2012 IL App (2d) 110405-U
No. 2-11-0405
Order filed March 23, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

PAVAN ARSOOR,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 10-SC-10015
	)	
NICHOLAS DiGREGORIO and	)	
SARAH DiGREGORIO,	)	Honorable
	)	Peter W. Ostling,
Defendants-Appellees.	)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices McLaren and Birkett concurred in the judgment.

ORDER

Held: Plaintiff showed *prima facie* reversible error in the trial court's grant of a directed finding on his claim that he validly terminated a real-estate contract and was entitled to the return of earnest money: plaintiff's letter informing defendants that he had not received "an unconditional written loan commitment" by the required date was sufficient to invoke the contract's contingency provision.

¶ 1 This is a *pro se* appeal of a small-claims judgment against plaintiff, Pavan Arsoor, with no brief from defendants, Nicholas DiGregorio and Sarah DiGregorio. Plaintiff's claim was for return of earnest money under a financing contingency in a real-estate purchase contract. Because defendants have not filed an appellate brief, we decide this appeal under the principles of *First*

Capitol Mortgage Corp. v. Talandis Construction Corp., 63 Ill. 2d 128, 131-33 (1976); we deem that he has made a *prima facie* case for reversal. We therefore reverse and remand the matter.

¶ 2 Plaintiff filed a small-claims complaint for return of $3,000 earnest money. He alleged that he had been unable to obtain financing that satisfied the financing contingency of a contract to buy defendants' residence. He further alleged that his lawyer had given defendants' lawyer proper notice of that failure but that they had not returned the money. Plaintiff then filed a group of what he identified as documents that he intended to use as evidence. These included a form real-estate contract dated April 26, 2010. The contract included a financing contingency (Paragraph 11) that made the contract contingent upon plaintiff's obtaining an appropriate mortgage by May 21, 2010:

> "This Contract is contingent upon Buyer obtaining a firm written mortgage commitment (except for matters of title and survey or matters totally within the Buyer's control) on or before May 21, 2010 for a [mortgage with certain terms, including a 6% maximum interest rate.] *** Buyer shall make a written loan application within five (5) Business Days after the Date of Acceptance. Failure to do so shall constitute an act of Default under this Contract. If Buyer, having applied for the loan specified above, is unable to obtain such loan commitment and serves Notice to Seller within the time specified, this Contract shall be null and void. If Notice of inability to obtain such loan commitment is not served within the time specified, Buyer shall be deemed to have waived this contingency and this Contract shall remain in full force and effect."

Concerning notice, the contract stated:

> "[With an exception not relevant here] all Notices shall be in writing and shall be served by one Party or attorney to the other Party or attorney. Notice to any of a multiple person Party shall be sufficient Notice to all. Notice shall be given in the following manner:
>
> * * *
>
> (c) By facsimile transmission. Notice shall be effective as of date and time of the transmission, provided that the Notice transmitted shall be sent on Business Days during Business Hours. In the event Notice is transmitted during non-business hours, the effective date and time of the Notice is the first hour of the next Business Day after transmission[.]"

¶ 3 Also in plaintiff's group of exhibits were a series of e-mails referring to loan applications. The earliest was dated April 29, 2010, and referred to a loan application that was being processed. The correspondence discussed ways in which plaintiff might overcome the problems with his credit.

¶ 4 Plaintiff further submitted a fax from his lawyer to defendants' lawyer dated May 21, 2010, which stated:

> "Pursuant to the financing contingency to the real estate contract, you are herein notified that the Purchaser has not received an unconditional written loan commitment as of today's date. This letter shall serve as a request to extend the mortgage continency up to and including Tuesday, June 15, 2010."

The letter also mentioned a specific loan application. The letter was printed with a "Transmission verification report" showing one page transmitted in 20 seconds at 14:54 on May 21, 2010, a Friday.

¶ 5 The evidence package also includes a "Notice of Inability to satisfy contingency and/or Mutual Cancellation Agreement" using what appears to be a standardized form. This is dated June

2, 2010, and is signed by plaintiff—there is also a letter from plaintiff's lawyer to defendants' lawyer with the same information. What is not present is anything suggesting that defendants granted the request to extend the contingency period. There is only a letter from defendants' lawyer asking why the notice of cancellation was late.

¶ 6 At the informal trial, the trial court asked plaintiff whether he had any evidence that defendants had granted an extension to the contingency. Plaintiff had none.

¶ 7 The trial court found in favor of defendants at the close of plaintiff's evidence. It stated of plaintiff:

> "[Y]ou have not been able to present any notice of inability to obtain financing in compliance with the terms and provisions of Paragraph 11 of the contract, signed and acknowledged by the defendants, the Degregarios, and/or their attorney acknowledging your [in]ability to obtain that financing and your request to terminate the contract prior to the expiration of that mortgage contingency. There's no written acknowledgments on the part of the defendants to that. *** You've presented no notice of any inability to obtain the financing and thereby terminate the contract.
>
> There is evidence that there was an attempt to request an extension of that financing contingency beyond the original contingency date of May 21st, 2011 [*sic*]. However, all of the documents that you've presented do not bear any acknowledgment. In other words, none of those requests to extend have been signed by the Degragorios and/or their attorney to acknowledge and agree to any extension of that contingency.
>
> ***

> *** [T]here's no evidence contractually as to any extension of that request, there's no evidence contractually of any *** notice of inability to obtain financing and thereby terminating the contract[.]"

The trial court "dismissed" the complaint.

¶ 8 Plaintiff filed a timely motion to reconsider. He asserted that the trial court pulled the hearing into an area not previously disputed: that defendants had granted an extension of the financing contingency. He also argued that, had they not granted an extension, his case should have been even stronger, as he did not have financing as of the original date of May 21, 2010.

¶ 9 The trial court denied the motion; the order stated that it reaffirmed its findings at trial. Plaintiff timely appealed.

¶ 10 On appeal, plaintiff argues that his request for an extension of the financing contingency served as adequate notice that he had failed to obtain financing. He argues that, if defendants did not agree to the extension, the contract was nullified as of May 21, 2010. Further, if they did agree, he asserts that the second notice, on the standardized form, was adequate. We conclude that plaintiff has made a *prima facie* showing of reversible error.

¶ 11 In *First Capitol Mortgage Corp.*, our supreme court explained the options a reviewing court may carry out when an appellee fails to file a brief:

> "We do not feel that a court of review should be compelled to serve as an advocate for the appellee or that it should be required to search the record for the purpose of sustaining the judgment of the trial court. It may, however, if justice requires, do so. Also, it seems that if the record is simple and the claimed errors are such that the court can easily decide them without the aid of an appellee's brief, the court of review should decide the merits of the

> appeal. In other cases[,] if the appellant's brief demonstrates prima facie reversible error and the contentions of the brief find support in the record[,] the judgment of the trial court may be reversed." *First Capitol Mortgage Corp.*, 63 Ill. 2d at 133.

¶ 12 In other words, a reviewing court may exercise one of three options to resolve a case in the absence of an appellee's brief: (1) it may serve as an advocate on behalf of the appellee and decide the case if justice requires that it do so; (2) it may decide the merits of the case if the record is simple and the issues can be easily decided without the aid of the appellee's brief, or (3) it may reverse the trial court when the appellant's brief demonstrates *prima facie* reversible error and is supported by the record. *Thomas v. Koe*, 395 Ill. App. 3d 570 (2009) (citing *First Capitol Mortgage Corp.*, 63 Ill. 2d at 133; see also *Myers v. Brantley*, 204 Ill. App. 3d 832, 833 (1990) (describing the three discretionary options an appellate court may exercise when an appellee fails to file a brief).

¶ 13 The record on appeal lends uncertainty as to the proper procedural classification of the trial court's ruling. Moreover, despite the opportunity to present a brief on appeal to persuade this court to uphold the trial court's judgment, defendants apparently declined to do so. In light of the uncertainty, the fairest approach is to consider whether plaintiff has made a *prima facie* case for reversible error.

¶ 14 Procedurally, we note that the trial court ruled for defendants at the close of plaintiff's evidence. When a trial court grants a "directed finding" in a bench trial, such a finding might be that "the plaintiff has failed to present a *prima facie* case as a matter of law"; this finding is subject to *de novo* review. *Minch v. George*, 395 Ill. App. 3d 390, 398 (2009). On the other hand, the trial court might have weighed all the evidence and found that it defeated the plaintiff's *prima facie* case;

this finding may be reversed only if it is against the manifest weight of the evidence. See *Gorski v. Board of Fire and Police Commissioners of City of Woodstock*, 2011 IL App (2d) 100808, ¶ 34.

¶ 15 In any event, we accept plaintiff's assertion that the trial court ruled for plaintiffs based on its finding that he had not shown that he had given the notice required by Paragraph 11 of the contract. The trial court seemed to determine that plaintiff had failed to present evidence that he had sought an appropriate loan. However, the trial court's reasoning was not entirely clear. Moreover, plaintiff's evidence package included correspondence that strongly implied at least one loan application was in process as of April 29, 2009, within three days of the contracts' signing. Plaintiff certainly presented evidence that lenders were not accepting his applications as made. Plaintiff asserts that the fax of May 21, 2010, was the required notice; that is, he gave the required notice, but further requested an extension. If defendants did not grant the extension, the fax was still notice of his inability to obtain financing.

¶ 16 We conclude that plaintiff has made a *prima facie* case that the fax was proper notice. "In construing a contract, the court's primary objective is to ascertain and give effect to the parties' intent as evidenced by the plain language used in the agreement." *Hannafan & Hannafan, Ltd. v. Bloom*, 2011 IL App (1st) 110722, ¶ 17. According to the contract:

> "This Contract is contingent upon Buyer obtaining a firm written mortgage commitment *** on or before May 21, 2010 for [an acceptable mortgage.] *** If Buyer, having applied for the loan specified above, is unable to obtain such loan commitment and serves Notice to Seller within the time specified, this Contract shall be null and void."

Plaintiff's fax said:

> "Pursuant to the financing contingency to the real estate contract, you are herein notified that the Purchaser has not received an unconditional written loan commitment as of today's date."

The language of the fax differed from the language of the contact in that the contract spoke of a "firm written mortgage commitment," whereas plaintiff's letter said an "unconditional written loan commitment." Given that a conditional commitment could not be a firm commitment, the phrases are essentially equivalent.

¶ 17 The purpose of the notice provision in a financing contingency is to ensure that a seller receives notice that the purchaser is unable to obtain financing. *Rogers v. Balsley*, 240 Ill. App. 3d 1005, 1011 (1993). When the seller does "receive[] notice, in writing, prior to the expiration of the specified time, the object of the notice provision [is] accomplished." *Rogers*, 240 Ill. App. 3d at 1011. Contrary to what the trial court concluded, plaintiff's fax accomplished that object here.

¶ 18 For the reasons stated, we reverse the directed finding in favor of defendants and remand the matter for a full trial.

¶ 19 Reversed and remanded.