

[7] The contract originally called for a closing in September 2022.

In short, specific performance should issue because, when there is no legitimate or persuasive excuse for not performing, "equity regards and treats as done what, in good conscience, ought to be done." Marioni, 374 N.J. Super. at 600-01; see also Goodell v. Monroe, 87 N.J. Eq. 328, 335 (E. & A. 1917). Plaintiff has demonstrated beyond dispute that he was in September 2022 – and remains now – ready, willing, and able to perform his part of the bargain. Stamato v. Agamie, 24 N.J. 309, 316 (1957). In evidence are documents, supported by testimony – all undisputed – that a mortgage loan was in place, that plaintiff had provided a $5,000 deposit (P-3) to defendant's attorney to be held in escrow (where it still remains), and that plaintiff had the remaining $36,148.56 available (P-5) at a time-of-the-essence closing at which neither defendant nor her attorney appeared. He testified credibly that the funds are still available and that he remains desirous of purchasing the property.

For all these reasons, plaintiff is entitled to a judgment of specific performance. A judgment has been entered that directs defendant to convey title to the property in exchange for the purchase price expressed in the contract (P-1). The closing is ordered to occur no later than thirty days from today.