Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2002-177

JANUARY TERM, 2003

Mutual Oil Co., Inc. v. Cashman-Cairnie, Inc.	}	APPEALED FROM: Windsor Superior Court DOCKET NO. 581-12-00 Wrcv Trial Judge: Alan W. Cook

In the above-entitled cause, the Clerk will enter:

In this contract action, defendant-seller appeals a summary judgment order in favor of plaintiff-buyer requiring seller to refund buyer' s $65,000 payment to secure an option to purchase certain real property in Hartford, Vermont. We reverse and remand.

The trial court disposed of this case on summary judgment, and our review is therefore governed by the same standard employed below. Wentworth v. Fletcher Allen Health Care, 171 Vt. 614, 616 (2000) (mem.). If the record shows no genuine dispute over the matter' s material facts, and any party is entitled to judgment as a matter of law, summary judgment is proper. V.R.C.P. 56(c)(3).

The undisputed facts in this case establish that the parties executed a document entitled " Option Agreement" in June 2000. It provided that seller would grant buyer an exclusive option to purchase certain property in Hartford, Vermont. In return, buyer would pay seller $65,000. Buyer could exercise the option by submitting a written notice to seller' s attorney no later than 5:00 p.m. on October 16, 2000. The agreement provided that the time and date for exercise of the option were " of the essence." The agreement further provided that the $65,000 payment became seller' s property upon signing the agreement, but " [i]f the Option is exercised, the $65,000 paid in consideration for the Option shall be credited toward the Purchase Price." If buyer accepted the offer by exercising the option, the agreement stated that closing on the property " shall take place fifteen days after the date on which the Option is exercised, but not later than 31 October 2000 at 10:00 a.m. . . . " The agreement also included the purchase price and other terms for the proposed sale, including the following provisions:

> 8. Possibility of Return of $65,000 Option Payment. . . . The Seller has, for more than thirty years, used [certain] . . . rights-of-way for access to the Property. . . . The source of the Seller' s record title to these three rights-of-way may need to be clarified. The Seller agrees to work diligently to clarify the source of its record title to these rights-of-way. If the Seller cannot clarify its record title to these rights-of-way before the closing of the sale contemplated by this Option, then Buyer may terminate this Agreement and receive back all sums paid under this Agreement, including the $65,000 Option Payment.

> 10. . . . E. . . . [*T*]*he Seller agrees to convey* [*the rights-of-way*] *with Quitclaim Covenants, and, unless the Seller conveys these rights-of-way with warranty covenants, the Buyer may terminate this Agreement, as provided above in Paragraph 8. The Seller' s failure to be able to convey these three rights-of-way by a warranty deed is not a default under this Agreement, and only entitles the Buyer to terminate this Agreement as provided in Paragraph 8, above.*

(Italics in original).

Upon signing the agreement, buyer paid seller $65,000 for the option. On October 13, 2000, buyer notified seller in writing that it was " terminating" the contract because it believed seller was not working diligently to clear up title to the rights-of-way. There is no dispute that buyer never exercised its option by 5:00 p.m. on October 16, 2000 as the agreement required. Buyer nevertheless asked seller to return the $65,000 option payment, and, when seller refused, the present litigation ensued.

In its decision on the parties' cross motions for summary judgment, the trial court concluded that Paragraph 8 of the agreement allowed buyer to terminate the agreement and obtain a refund of the $65,000 if seller did not clarify its title to the rights-of-way by October 31, an event the parties agree never occurred. The court noted that " [t]he contract does not state that an early termination would relieve defendant of its duty to clarify the title." As seller suggests on appeal, that conclusion is at odds with both the law and the language of the parties' agreement.

Absent ambiguity, " the construction of a contract is for the court as a matter of law." Morriseau v. Fayette, 164 Vt. 358, 366 (1995). We examine the contract as a harmonious whole, and we do not read other terms into the agreement " unless they arise by necessary implication." Id. at 366-67. Our review of the parties' agreement is further informed by the law governing option contracts. Generally, an option contract is one in which the seller of property, for consideration, promises a buyer to keep an offer of sale open, according to specified terms and for a certain period of time, leaving it to the buyer to accept the offer within the time limit. Durfee House Furnishing Co. v. The Great Atl. & Pac. Tea Co., 100 Vt. 204, 207 (1927); 3 E. Holmes, Corbin on Contracts § 11.2, at 465-67, § 11.6 (rev. ed. 1996). An option contract does not bind the buyer to purchase the property, and is therefore distinguishable from a purchase and sales contract which requires a promise from the buyer to do so. Zitzow v. Diederich, 337 N.W.2d 799, 801-02 (N.D. 1983); Corbin on Contracts § 11.18, at 621-25; see also Sisters & Bros. Inv. Group v. Vt. Nat' l Bank, 172 Vt. 539, 542 (2001) (mem.) (contract to purchase real property was valid bilateral contract because agreement memorialized exchange of mutually binding promises for consideration). When the option grantor requires acceptance within a definite time period, the expiration of that period automatically terminates the optionee' s power to accept the offer. Corbin on Contracts § 11.8, at 534. " There is no completed contract for sale of the property described in an option until the optionee has accepted the offer according to its terms, or to put it otherwise, has performed the conditions contained in the offer." Buchannon v. Billings, 127 Vt. 69, 74 (1968). Thus, the duties and obligations set forth in the proposed purchase and sales agreement to which the option relates do not arise until the buyer accepts the option. Id.; see Corbin on Contracts § 11.8, at 516 (buyer' s notice of acceptance is not only the acceptance to seller' s offer, but it is the performance of a condition precedent to the seller' s duty to perform).

With the above principles in mind, the language of the parties' agreement indicates that it is a traditional option contract, and seller' s duties with respect to the proposed sale of the property did not arise unless and until buyer accepted the offer according to the contract' s terms. Under Paragraph 3, buyer paid seller valuable consideration, $65,000, and in return seller granted buyer " the exclusive right and option" to purchase seller' s Hartford property. To bind both parties to the sale itself, the agreement required buyer to notify seller in writing no later than 5:00 p.m. on October 16, 2000 that it accepted the offer to purchase the property. That date passed without buyer' s written exercise of its option.* Once the date for exercising the option lapsed, seller owed buyer nothing more relative to the property or the parties' agreement. According to the contract, the $65,000 became seller' s property when the parties signed the agreement, and the contract has no provision requiring seller to refund the money in the event buyer did not elect to exercise its option by the deadline, regardless of the reasons for buyer' s decision.

Buyer nevertheless argues, and the trial court concluded, that under Paragraph 8 of the agreement, seller' s failure to clarify its title to the rights-of-way no later than October 31 entitled buyer to a refund of the $65,000 consideration it paid for the option. The language of Paragraph 8 itself demonstrates that seller' s obligation to clarify title depended

upon buyer' s exercise of its option: " If the Seller cannot clarify its record title . . . before the closing of the sale contemplated by this Option" (emphasis added), then buyer may terminate the agreement and receive its earnest money back. The emphasized language confirms that the enforceable contract is an option contract and not a purchase and sales contract; the option contemplated a sale, but only if buyer exercised the option. By its own terms, Paragraph 8 ties its termination and refund provisions to seller' s obligation to convey by allowing seller until " before the closing of the sale" to clarify title to the rights-of-way. If buyer did not exercise its option, the parties would not have an enforceable purchase and sales contract, and therefore no closing would take place. Paragraph 10(E) also supports this construction. Like Paragraph 8, Paragraph 10(E) ties Paragraph 8' s termination and refund provisions to seller' s obligation to convey: " The Seller' s failure to be able to convey these three rights-of-way by a warranty deed is not a default under this Agreement, and only entitles the Buyer to terminate this Agreement as provided in Paragraph 8, above." The contract therefore unambiguously links seller' s title clarification duty with its duty to convey, which did not arise because buyer let its option lapse.

Under the trial court' s construction of Paragraph 8, however, after buyer' s option lapsed on October 16, ending buyer' s right to insist on conveyance, seller still had to clarify title to the rights-of-way or surrender the $65,000 consideration it received for granting buyer an exclusive option to purchase. That construction is simply unreasonable. First, we can find no contract provision allowing buyer to " terminate" the option agreement and receive a refund before it exercised the option, as the trial court found. Second, no purpose would be served for seller to clarify title if buyer had no obligation to follow through with the sale. No contract language, therefore, supports the trial court' s construction of the parties' agreement.

Buyer also argues that its construction of Paragraph 8 is the only reasonable one because " [l]ogically, exercise of the option is something that would take place only after" buyer knew the status of the rights-of-way. Although it may have been " logical" for buyer to exercise the option after it knew the status of the rights-of-way, that is not what the express contract terms provide. Before October 16, the only enforceable promise in the parties' agreement was seller' s promise to hold the offer open until October 16. Had buyer desired to make the exercise of its option contingent upon seller' s ability to clarify title, it should have so stated in the contract. Having failed to do so, it cannot now complain that it is entitled to a refund of the money it paid to seller for seller to forego other potential purchasers during the option period, a commitment which the record shows seller fulfilled as promised.

Based on the undisputed factual record, we conclude that seller, not buyer, was entitled to judgment as a matter of law, and the trial court therefore erred in granting summary judgment for buyer.

Reversed and remanded for entry of judgment for appellant Cashman-Cairnie, Inc.

BY THE COURT:

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Jeffrey L. Amestoy, Chief Justice

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John A. Dooley, Associate Justice

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Marilyn S. Skoglund, Associate Justice