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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2008-263

MARCH TERM, 2009

Robert W. Phillips II	}	APPEALED FROM:
	}	
v.	}	
	}	Washington Superior Court
	}	
Peter Noel Duhamel and W.J. Heney & Sons, Inc. d/b/a Coldwell Banker Heney Realtors	}	DOCKET NO. 721-12-05 Wncv
		Trial Judge: Dennis R. Pearson

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

Seller appeals the superior court's order concluding that seller breached the parties' purchase and sale contract and granting buyer specific performance of the contract. On appeal, seller argues that the trial court erroneously concluded that seller breached the contract because buyer first repudiated the contract through his attorney. Seller also claims that the court erred in failing to award him damages for buyer's failure to close as promised. We affirm.

On August 25, 2005, the parties entered into a written purchase and sale agreement whereby seller promised to convey forty-four acres of land in East Montpelier to buyer in exchange for $85,000. The contract set a closing date of November 1, 2005 at a time and place to be decided. The contract did not have a financing or any other sale contingency. The contract provided that buyer had until November 1, 2005 to obtain permits to subdivide the property into two lots. The contract stated that if buyer was successful in obtaining the permits, then buyer would purchase the property with two separate deeds and be responsible for drafting the deeds. Otherwise, the sale would proceed with one deed drafted by seller. Sale was not contingent on obtaining the permit. The contract also required seller to provide written notice of seven working days prior to closing if seller required the funds by electronic or wire transfer.

Seller was involved in another transaction which required him to make a substantial payment by November 1. According to seller, failure to make this payment would result in a large penalty. The trial court found that there was no record evidence that buyer knew the amount seller was required to pay on his separate transaction or that a default penalty would occur if payment was late.

The trial court found that by October 20, 2005, seller knew that buyer would not obtain a permit by November 1, 2005. Seller was therefore responsible for drafting a single deed. Seller planned to draft the deed himself, but did not begin to prepare the deed until late on Monday, October 31, 2005. In addition, the trial court found that seller planned to not be personally present at the closing and there was no evidence of how he planned to deliver the deed—signed or unsigned—to the closing in Vermont the next day. Seller did not provide advance notice that he would require a wire transfer. In an email sent to buyer's attorney on the evening of October 31, 2005, seller sent wire instructions.

Buyer retained an attorney to assist him with the closing. This attorney had represented buyer in a prior real estate transaction with seller. After 5 p.m. on October 31, 2005, buyer's attorney spoke with seller and reportedly told seller "the closing is off" because buyers did not have the money. Buyer's attorney told seller that he based this information on a conversation he had with buyer's wife that a second mortgage did not come through. Buyer's wife was not a party to the transaction. The trial court found that buyer told his attorney later that evening that he had the funds and wanted to proceed with the closing the next day. At 9:30 a.m. on November 1, buyer's attorney telephoned seller and explained that buyer wished to proceed with the sale and would deliver bank checks for the entire amount due. At that time, seller also wanted to proceed with the sale. Later that morning buyer's wife delivered the checks to seller's listing broker. The sale, however, was not completed. Seller insisted on a wire transfer, and although buyer was willing to cancel the checks and wire the funds to seller, buyer insisted that he have a valid, recordable deed first. Because seller was unable to produce the deed and buyer would not send the funds without the deed, the parties were at an impasse. Seller declared buyer in default. Consequently, seller was unable to meet his obligation on his other transaction and claims he paid a $10,000 penalty. Buyer filed suit for breach of contract, seeking specific performance. Seller claimed that buyer first breached the contract and sought damages for the penalty he paid on his other obligation, as well as improvements purportedly made to the property and real estate taxes.

The trial court concluded that seller breached the contract by failing to provide a valid, enforceable, and recordable deed on the closing date. The court found that buyer did not repudiate the contract, and, in any event, any repudiation was effectively withdrawn. The court ordered specific performance of the contract. Seller appeals.

Seller first argues that the trial court erred in finding that seller breached the contract because buyer first repudiated the contract through his attorney. Seller relies on buyer's attorney's statement made during their October 31 telephone call that "the closing is off." Seller contends that the attorney had actual or apparent authority to speak for buyer and that this statement repudiated the contract.

To repudiate a contract, one must convey "a positive and unequivocal refusal to perform under the contract." Lowe v. Beaty, 145 Vt. 215, 218 (1984) (quotation omitted). The trial court concluded that buyer's attorney lacked actual authority to cancel the closing because it found there was no evidence that seller himself intended to cancel the sale or that he instructed his attorney to do so. See Lakeside Equip. Corp. v. Town of Chester, 2004 VT 84, ¶¶ 5-6, 177 Vt. 619 (mem.) (requiring authorization from the principal to agent to create actual authority). The court further explained that while buyer's attorney may have possessed apparent authority to cancel the contract, any repudiation was ineffective because seller did not detrimentally rely on this show of apparent authority. See New England Educ. Training Serv., Inc. v. Silver St. P'ship, 148 Vt. 99, 105 (1987) (Apparent authority "derives from conduct of the principal, communicated or manifested to the third party, which reasonably leads the third party to rely on the agent's authority.").

We do not address the question of whether buyer's attorney had actual or apparent authority to cancel the contract because any repudiation was withdrawn by buyer when he notified seller on the morning of November 1 that he intended to proceed with the sale. "As a general rule, a repudiation can be withdrawn provided such withdrawal occurs before the injured party materially changes his position in reliance on the repudiation." Lowe, 145 Vt. at 218. Seller contends that buyer could not withdraw the repudiation because seller materially changed his position in reliance on buyer's attorney's statement that the closing was off by discontinuing

his efforts to prepare a deed. We conclude that seller did not detrimentally rely on the repudiation. The trial court found that seller did not materially change his position following his conversation with buyer's attorney. The court found that he "did nothing on the evening of 10/31/05 to indicate that he agreed, or also considered that the 'closing was off.' " Seller's inability to produce a valid and enforceable deed at closing the following day did not result from seller's communication with buyer's attorney. Seller knew by October 20 that he was obligated to prepare a deed and deliver it for closing. Yet, in seller's email—sent at the end of the day on October 31, 2005 and before seller spoke with buyer's attorney—seller explained that it was "too late to begin drafting the deed today." As the trial court explained, seller's "inability to deliver a duly executed and legally valid deed on 11/1/05, in Vermont[] was[,] on this record[,] already an irremediable defect well before the telephone call from [buyer's attorney] after 6 pm on 10/31/05." In addition, even if seller could have completed the deed, seller had no way of delivering it to the closing since he had planned all along to be in New York on November 1. Ultimately, as the trial court explained, the failure to close resulted from seller's own inability to meet buyer's reasonable and contracted right to have a valid, recordable deed in hand on November 1, 2005 before wiring the money to seller.

We find no merit to seller's argument that the court erred in failing to award him damages. Because we affirm the trial court's conclusion that seller breached the contract, there is no basis to award seller damages. Furthermore, the record supports the trial court's finding that there was no evidence offered to support seller's contention that he is entitled to reimbursement for alleged improvements made to the property.

Affirmed.

BY THE COURT:

John A. Dooley, Associate Justice

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice