STATE OF NEW YORK
SUPREME COURT COUNTY OF WAYNE

DAVID CONNORS,

Plaintiff,

-vs-

Index No. 63093

2007

JON E. GRAY, CHRISTINA M. GRAY, GERALD BUSS, DIANA BUSS, ALLIANCE BANK, OSWEGO COUNTY SAVINGS BANK,

Defendant.

APPEARANCES: HARRIS BEACH PLLC
(Douglas A. Foss, Esq., of counsel)
Attorneys for the Plaintiff

PHETERSON, STERN, CALABRESE, NEILANS & SPATORICO, LLP
(Derrick A Spatorico, Esq., of counsel)
Attorney for Defendants Buss

Jon E. Gray and Christina M. Gray
Defendants Pro Se

MEMORANDUM - DECISION

John B. Nesbitt, J.

I. INTRODUCTION AND BACKGROUND

In April 2002, defendants Jon and Christine Gray *(the "Grays")* purchased improved real property at 5530 Martin Road in the Town of Marion, consisting of approximately thirty acres, a single family residence, and three detached buildings and a shed. The purchase price was paid largely through a purchase money mortgage in the amount of $192,000. The Grays had grand plans for the property, which not only would serve as their home, but a farm for raising and sale of the exotic (by Wayne County standards) Alpaca sheep, and the operational site for commercial livestock transporting. Unfortunately, the costs associated with these enterprises eclipsed the income the Grays were able to generate, which only became exacerbated when Mrs. Gray lost her job at Frontier Communications in 2005.

The purchase money mortgage upon the property fell into default, and the assignee thereof - Alliance Bank - commenced foreclosure proceedings in March of 2007. At that time there was also a second mortgage upon the property held by Oswego County Savings Bank, which, as such, was named as a defendant in that action. The Grays had decided at some earlier point to sell the property because of their difficult financial situation, listed the property for sale, and in December of 2006 began negotiations with plaintiff David Connors *("Connors")* for his possible purchase of the property. These negotiations culminated in an ostensible contract for the sale and purchase the property by Connors dated April 12, 2007, for $205,000. Shortly thereafter, Grays apparently became aware that they had seriously miscalculated the sums needed to clear title of the liens of mortgage and pay the other expenses associated with the sale of the property. The Grays entered into a contract for the sale of the property at a higher price on or about April 24, 2007, with defendants Gerald and Diana Buss *(the "Busses")*. Apparently, Connors learned that Grays were less than committed to his April 12, 2007 contract. By letter dated May 3, 2007, Connors wrote to the Grays and their attorney:

> I have received my mortgage commitment and I hereby waive the condition in my contract to obtain a mortgage. I am ready to close. Please deliver title papers to my attorney. There are no other impediments to my closing if the title is clear.
>
> I know that you knew my purchase price would not pay off your mortgages on both the first contract you accepted and the second contract you accepted, and yet you agreed to sell it to me on those terms.

Connors also prompted his attorney to contact Grays' attorney to ascertain their intent regarding his purchase contract, resulting in a May 7th letter from the latter repudiating that contract based upon the alleged inadequacy of the purchase price to produce funds sufficient to meet the Gray's obligations attendant sale of the property. As stated in that letter:

> "[M]y clients did know that there would be a short but believed it to be approximately $8,000. They informed me that they had sufficient funds to cover that amount. They have subsequently learned that the shortfall totals approximately $18,000 and they cannot cover that amount. This would seem to be a mistake in a material fact of the contract.
>
> In addition, the contract calls for us to deliver a clear title to your client. If we cannot satisfy the mortgage (and we have previously provided you a copy of the bank's letter indicating they will require payment in full) we cannot meet that condition. This would seem to constitute impossibility of performance.

> If your client wishes to increase his offer, I would be happy to discuss that with my clients."

Based upon this letter, as well as a report from Connors' real estate agent that the Grays were showing the property to other prospective purchasers despite their contract with Connor, Connors' attorney filed the Connor-Gray contract in the Wayne County Clerk's Office on May 10, 2007, with filing number F013002.

At this point, the Busses, who had contracted for the purchase of the property after Connors, presented a written offer to Connors dated May 20, 2007, referencing "5530 Martin Road, Town of Arcadia NY: Purchase contract April 24, 2007; Gray to Buss," Buss' indicated their "desire to purchase the above property. With this letter we offer Mr. David Connors five thousand dollars ($5,000) upon receipt of a release of his purchase contract dated April 12, 2007 with the owners of the property, Jon and Chris Gray, 1871 Weisstown Road, Boyertown, PA 19512." Evidently the fact of the earlier contract with Connors has at some point been disclosed to Buss'; hence, the offer by Buss to Connors for its release.

Connors rejected the Busses' offer, insisting that the Grays honor their contract with him and close accordingly. With an eye that the matter may end up in litigation, Connors engaged further legal counsel to pursue the matter. Discussions were had between the parties' respective attorneys.[1] Connors was not interested in any settlement that did not include his acquisition of the property. By letter dated July 30th from Connors' attorney to Grays' attorney, Connor's presented a proposed resolution that addressed the practical difficulties facing the Grays:

> As we discussed on the phone last week, my client David Connors, still wants the property very much, and in fact has asked us to commence a suit for specific performance right away. In the interest of saving everyone time and money, Mr. Connors has agreed to cover the shortfall and any closing fees and

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[1] The Verified Complaint at ¶21 alleges that:
On or about July 10, 2007, counsel for plaintiff received a telephone call from counsel for defendants Buss announcing that defendants Buss intended to acquire the property, that defendants Buss were aware of the filing of plaintiff's contract in the Wayne County Clerk's Office, that they intended to close irrespective of such filing, and that plaintiff could contest title to the property in court.

costa that the Greys are not able to come up with, and then take a Confession of Judgment from the Grays for whatever that amount turns out to be. I do not have recent payoff statements, but if the Grays are agreeable, I would spend the time to get the eact numbers together. For discussion purposes, earlier estimates looked something approximating this:

Loan 1 payoff:	$194,693
Loan 2 payoff:	$ 23,613
Transfer Tax:	$ 873
Broker Fee:	$ 15,280
TOTAL approximately	**$235,450**

Less $205,000 Purchase Price
Confession of Judgment by Greys to Connors for approximately $30,000

Of course, if the Grays were able to reduce the payoff amounts or the Broker Fee, this would benefit them. Kindly advise me at your earliest convenience if the Greys are willing to consider this offer.

The Grays' attorney responded by letter dated August 14th, indicating that he had discussed Connors' "offer of settlement with Mr. and Mrs. Gray and they have declined."[2] Indeed, two days latter, on August 16th, a deed went on record transferring the property to the Busses, a deed acknowledged by the Grays on August 9th. This transfer was discovered by Connors' attorneys in late August after receipt and review of a stub search prepared for the purpose of preparing a lis pendens to be filed in conjunction with an action for specific performance. Such action was commenced by Connors on September 25, 2007 by filing of a summons and complaint and lis pendens in the Wayne County Clerk's Office. Issue was joined by service of an answer and on behalf of defendants Buss. Defendants Gray appear pro se. The two defendant banks do not appear, presumable because their interests were satisfied upon the transfer of the property from defendants Gray to defendants Buss.

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[2] The letter also stated that the attorney - Samuel J.Bonafede, Esq - had "also informed [the Grays] that [he] will not be representing them any further in this matter." Attorney Bonafede apparently had earlier terminated his representation of the Grays following the involvement of the Buss' and filing of the Connors contract in the Wayne County Clerk's Office. He did agree to a limited resumption of his representation for the purpose reviewing the Connor's settlement proposal to Grays. The record does not reveal whether Grays have had any legal representation since their rejection of the Connor's settlement offer, including their subsequent sale to Busses. Indeed, they appear *pro se* in this action.

II. THE PLEADINGS AND PENDING SUMMARY JUDGMENT MOTIONS

The Complaint in this action asserts three causes of action, all predicated upon the assumption that a valid contract existed for the sale of the property from the Grays to the Busses. The first cause of action alleges that plaintiff fully complied with his pre-closing obligations under the contract, stood ready, willing, and able to complete those obligations incident closing, duly demanded that defendants Gray do likewise, and that defendants Gray refused to do so and repudiated the contract. The Grays then conveyed the property to defendants Buss, who took title with actual knowledge of plaintiff's pre-existing contract rights and thus acquired title subject thereto. Under these circumstances, alleges plaintiff, there being not adequate remedy at law, specific performance of his contract with the Grays is required. The second cause of action seeks monetary damages against defendants Gray resulting from their breach of contract, including additional expenses to plaintiff that may be incident judicial direction that plaintiff's contract with the Grays be specifically performed. The third cause of action seeks damages against defendants Buss who, it is alleged, had "knowledge of the valid and existing contract between Gray and plaintiff," but nevertheless "intentionally procured conveyance to them of title to the Property, which conveyance by defendants Gray breaches the contract between defendants Gray and plaintiff."

Defendants Busses' Answer consists principally of a general denial, except to admit the written agreement between plaintiff Connors and defendants Gray, the discussions between Connors and the Grays regarding methods to complete the agreement when the Grays indicated an inability to satisfy the existing mortgages upon closing, and the fact that the property was transferred by the Grays to Buss's in August, 2007. Busses' Answer does raise a number of defenses, not only challenging plaintiff's claim that there was a valid contract, but, if so, whether it is enforceable under the circumstances of this case. The Answer of defendants Gray consists of a letter signed and notarized setting forth their version of the events predicating this litigation and their personal difficulties, and some remarks demonizing the plaintiff and canonizing defendants Buss.

Plaintiff Connors and defendants Buss both move for summary judgment. Plaintiff seeks "partial summary judgment for specific performance directing defendants Gerald and Diana Buss

to convey title to specific real property in return for plaintiff's performance of the terms of his contract to acquire such property. Defendants Buss oppose that motion, and cross-move to dismiss the complaint.

III. DISCUSSION

Assuming there is a valid contract between the plaintiff and defendants Gray, the motion of the plaintiff is appropriate. This is not a case of mutual mistake or one of unilateral mistake with fraud or over-reaching by the party seeking to enforce the contract. So too, contracts are generally enforceable regardless of the difficulties facing or consequences visited upon those who seek to avoid them. Defendants argue that to enforce the contract "would likely force the Grays into bankruptcy," and that to enforce a contract that "will cause the seller to have to consider bankruptcy is against public policy." To the contrary, if such were the case, there would be no need for bankruptcy laws, because contracts that lead to insolvency would be voided without the need for and intervention of bankruptcy courts.[3] No regime of contract law could long survive if simple inability to perform excused contract compliance. Thus, the equitable doctrine of impossibility tempering strict application of contract law "is only available where the performance is rendered impossible by the happening of an unanticipated event that could not be foreseen or guarded against in the contract" (22A NY Jur2d, Contracts §388 at p, 56). This is clearly not the case here. And clear as well, is the fact that defendants Buss took title with actual knowledge of the earlier Connors contract, and the fact that Connors was not just going to go away when the Busses entered the picture. Thus, the Busses cannot claim the protections afforded bonafide purchasers unaware of prior interests in the subject matter.

What stays the Court's hand is the issue of attorney approvals as relates to whether a binding contract was actually created. Section 4(c) of the contract between Connors and the Grays reads:

> **Attorney Approval.** This contract is subject to the written approval of attorneys for the Buyer and Seller within seven calendar days, excluding Sundays and public holidays, from date of acceptance (the Approval Period). If either attorney (i) does

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[3] "Where impossibility or difficulty of performance is occasioned only by financial difficulty or economic hardship, even to the extent of insolvency or bankruptcy, performance of a contract is not excused." 22A NY Jur 2d, Contracts §390.

> not provide written approval with the Approval Period or (ii) makes written objection to or conditionally approves (collectively the Objections) the contract within the Approval period and the Objection is not cured by written approval by both attorneys and all of the parties within the Approval Period, then (A) either Buyer or Seller may cancel this contract by written notice to the other and any deposit shall be returned to the Buyer or (B) the approving attorney may notify the other party (with a copy to any attorney listed below) in writing that no approval has been received and that the noticed party has five (5) calendar days, exclusive of Sundays and public holidays, from receipt of the notice (Grace Period) to provide written attorney approval or disapproval of the contract. The approving attorney shall provide to the noticed party (with a copy to any attorney listed below) a copy of the approving attorney's approval letter, whether conditional or not, along with the written notice of the Grace period. If written attorney approval or disapproval is not provided to the approving attorney within the Grace Period, then this Attorney Approval contingency shall be deemed waived by the noticed party and any conditions in the approving attorney's approval letter shall be deemed accepted by the noticed party.

The record before the Court does not document that this attorney approval procedure was complied with so to create a binding and enforceable contract between Connors and the Grays, thus creating either a question of fact or at least a need for further supplementation of the record. Specifically, it does not appear that Attorney Bonafide (the attorney listed for Grays in the contract) ever approved the contract or that the requisite notice was given to trigger waiver of the attorney approval requirement. By letter submission dated December 7, 2007, plaintiff's attorney addresses this issue:

> The Defendants argue that the Grays' attorney never approved the contract form and that this means that "there is no approved contract." Defendants' Answer at ¶26. The fact, however is that the Grays' attorney *did* indicate his approval. (emphasis in original) The contract required approval in writing, and stated that in the absence of that approval, either party could cancel the contract (by notice in writing), or invoke a "grace period"within which the other party's attorney was supposed to provide approval. Defendants' Answer at Ex. B, ¶4(c). The contract did *not* state that it was automatically nullified if neither of these options were exercised (and neither one was in this case). Nor did it state that attorney approval was only valid if provided within a particular time period, or used particular language. Mr. Bonafede's letter of May 7 convey in writing his approval of the contract, by acknowledging its existence and validity. Defendants' Answer at Ex. C. It was, therefore, a valid attorney approval under the terms of the contract. It was, therefore, a valid attorney approval under the terms of the contract. The Busses can hardly argues that Mr. Bonafede's approval is somehow invalid because

it did not comply with some optional formalities that his own clients, the Grays, chose to ignore.

Whatever else may be said of Attorney Bonafede's letter of May 7th, it certainly was not a contract approval, but more of a flat out rejection. To be sure, the letter based his objection to the contract on matters other than "contract form," that is, issues that usually merit attorney oversight in contract preparation. And one may speculate that failure to take issue with the contract form implies that Mr. Bonafede had no issue with it as drafted and completed. But the contract does not prohibit an attorney from disapproving the same for any or no reason, and no authority has been cited otherwise. Nor is there warrant to say in this case that the approval requirement procedure was a matter of "optional formalities." In essence, a contract of this sort "subject to attorney approval" is simply a tentative agreement - an incomplete contract- an agreement to agree - unless and until the third party approvals are obtained or dispensed with in accordance with the terms of the contract. At any rate, on the present record, the Court cannot hold as a matter of law whether the attorney approval procedure was or was not complied, except to find that the May 7th Bonafede letter is not a contract approval. Lastly, defendants allege that plaintiff's own attorney approval was conditional and in the nature of a counter-offer. This document was identified as a letter from Attorney Rubery "attached as Exhibit D" to the Spatorico November 21st affidavit. Id at ¶24. Exhibit D as submitted to the Court is a copy of the August 14th fax from Attorney Mullin to Attorney Bonafede. Thus, the Court cannot rule on the implications of such approval.

IV. CONCLUSION

The respective motions for summary judgment are denied in accordance with this decision.

Dated: August 7, 2008
Lyons, New York

John B. Nesbitt
Acting State Supreme Court Justice