

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

(FILED: May 8, 2013)

VANNY SAMNANG AND :
NOROTH VANN :
:
v. :
:
MICHAEL ALGER :

P.C. No. 08-7361

DECISION

LANPHEAR, J. This matter was tried by the Court, jury waived. Ms. Vanny Samnang and Noroth Vann (Buyers) agreed to purchase a home located at 129 West Allenton Road, North Kingstown, Rhode Island, from Michael Alger (Seller), pursuant to a written sales agreement. Ms. Samnang provided a downpayment, yet the sale of property failed. Hence, she seeks return of her deposit based on book account and unjust enrichment. While Seller did not counterclaim, he affirmatively asserted that he was ready and willing to sell, the Buyers waived their protection under the Agreement and should be estopped from recovering.

I

Findings of Fact

David Alger is Seller’s brother who owned property adjacent to his brother Michael. Michael Alger managed David’s adjacent property at 129 West Allentown Road, in North Kingstown. In June 2008, Ms. Samnang contacted Michael Alger to inquire about the property. After a meeting at the property, they came to a consensus and agreed to a conveyance. Ms. Samnang had previously done business with Attorney Jason Marinelli and arranged for a new

meeting with him. On June 15, 2008, the Buyers and Seller met with Attorney Marinelli in Attorney Marinelli's office. Attorney Marinelli prepared a draft Purchase and Sales Agreement. See Joint Exhibit 2. The parties discussed the Agreement, agreed on a few changes, and all three of the parties signed the Agreement on June 22 and 23, 2008. (Joint Ex. 2 at 6).

While the Agreement is in a standard form, there are some notable exceptions. The total deposit to be paid was \$22,000, over eighteen percent (18%) of the purchase price. As Seller had openly acknowledged that the deed was into his brother David's name, he agreed that the sale was "Subject to a deed being recorded into Michael Alger prior to closing." (Joint Ex. 2)¹ While meeting at Attorney Marinelli's office, Ms. Samnang expressed concern about the requirement in Section 5 that the deposit be retained by a broker, as no broker was involved. The parties then agreed that Michael Alger, the Seller would hold the deposit. Ms. Samnang brought two cashier checks totaling \$11,000 to the June meeting. Attorney Marinelli then gave the cashier checks to Seller. Attorney Marinelli, acting as counsel for Ms. Samnang, drafted the Agreement.

Mr. Alger, Ms. Samnang and Attorney Marinelli each recognized this was a partially constructed structure. Shortly after both parties signed the Agreement, Mr. Marinelli telephoned town officials to be sure that a Certificate of Occupancy could be acquired after some work was completed at the property. He received only favorable responses from the town officials he spoke with.

The Agreement was contingent on the Buyers obtaining a mortgage on the property. Although Ms. Samnang made a verbal inquiry about a mortgage at one bank, she never submitted a written application, or a formal application. As the Buyers did not apply for a mortgage, they never received a commitment or a denial letter. The Buyers never told Mr. Alger

¹ A deed was recorded from David Alger to Michael Alger in September, 2008. (Joint Ex. 1).

what they were doing with the mortgage application. They never informed the Seller of any application, or any acceptance or any rejection. Section 8 of the Agreement states, in pertinent part:

(a) The Buyer must apply for such [contingent] mortgage within 14 days of this Agreement. **If the Buyer fails to make formal application by said date, the Buyer shall be in default of this Agreement, shall forfeit all Deposits, and this Agreement shall be deemed null and void.**

(b) ...

(d) In the event the Buyer has received neither a commitment nor a denial for such mortgage by the Contingency Date [August 1, 2008], the Buyer shall, by the Contingency Date, and by written notice to the Seller or Listing Agent, request to extend the time by which a copy of the written commitment or denial must be provided, or waive the mortgage contingency clause by written notice. ...

(e) in the event the Buyer has not provided a copy of the written commitment or denial for such mortgage and has not given written notice as specified in 8(d) to the Seller or Listing Agent by the Contingency Date or extensions thereof, then the Buyer shall be in default of this Agreement, shall forfeit all Deposits, and this Agreement shall be deemed null and void. (Emphasis in original).

Sec. 8(a)(b)(d)(e).

Section 3 of the Purchase and Sales Agreement required an \$11,000 deposit to be paid when the Agreement was signed, and another “\$11,000.00 Additional Deposit to be paid on or before June 25, 2008.” (Joint Ex. 2, at 1). As indicated, the first \$11,000 was paid to Seller in two checks. A third and separate check² was written to Mr. Alger which was returned for insufficient funds. Mr. Alger, continuing to ask for full payment of the deposit, received a fourth

² While the Court finds that a total of two checks were returned as unpaid by the banks, it is uncertain as to the date of what it labels the “third and separate check.” This document was not placed in evidence. The Court infers that Mr. Alger returned the third check to Ms. Samnang after it bounced, in exchange for the fourth check.

and separate check³ for \$5000 on July 9, 2008. This was well after the June 25, 2008 Agreement deadline. This check was also returned by the bank for insufficient funds in the account. Mr. Alger again protested, and received Joint Exhibit 5, a check for \$6000. See Joint Ex. 5. The check was dated June 25, 2008, but was not presented to Mr. Alger until after the fourth check received on July 9, 2008 bounced, indicating that the check was obviously predated. The predating gave the appearance of meeting the June 25, 2008 deadline, but it did not. Receiving no additional payments from Ms. Samnang, Seller received only \$17,000 in total payments from Ms. Samnang, despite the fact that the Agreement required that a deposit of \$22,000 to be paid in two installments.

After the last check for \$6000 was delivered, Ms. Samnang told Mr. Alger she had trouble obtaining the purchase monies as she had been denied a mortgage, and she thus wanted the price of the house reduced by \$5000. She never requested a deadline extension. Mr. Alger made no new commitment to Ms. Samnang. After they talked, Mr. Alger recognized that he was still shortchanged on the deposit and grew concerned. Mr. Alger, admittedly upset, telephoned Attorney Marinelli, informing him that Ms. Samnang was “in default” for delivery of bad checks, failing to pay the entire deposit, and clearly insisted that he would not proceed with the closing.

Attorney Marinelli then telephoned his client, Ms. Samnang. He reported that Mr. Alger was claiming a default. Attorney Marinelli returned a fee payment from Ms. Samnang for \$500 on July 15, 2008, apparently believing that the closing would never occur. At some point, Attorney Marinelli told Ms. Samnang that if she delivered \$105,000 to him he would try to get

³ It may be more appropriate to label this document a draft as it is “payable through” an institution, there are odd limitations upon it, and the name of the bank is illegible. (Joint Ex. 6). However, this was not an issue at trial.

the deposit back. Ms. Samnang delivered a check for \$105,000 to Attorney Marinelli on or after August 21, 2008—after the scheduled closing date listed on the Agreement. Attorney Marinelli never scheduled a closing in writing, nor does it appear that he ever scheduled a firm closing time at all. On September 11, 2008, Attorney Martinelli released \$105,500 to Ms. Samnang. An attorney associated with Mr. Marinelli sent Mr. Alger a demand letter on September 18, 2008, but the letter did not schedule a closing. The letter was not introduced into evidence.

II

Presentation of Witnesses

The high court encourages hearing tribunals to “articulate [their] assessment of the witnesses’ credibility.” State v. Forbes, 925 A.2d 929, 935 (R.I. 2007).

Mr. Michael Alger was Plaintiff’s first witness. Mr. Alger described the chain of events although he was not sure of all of the dates, probably because he did not anticipate being called as the main witness. It appeared that he had not spent any time reviewing the four-year old documents prior to testifying. While not appearing to be terribly sophisticated in real estate transactions, he was aware of the significance of the documents, and the need to keep one’s word. He clearly described his exasperation after dealing with bounced checks, Ms. Samnang’s failure to meet the contractual deadlines, and her eventual demand that the sales price be lowered. On further examination by his own attorney, Mr. Alger was able to promptly describe the multiple defaults and contract breaches. Nevertheless he was cooperative, responsive and credible, to the extent of his memory.

Attorney Jason Marinelli was the second witness. He represented Ms. Samnang during the negotiations of the Sales Agreement and verified the authenticity of the document. Oddly, while admitting to having favorable conversations with the building officials, he could not recall

getting a deed from Michael Alger's brother, David. Although Attorney Marinelli knew that he would be called upon to testify and had much of his file material available, he could not locate a firm closing date. Attorney Martinelli did not deny the conversation with Mr. Alger concluding the Agreement, located no note memorializing this important call, but indicated that his usual practice would be to call the client promptly. Attorney Marinelli admitted to asking Ms. Samnang to pay the full contract price so they could get the deposit returned. Ms. Samnang ignored such recommendation. Attorney Marinelli admitted that his recommendation for Ms. Samnang to tender \$105,000 was only to attempt to get the deposit refunded—not to close on the property, which limited his credibility. Although cross-examination was quite tamed and courteous, Attorney Marinelli's recollection diminished. The Court concludes that he either had little recall of this particular transaction after the negotiation of the Agreement, or he was attempting to protect his former client.

Ms. Samnang was the third witness. An intelligent woman, she was poised and prepared for her testimony. She was courteous and deferential to the attorneys and the Court yet, while appearing demure, she was sharp enough to insert information in her answers to make her point clear, not necessarily responding to the pending question. This Court concludes that she intentionally sought to avoid clear cross-examination questions. Through her responses she admitted to the contract and her defaults. The Court did not need to question her credibility, but did question her sincerity. While admitting her defaults, she seemed to act as if she had done nothing wrong, and Mr. Alger should have simply sold the property to her for a lower price, after the deadline. Mr. Noroth Vann never appeared at trial and never testified.⁴

⁴ Mr. Vann's name stopped appearing on the attorney filings. As he did not appear at trial, he did not press for any recovery.

III

Analysis and Conclusions of Law

A

Default of Purchase and Sale Agreement

Ms. Samnang defaulted on the Purchase and Sales Agreement. Simply put, Ms. Samnang materially defaulted on the Purchase and Sales Agreement in a number of respects. These include:

1. She passed a deposit check that did not clear (the “third check”) listed above;
2. She passed a second check or draft that did not clear (the July 25, 2008 document);
3. She was late in delivering all payments after the Agreement was signed;
4. She never paid the full deposit as agreed (\$22,000);
5. She failed to close (deliver all purchase monies) on or before the agreed date;
6. She never scheduled a closing after she was tardy with the original closing;
7. She failed to apply for a mortgage, as she agreed;
8. She failed to inform Mr. Alger of the status of her mortgage, as agreed;
9. After being called in default, her only response was an attempt to lower the price and get her deposits back.

As if this weren't enough, Ms. Samnang's actions were otherwise questionable, and demonstrate her lack of good faith:

1. Ms. Samnang falsely indicated that she could not get a mortgage, while she had never even made an application for one as she agreed;

2. Her attorney tried to resolve her difficulty by requesting that all the purchase monies be available from Ms. Samnang; however, even the attorney admitted the goal at that point was not to perform the contract, but to get the deposit refunded;
3. Ms. Samnang never attempted to cure her defaults;
4. When called on her questionable conduct, Ms. Samnang blamed Mr. Alger for not getting a deed from his brother, even though no closing had yet been scheduled.⁵

Ms. Samnang defaulted on the Agreement and never established that Mr. Alger either defaulted or violated the Agreement.

B

Mr. Alger's Remedy for the Defaults

The remedy under the contract is clear: Mr. Alger retains the deposit. Again Section 8, paragraph (a) of the Purchase Agreement provides that Mr. Alger retains the deposit if Ms. Samnang fails to adhere to its provisions:

(a) The Buyer must apply for such [contingent] mortgage within 14 days of this Agreement. **If the Buyer fails to make formal application by said date, the Buyer shall be in default of this Agreement, shall forfeit all Deposits, and this Agreement shall be deemed null and void.** (Emphasis in original).

(Joint Ex. 2, Sec. 8(a)).

Paragraph 22 of the Agreement is even more explicit:

Upon default by the Buyer, the Seller shall have the right to retain the Deposits, such right to be without prejudice to the right of the

⁵ At trial, Ms. Samnang claimed that Mr. Alger was never the true owner so he should not be allowed to recover under the Purchase Agreement. Mr. Alger disclosed that he was not the owner before the Agreement was executed. It is reflected in the Agreement. Mr. Alger did not receive a deed from his brother before the closing, as Ms. Samnang had defaulted and Mr. Alger was already requesting that the full deposit be paid.

Seller to require specific performance and payment of other damages, or to pursue any remedy, legal or equitable, which shall accrue by reason of such default.

(Id. at par. 22).

The contract is clear and unambiguous. Both parties entered into it freely, intended it as a binding contract and expected it would be adhered to. The contract even spells out the recovery allowed to each party in the event of a default. Retention of the damages is specifically mentioned as a remedy of the Seller. There was no evidence or argument to suggest that the amount of the deposit here was an unreasonable amount for Mr. Alger to retain. See Riley v. St. Germain, 723 A.2d 1120, 1122-1123 (R.I. 1999).

C

Recovery by a Claim of Unjust Enrichment

A recovery by a claim of unjust enrichment is inappropriate here. There is an agreed upon written contract between the parties. It defines the rights, relations and remedies of the parties. Neither party questions the validity or clarity of the contract. Rewriting an established contract, simply because one party alleges some difficulty in performing, does not seem appropriate when there has been no attempt to renegotiate with the opposing party. In order for a party to recover in unjust enrichment, an equitable claim, there must be no adequate remedy at law. Multi-State Restoration v. DWS Properties, 61 A.3d 414, 419 (R.I. 2013); J.K. Social Club v. J.K. Realty Corp., 448 A.2d 130 (R.I. 1982).

Earlier this year, in the same case, our high court reviewed the prerequisites for establishing a claim of unjust enrichment as:

“This Court has held that ‘actions brought upon theories of unjust enrichment and quasicontract are essentially the same.’”
Bouchard v. Price, 694 A.2d 670, 673 (R.I. 1997) (quoting R & B

Electric Co. v. Amco Construction Co., 471 A.2d 1351, 1355 (R.I. 1984)). Furthermore, “in order to recover under quasi-contract for unjust enrichment, a plaintiff is required to prove three elements: (1) a benefit must be conferred upon the defendant by the plaintiff, (2) there must be appreciation by the defendant of such benefit, and (3) there must be an acceptance of such benefit in such circumstances that it would be inequitable for a defendant to retain the benefit without paying the value thereof.” Bouchard (quoting Anthony Corrado, Inc. v. Menard & Co. Building Contractors, 589 A.2d 1201, 1201-02 (R.I. 1991)).

Multi-State Restoration v. DWS Properties, 61 A.3d 414, 418-9 (R.I. 2013).

Ms. Samnang established the first element. Mr. Alger was conferred a benefit by Ms. Samnang, that benefit being a payment of the \$17,000 deposit. Ms. Samnang also established the second element, that Mr. Alger appreciated the benefit. Indeed he personally received and possessed the \$17,000. The third element is a far greater challenge.

Ms. Samnang is required to establish that, under the circumstances, it is inequitable for Mr. Alger to retain the benefit without paying for it. First, as noted at length above, it is Ms. Samnang who defaulted on the Agreement, hence equity does not weigh in her favor. Second, Ms. Samnang executed a clear, detailed contract which specified that if Ms. Samnang defaulted, Mr. Alger would retain the deposit money. Although it was established at the time of signing that the deposit monies would total \$22,000, Mr. Alger is not seeking the full deposit amount due by the Agreement, but stands firmly opposed to refunding the amount paid. Pressing for recovery under an implied contract avenue is counterintuitive where the party seeking redress has failed to abide by a reasoned, negotiated written contract and the contract has not been demonstrated to be unfair. Third, Mr. Alger removed the house from the market, took time to meet and negotiate with Ms. Samnang and Attorney Marinelli, and continued to prepare and reserve the property for the sale.

Ms. Samnang defaulted and breached the contract repeatedly. She failed to establish the third element of her unjust enrichment claim.

IV

CONCLUSION

For the foregoing reasons, Mr. Alger is allowed to retain the deposit monies he received as Ms. Samnang failed to establish a claim against him.

Judgment shall enter against the Plaintiffs, Ms. Vanny Samnang and Mr. Noroth Vann, and for the Defendant, Michael Alger, on Count One and Count Two of the Complaint.



RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE: Vanny Samnang and Noroth Vann v. Michael Alger

CASE NO: PC 08-7361

COURT: Providence Superior Court

DATE DECISION FILED: May 8, 2013

JUSTICE/MAGISTRATE: Lanphear, J.

ATTORNEYS:

For Plaintiff: Patrick S. Bristol, Esq.
Anthony J. Brosco, Esq.

For Defendant: Domenic A. Mosca, Jr.