2 Vt. Dec. Ct. Rep. 119

STATE OF VERMONT
WINDSOR COUNTY, SS.

MILDRED PERRY	)	WINDSOR SUPERIOR COURT
	)	
V.	)	DOCKET NO. S239-95 WrC
	)	
JAMES W. MACNUTT	)	

DECISION AND ORDER

INTRODUCTION

This case concerns a contract for the sale of a house and land. The plaintiff seller alleges breach of contract and seeks specific performance, or liquidated damages in the alternative. The defendant purchaser denies that he breached the contract, and he also disputes the asserted amount of liquidated damages that would be appropriate in the event of a breach. The defendant also seeks return of the $1,000 deposit on the ground that he was entitled to terminate the contract and receive back his deposit. The matter is before the court for a decision on the merits of the case, following a court trial which took place on July 24 and 25, 1997. Plaintiff, who was not present, was represented by Melvin Fink, Esq. Defendant represented himself.

FINDINGS OF FACT

Based on the evidence submitted, the court makes the following findings by a preponderance of the evidence:

1. Plaintiff Mildred Perry is a resident of New Jersey who owns property located in Ludlow.

2. Defendant James MacNutt is a resident of Perkinsville who moved to Vermont in October of 1994 to take a job in Springfield.

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3. On October 14, 1994, Defendant signed a purchase and sales agreement to purchase a residence owned by Plaintiff on 4.6 acres on East Hill Road in Ludlow. He met with the realtor who was the agent of the Plaintiff to draw up the terms of the purchase and sales agreement. The agreement provided for a purchase price of $120,000. Defendant paid $1,000 as a deposit at the time of signing the contract. The contract provided for an additional deposit of $11,000 to be paid on October 31, 1994, and it provided for a closing date on or before November 18, 1994. The contract is on a standard form realtor's agreement. The box in the paragraph labelled "Financing Contingency" was marked to signify that the contract was subject to the purchaser's ability to obtain financing for the purchase. The purchaser had a right to terminate if unable to obtain financing. There are specific options in that paragraph that provide the opportunity for the financing contingency to be subject to limitations, but none of the blanks for these options was completed.

4. Under ¶ 10, entitled "Special Conditions of Contract," a provision has been added that is not part of the printed form agreement. It states as follows: "Subject to satisfactory water test." Paragraph 11, entitled "Addenda to Contract," specifically refers to "Addendum A, Water Test" as being part of the contract. Addendum A is attached on a separate page. It contains provisions routinely used by the realtor who drafted the contract, who maintains an active real estate practice in the Ludlow area. It reads as follows:

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WATER POTABILITY

This sale is contingent upon the Purchaser obtaining, at Purchaser's sole cost and expense, a water test as to the potability of the domestic water supply for the dwelling located on the subject premises on or before October 26, 1994. A copy of the report of said water test shall be delivered to Seller and Seller's attorney on or before November 2, 1994. If such water test reveals that said water supply is satisfactory, this contingency shall be eliminated. In the event said water test discloses any unsatisfactory condition, Seller shall have the option of correcting same, at Seller's expense, or making an appropriate allowance in the purchase price to cover the expense of correcting such defect, or Seller or Purchaser may, at either's option, terminate this sale, in which event all deposit moneys shall be returned to Purchaser. In the event Purchaser fails to notify Seller in accordance with the terms herein, this contingency shall be deemed waived by the Purchaser and the entire purchase price shall be due at closing without any further allowance.

Accordingly, the contract as signed by the purchaser specified that he had until October 26 to make arrangements for any type of test he chose in order to test the potability and satisfactory nature of the water supply, and he had until November 2 to report those results to the seller. With respect to the financing contingency, the entire contract was contingent upon the purchaser obtaining financing, but with no particular obligations to the seller concerning the terms that the purchaser must accept for financing.

5. On October 18, 1994 the purchase and sales agreement was signed by the seller, plaintiff Mildred Perry, without any changes. Also on October 18, the realtor's associate, Amy Wessells, offered to assist the buyer in obtaining a water test from the state. The purchaser, the defendant in this case, accepted the assistance of Ms. Wessells in connection with that test. Ms. Wessells collected a sample of water from the property and mailed it to the State of

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Vermont Lab for a coliform test. The state test for coliform bacteria is not the only test available to test the potability of water. It is the one routinely suggested by the realtor and relied upon by many buyers.

6. On October 22, 1994, the defendant went to Ohio to prepare to move himself and his family and his furnishings to Vermont, and to close on the sale of his house in Ohio. He did not return to Vermont until October 29. The test for coliform was completed and the test report, dated October 24, showed no presence of coliform bacteria in the water supply. Between the time of signing the purchase and sales agreement on October 14, and the deadline for the water potability contingency on October 26, defendant made no arrangements for the performance of any other tests on the water supply. He conducted no other tests of his own.

7. Defendant applied for financing for the purchase from Vermont National Bank. He learned from the bank that it was willing to provide financing, however a condition of the financing was that within 30 days of completing the purchase, defendant would be required to complete certain significant repairs to the foundation and to rotten logs in the log home. In requiring these repairs to be made within 30 days as a condition of its willingness to finance the purchase, the bank relied on the appraisal report prepared by its independent appraiser. When defendant learned of this condition he contacted the loan officer, Catherine Eakins, because he did not wish to accept this requirement, since it would substantially increase the initial cost of the property. Although

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he planned to make these repairs, he anticipated doing so over a one-year period to spread the cost over time, rather than doing them within 30 days. Defendant was referred to Dawn Loring, the supervisor who supervised loan underwriting at the Vermont National Bank office in Brattleboro. Defendant attempted to persuade Ms. Loring to eliminate the 30-day requirement for the repairs because it would increase the initial cost of the property beyond the amount of the contract price. The required repairs were significant, and defendant did not wish to take on the obligation to incur that cost within 30 days of the closing. In conversations with Ms. Loring, he learned that the bank was not willing to eliminate that requirement. On October 27, 1994, the bank issued its commitment letter which contained that requirement, and which also called for purchaser together with his wife to accept the commitment in writing. Also on October 27, defendant's attorney Susan Crawford discovered a title problem and immediately notified the seller's attorney Melvin Fink that same day, which was the day defendant and his family left Ohio for Vermont. Defendant and his wife made plans to proceed to closing, having reluctantly decided to accept the financing terms, although they had not yet signed the commitment letter accepting the financing terms.

8. Defendant and his family arrived in Vermont on Saturday, October 29. On Sunday, October 30, they went to the property to prepare to move in. They had arranged for their moving van to deliver the furniture directly to their new property, and the closing had been tentatively advanced to November 1, 1994. They

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spent most of the day on Sunday at the property. They found the water to be discolored and to have particles suspended in it that settled to the bottom when the water was allowed to stand. They ran the water and kept it running at some length in anticipation that the discoloration would disappear, based on the understanding that it was due to the system having remained idle for an extended period of time. However, the discoloration did not disappear.

9. On Monday, October 31, an additional deposit of $11,000 was due, but the parties may no arrangements for that payment because they anticipated closing on the following day, November 1, 1994. The balance of the deposit was not paid on October 31, 1994. Defendant's wife returned to the property to continue cleaning, while defendant went to work at his new job. Again she left the water running continuously, but the discoloration in the water had not gone away by late morning or early afternoon. Defendant contacted the realtor to request a modification in the terms of the contract to allow more time to do additional testing to the water supply. Defendant was referred to the seller's attorney Mr. Fink, who denied the request.

10. On November 1, 1994, defendant's wife again returned to the property. Defendant, having learned that the seller would not modify the terms of the contract to permit additional water testing, decided to terminate the contract. Defendant's wife collected a sample of water from the property in a clear glass jar,

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and left the house.[1] Defendant faxed a letter to his attorney, who then faxed a letter to the seller's attorney, notifying Mr. Fink that the defendant elected to terminate the contract pursuant to Addendum A. Defendant stated that visual inspection indicated an unacceptable problem with the water, even though the state test showed that no coliform bacteria was present. Defendant also notified the moving van to divert the delivery of furniture to another location.

11. Defendant then notified the Vermont National Bank of the problem in two ways. On November 2, 1994, the following day, he telephoned Ms. Loring, the underwriting supervisor, to inform her that, although he was still interested in purchasing the house, the problems with the water, including both discolored water and sediment floating in the water, created the prospect of additional costs to remedy the problem to make the property useable. This added another financial burden in connection with the initial purchase of the property, and it meant that the purchaser could no longer accept the bank's requirement in the financing package that the foundation and other repairs be completed within 30 days of closing. He told Ms. Loring that on that basis, he and his wife would not be able to accept the financing offered by the bank, and would not sign the letter of commitment. On November 3, defendant

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[1]This water sample was admitted as evidence. A substantial amount of particle matter is clearly visible in the water. It swirls throughout the sample when the jar is shaken, and settles as sediment at the bottom when there is no movement. Pam MacNutt testified, and the court finds, that the particles have become more grouped together in "clumps" than they were on November 1, 1994.

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wrote to loan officer Catherine Eakins, at the local branch of the bank, with the same message. His letter ended with the statement: "I will not, therefore, accept and sign your commitment." The seller's attorney has suggested that these actions on the part of the purchaser were the product of "posturing," in an attempt to scuttle the financing in order to give defendant a valid basis for backing out of the contract. The court finds that the problem with the water supply created an additional financial liability connected with purchasing the property that compounded the existing burdensome problem of the bank's requirement that significant repairs be completed within 30 days. The impact was that if the purchaser accepted the bank's financing package, he would be accepting immediate financial commitments in unknown amounts significantly beyond the amount of the contracted purchase price. The court finds that his refusal to accept and sign the bank financing letter was done in good faith. There were no terms in the purchase and sales agreement that required defendant to accept financing that required additional significant unanticipated expenses above the purchase price within a short time after closing. Even before he knew about the possibility of extra expenses to address water problems, he had already negotiated hard to eliminate this requirement. The water problems affected the fundamental ability to use the house as a family residence, and therefore the need to spend any available money on the water problems meant that it was no longer financially feasible to make repairs within 30 days of closing.

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12. On November 10, 1994, the seller's attorney responded to the November 1 communications in which the purchaser sought to terminate the contract on the basis of Addendum A, the water test contingency. Mr. Fink's letter of November 10 to defendant's attorney Ms. Crawford was hand-delivered well before the required closing date on the contract. It included an enclosure that satisfied the title problem that Ms. Crawford had raised. In his letter, Mr. Fink represented that the water discoloration disappears upon utilizing the system. He stated that defendant was not entitled to terminate the contract on the basis of Addendum A, and that the seller did not agree to such termination and was not returning the deposit. It continued by stating that the seller was, "ready, willing and able to close," and that the seller expected the buyer to perform under the contract; if not, the seller would be seeking, "the full amount of the contract deposit." (emphasis in letter). At that point, the additional deposit amount of $11,000, originally due on October 31, 1994, had not been paid. The content and tone of the November 10 letter from Mr. Fink show that the seller refused to accept the buyer's attempt to terminate the contract due to dissatisfaction with the water supply, but that the seller was *not* declaring that the buyer had breached the contract or was in anticipatory breach. Rather, the letter clearly shows the seller's expectation that the buyer would close pursuant to the terms of the contract, and invites him to do so. The closing date provided for in the contract was still over a week away.

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13. On November 15, 1994, Vermont National Bank, in response to the purchaser's notification that the purchaser would not accept the financing as offered, issued a denial of credit in which it notified the buyers in writing that their application for credit was being denied. The grounds were stated as follows: "Buyers not willing to accept terms of commitment due to concerns about the safety of the water system." The court finds that the problem of the water system created the need for increased expense which, together with the terms of the bank's commitment, was the reason for defendant's non acceptance of the financing. On the same day, November 15, 1994, defendant wrote to the seller's attorney and set forth his position. First he reiterated the fact that he had attempted to terminate the contract on November 1, 1994, on the grounds that the water supply was not satisfactory and that he had exercised a right to terminate under Addendum A. In addition, he attached a copy of the bank's denial of credit and relied on the terms of the financing contingency in item eight of the purchase and sale contract as a second basis to terminate the contract. Defendant requested the return of the $1,000 deposit.

14. No closing took place on or before November 18, 1994. On November 19, 1994, defendant first became aware of another property, which he eventually purchased. Prior to November 19, 1994, he had not taken any steps to look for or try to buy another residence.

15. On November 21, 1994, the seller's attorney, Mr. Fink, responded to defendant's notice with a letter in which he stated

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the seller's position that the purchaser had breached the purchase and sales agreement by not paying the additional deposit of $11,000 on or before October 31, 1994, and by failing to close on or before November 18, 1994. In the letter Mr. Fink claims that defendant's invocation of the financing contingency is an improper basis for termination of the contract. At that point, the seller's position was that the buyer was in breach of the contract, and Mr. Fink informed defendant that his client intended to bring an action for specific performance, together with an alternative claim for deposit moneys in the amount of $12,000 plus attorney's fees and court costs.

16. The purchase and sales agreement contains a paragraph called, "Mediation of Disputes," in which the parties agreed to submit any claim arising out of the contract to mediation in accordance with the rules and procedures of the Homesellers/Homebuyers Dispute Resolution System (DRS). Neither party sought to use this procedure at any time, nor were they given any information by the realtor to enable or encourage them to do so. After the suit was filed, the parties engaged in mediation ordered by the court prior to the contested hearing.

17. The purchase and sales agreement sets forth the seller's rights in the event of the purchaser's failure to close or default. Paragraph 21 provides that in the event that purchaser fails to close or is otherwise in default, the seller has two alternative remedies: First, the seller may chose to terminate the contract and retain all contract deposit funds and liquidated damages.

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Alternatively, the seller may pursue all legal and equitable remedies provided by law. However, if the seller does not notify the purchaser of the seller's selection of remedy within 30 days of or following notice of the purchaser's default, then the seller is limited to the sole remedy of retaining all deposit money as liquidated damages. The contract also provides that if the water test contingency is not satisfied according to its terms, or if the financing contingency is not met, the purchaser may terminate the contract and receive back the deposit money paid. It further specifies circumstances in which each such contingency shall be deemed waived by the purchaser.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the court makes the following conclusions of law:

1. This action is based on the plaintiff seller's claim for breach of contract. The defendant purchaser claimed, as an affirmative defense, that the seller failed to comply with the terms of the contract providing for mediation, and thus is prevented from pursuing this court action. Defendant has shown that neither party sought to invoke mediation to bring about a resolution of this action before the suit was filed, although the purchase and sales contract contains an agreement on the part of the parties to engage in mediation. The court strongly endorses mediation as a process to be pursued prior to litigation, as evidenced by the court's own requirement that the parties engage in

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mediation prior to being able to conduct an evidentiary hearing. Because the parties engaged in pretrial mediation, the requirement of mediation has been fulfilled. While participation in mediation may be a prerequisite to an evidentiary hearing, the fact that this was not completed prior to filing will not entitle defendant to judgment based on the failure of mediation as an affirmative defense. It is not included in the affirmative defenses listed in V.R.C.P. 8(c); it is a procedural requirement and not a substantive defense.

2. Defendant's position is that he was entitled to terminate the contract on November 1, 1994, because as of that date, the water supply was not satisfactory to him, and he had until November 2, 1994, to give notice on that issue. His position is that the state test that showed no bacteria was not conclusive as to potability, and that his own visual inspection prior to October 26, 1994, was part of the "test" that he performed, the results of which he communicated to the seller prior to November 2. This argument is disingenuous. Under the terms of the contract, the purchaser was entitled to obtain any kind of testing as to potability and the water supply that he wished, but he was required to do the testing before October 26, 1994. The seller had limited her risk that testing of the water supply would be a reason for terminating the agreement by contracting for a deadline on the testing; otherwise the contingency was waived. Giving defendant the benefit of the doubt and counting his own efforts to try out the water supply as a "test," the evidence shows that defendant's

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real "test" of the discoloration and sediment did not happen until October 30 and 31 of 1994, which was beyond the deadline. In essence defendant is asking the court to rewrite the contract by interpreting it to give him a right to terminate the contract for an unsatisfactory water supply based on his subjective evaluation of the water supply up to November 2, 1994. This would constitute a modification in the terms of the contract as written. Defendant did not need to agree to the limited language contained in Addendum A, but he did so. The most reasonable interpretation of the contract is to read Addendum A and ¶ 10 as a coordinated set of terms establishing the right to test the water by a certain date and provide notification of the results by a certain later date. Defendant might wish that he had signed a contract with a more open-ended opportunity to terminate on the basis of his subjective dissatisfaction with the water supply, but the court will not substitute new terms for the ones the parties agreed to as part of the contract. The seller was entitled to rely on the fact that any testing would be done on or before October 26, 1994, and there was no testing that yielded unsatisfactory results prior to that date. Thus, defendant's attempt to terminate the contract on November 1, 1994, was not based on proper grounds and was invalid. Defendant is not entitled to a declaration that he terminated the contract on November 1, 1994, and that he is thereby entitled to a return of the deposit money.

3. In these court proceedings, plaintiff argues that defendant breached the contract on October 31, 1994, by not paying

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the additional deposit due of $11,000. However, that was not the position taken by the seller in response to the purchaser's attempt to terminate on November 1, 1994. Rather, in Mr. Fink's letter of November 10, 1994, the seller's position is that the buyer's attempt to terminate was invalid. The seller did not consider the buyer in breach, but rather considered that the buyer was obligated to fulfill the requirements of the contract, and to close on or before November 18. Mr. Fink did not claim a breach of the contract due to nonpayment of the second deposit, and he did not demand payment of it prior to the closing date. Therefore, as of November 1 and continuing through November 10, the contract remained in force. The plaintiff had not declared the buyer in breach; she was seeking performance of the contract, and both parties remained under the obligations of the contract terms.

4. The next question is whether or not defendant was entitled to terminate the contract based on the financing contingency. Defendant's position is that he was unable to obtain satisfactory financing, and that therefore he was entitled to terminate the contract as of November 15, the date of his notice, and receive the return of his deposit. Plaintiff's position is that defendant's attempt to rely on the financing contingency is a subterfuge because his real reason for not wanting to complete the purchase was his dissatisfaction with the water, and not the bank's requirement that he undertake repairs to the house within 30 days. However, the court has found that there was a proper and good faith basis for defendant to decline the financing package offered by the

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bank, because it imposed additional costs of the purchase on him which he could not bear in view of the additional costs of addressing the lack of satisfactory water, which was essential for use of the property as a residence. Therefore the court concludes that defendant was justified in relying upon the terms of the financing contingency provision to terminate the contract. He had a proper basis for termination, and he gave immediate notice. Under the terms of the contract, there were no restrictions on the type of financing that defendant was required to accept, and he had a right to terminate. Under ¶ 22 of the purchase and sales agreement, in the event the purchaser terminates under a specific provision entitling him to do so, he is entitled to a refund of his deposit. Therefore, the court concludes that defendant was entitled to terminate the contract as he did in his letter of November 15, 1994, and that as of that time he was entitled to a return of his deposit.

ORDER

Judgment is entered for Defendant, who is entitled to return of his $1,000 deposit, plus interest since November 15, 1994.

Dated this 14th day of August, 1997.

Mary Miles Teachout

Hon. Mary Miles Teachout,
Presiding Superior Court Judge

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