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2018 IL App (3d) 170487-U

Order filed November 30, 2018

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2018

| | | |
|----------------------|---|-------------------------------|
| DAWN CHUNG, |) | Appeal from the Circuit Court |
| |) | of the 10th Judicial Circuit, |
| Plaintiff-Appellee, |) | Peoria County, Illinois, |
| |) | |
| v. |) | Appeal No. 3-17-0487 |
| |) | Circuit No. 15-CH-89 |
| |) | |
| SONNY PHAM, |) | Honorable |
| |) | James Mack |
| Defendant-Appellant. |) | Judge, Presiding. |

JUSTICE O'BRIEN delivered the judgment of the court.
Justices McDade and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held:* Plaintiff was entitled to specific enforcement of real estate purchase agreement she entered with defendant who unsuccessfully claimed he was unaware the agreement was to sell the building he owned.

¶ 2 Plaintiff Dawn Chung brought a multi-count complaint against defendant Sonny Pham, alleging, in part, breach of contract based on his failure to sell her property pursuant to a real estate purchase agreement which the parties executed and seeking specific performance. The trial

court entered partial summary judgment in favor of Chung on her breach of contract and specific performance claims. Pham appealed. We affirm.

¶ 3

FACTS

¶ 4

Plaintiff Dawn Chung filed a 12-count complaint against defendant Sonny Pham, alleging, in part, breach of contract and seeking specific performance. The complaint arose from a real estate purchase agreement by which Pham was to sell a commercial property to Chung. The property was used by Chung to run a nail salon. In addition to the salon, the business also served as Pham's residence. According to the complaint, Pham failed to attend the closing for the property transfer and refused to transfer the property to Chung in violation of the parties' real estate sales agreement. Pham answered the complaint, denied the claims and asserted five affirmative defenses: fraud/deceit, duress, unconscionability, lack of consideration and unclean hands.

¶ 5

The parties were deposed. At her deposition, Chung testified that her work experience included working in her family's restaurant and doing nails. She began working at Pham's nail salon, Nails2Envy, in 2006. She was an independent contractor and earned a commission of 70% of her sales. Pham told her she could take over the business in 2006. Pham did not pay her any commission from 2007 to 2009. In 2009, the business license was transferred to Chung's name and she opened a business bank account. Beginning in January 2010, all the funds from the business went into her account. Also in 2010, she began paying the mortgage, insurance and utilities per the parties' verbal lease. Chung paid the real estate taxes for 2009 through 2015.

¶ 6

In 2014, Pham told her he would sell her the building. In November and December 2014, Chung stopped paying the mortgage per the instructions she received from the bank. The banker also told Chung that the bank was going to foreclose on Pham's loan or that the loan was going

to terminate and it would be a good time for Chung to buy the building. The banker was aware of Chung's plans to buy the building because Pham had repeatedly asked the banker, who was a customer of Chung's, to check Chung's credit to see if she would be able to obtain financing to buy the building. She faxed the purchase agreement's signature page to Pham, who was in Wisconsin, and told him he had to sign or the bank would foreclose on the building. He signed and returned the signature page. She then faxed him the entire purchase agreement, which he also signed and returned.

¶ 7 At his deposition, Pham testified that he bought the property at issue in 2006 and built a commercial building to house a nail salon. He lived in the basement of the building. He financed the building with a mortgage issued by the Morton Community Bank for \$243,000. Pham opened a nail salon, which he hired Chung to run. He knew Chung from a prior business relationship. Chung worked for him as an independent contractor and her nail business was his tenant. They had a verbal lease, which either of them could terminate at any time. He denied that Chung owned the business, stating that she only owned the name and that he owned the equipment and supplies. He could not remember why, beginning in 2010, there was a change in the business checking account and the mortgage payments were no longer paid out of his account. They were thereafter paid out of a Nails2Envy account in Chung's name. At all times, the loan was in his name. He paid off the mortgage in April 2015 with a loan from his sister, which was secured with a recorded mortgage.

¶ 8 In December 2014, Pham was working in Wisconsin when Chung informed him the bank was going to foreclose on the building and he needed to immediately sign documents that she would fax to him. She faxed a signature page, which he signed and returned. She then faxed the whole agreement, which he also signed and returned. He had access to the documents for review

before he faxed them back to Chung but he did not have a chance to review them. He did not review them at any time. He signed the addendum on January 8, 2015, which extended the closing date. He acknowledged his signature on the addendum but had no recollection of signing it. He had the flu around the time the addendum was signed.

¶ 9 Pham believed the document he signed in December was to stop the foreclosure. He did not know it was a purchase agreement until the day before the scheduled closing when he spoke to Chung. He then went to the bank and discovered there was no foreclosure pending. He also learned that Chung had not made mortgage payments for November and December and he obtained a check from her for the past due amount. He never intended to sell the building to Chung. After he returned home from Wisconsin, he asked Chung about the mortgage and foreclosure and she told him she was handling it. He was aware Chung did not work at the bank or represent them but he trusted her representations to him because they were intimately involved. Pham admitted that he had purchased, improved or developed and sold three properties since 2000.

¶ 10 Chung moved for partial summary judgment. Included with her motion were supporting affidavits and a memorandum of law. In her affidavit, she averred that her tax returns indicated that she owned the salon beginning in 2009 or 2010 and included schedules itemizing the business income and expenses. She further averred that her previous real estate experience consisted of renting an apartment for herself, buying a home with her husband from his brother and lending Pham money for a down payment for a house for his sister. Pham might have put that house in her name after his sister no longer wanted it. Chung also averred that a loan officer from the bank was a customer at the nail salon and informed her that Pham's mortgage loan was terminating and she was not sure it would be renewed because Pham was not connected

with the nail salon and was unemployed. Chung said the loan officer also told her it would be a good time for Chung to follow through with the purchase agreement. She shared the conversation with Pham, who agreed to sell her the building. Chung received help with the purchase through her friend Fred Rapp, who assisted her with hiring an attorney and obtaining financing and a down payment.

¶ 11 Following argument, the trial court denied the partial summary judgment motion as to the specific performance count, finding it lacked information regarding Chung's real estate experience to determine whether Pham's reliance on her statements regarding the mortgage and foreclosure was reasonable. With the court's permission, Chung filed a supplemental issue on Chung's experience. A second hearing took place and the court found that Chung's real estate experience, education and training were not such that Pham could reasonably rely on her statements regarding the property despite accepting as true Pham's assertions about the nature of his relationship with Chung. The court found that a valid enforcement contract existed, that Pham breached the contract and that Chung established the elements for specific performance. It entered an order granting Chung partial summary judgment on the breach of contract count. The court enjoined Pham from transferring title to anyone other than Chung and to perform under the contract terms within 60 days. The order also contained Illinois Supreme Court Rule 304(a) language. Ill. S. Ct. R. 304(a) (eff. Mar. 8, 2016). Pham appealed.

¶ 12 ANALYSIS

¶ 13 The issue on appeal is whether the trial court erred when it granted partial summary judgment in favor of Chung. Pham argues that summary judgment was improper as there were genuine issues of material fact regarding his affirmative defenses of fraudulent

misrepresentation, duress and unclean hands and whether his reliance on Chung's statements was reasonable.

¶ 14 Summary judgment is appropriate where the pleadings, depositions, admissions and affidavits, if any, establish there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2016). Where the material facts are in dispute or, if undisputed, reasonable persons might draw different inferences from them, summary judgment is not appropriate. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 43 (2004). As a drastic measure, summary judgment should only be granted where the movant's right to judgment is clear and free from doubt. *Id.* This court reviews a trial court's grant of summary judgment *de novo*. *LaSalle National Bank v. Skidmore, Owings & Merrill*, 262 Ill. App. 3d 899, 902 (1994).

¶ 15 "Specific performance is an equitable remedy requiring a defendant to perform an affirmative act in order to fulfill a contract." *Dixon v. City of Monticello*, 223 Ill. App. 3d 549, 560 (1991). Contracts to convey real estate are often enforced by specific performance because there is not an adequate remedy at law. *Id.* at 561. A plaintiff is entitled to specific performance when he establishes (1) the existence of a valid, binding and enforceable contract; (2) he has performed with his obligations under the contract or is ready, willing and able to perform, and (3) the defendant has failed or refused to perform his duties under the contract. *Id.*

¶ 16 An affirmative defense seeks to avoid the legal effect of or defeat a cause of action. 735 ILCS 5/2-613(d) (West 2016). It does not negate the essential elements of the cause of action but admits its legal sufficiency and asserts new matters defeating a plaintiff's seeming right to recover. *Farmers Automobile Insurance Ass'n v. Neumann*, 2015 IL App (3d) 140026, ¶ 16. "[A] competent adult is charged with knowledge of, and assent to, a document that he willingly signs

and that ignorance of the contents of that document does not avoid its effect.” *Lyons Lumber & Building Center, Inc. v. 7722 N. Ashland, LLC*, 2016 IL App (3d) 140487, ¶ 28. A party’s claim he did not understand what he was signing constitutes a unilateral mistake, which is not a defense to a claim of breach of contract. *Id.* ¶ 34.

¶ 17 To establish fraudulent misrepresentation, a party must establish “(1) the existence of a false statement of material fact, (2) made by a party who knows or believes it to be false, (3) with the intent to induce another to act, (4) which causes action by another in reasonable reliance on the statement’s truth, and (5) causes an injury to the other resulting from the reliance.” *Krilich v. American National Bank & Trust Co. of Chicago*, 334 Ill. App. 3d 563, 570 (2002). To prove duress, a party must establish he was induced by a threat or wrongful act to execute a contract where the circumstances prevented him from exercising his free will. *Id.* at 571. The doctrine of unclean hands prevents a party who is guilty of misconduct, such as fraud, from a recovery to which he would otherwise have been entitled. *Long v. Kemper Life Insurance Co.*, 196 Ill. App. 3d 216, 219 (1990).

¶ 18 The three affirmative defenses Pham discusses on appeal are based on the same premise: that he signed the purchase agreement only because Chung informed him that the bank was going to foreclose on the property if he did not immediately sign and return the document. While he admits he signed the agreement, he asserts that he believed it was a document to stop the foreclosure based on statements Chung made to him. The trial court found that it was not reasonable for Pham to rely on Chung’s statements. We agree.

¶ 19 As the court found, Pham was experienced in buying and selling real estate and had built and sold several buildings himself, including the building at issue. He indicated three properties he bought and developed. In contrast, Chung had limited real estate experience. She and her

husband bought a home from her brother, she loaned Pham down payment money for a house he bought for his sister and she signed a lease for the apartment she lived in with her son at the time of the trial court proceedings. The loan that was purported to be foreclosed was solely in Pham's name, although Chung had been making the mortgage payments for several years. Pham knew that Chung was not an employee or a representative of the bank when he accepted her word on the status of his loan. He did not take any action to ascertain the status of his mortgage until the day before the closing, which was nearly two months after he signed the purchase agreement. He admitted he did not read the agreement but depended on Chung's assurances that she was taking care of the foreclosure. We find his reliance was not reasonable.

¶ 20 Pham also failed to demonstrate Chung's statements constituted duress. The loan was in his name and he was responsible for it and charged with knowing its status. He testified he relied on Chung's representations because of his intimate relationship with her and because he trusted her. But even accepting those assertions as true, Pham did not demonstrate how he was prevented from exercising free will. Faxing the documents to Pham and requesting that he immediately sign and return them did not demonstrate duress. Close personal relationships and trust do not amount to duress or serve to deprive a person of his free will. The defense of unclean hands does not assist Pham either. Pham did not establish that Chung acted fraudulently; rather, he showed that he did not investigate Chung's claims about the foreclosure, although the loan and mortgage were solely in his name. Because his reliance on Chung's statements was not reasonable, her claims of foreclosure could not excuse his subsequent breach of contract. Pham does not maintain the contract did not exist and the trial court found that it was valid and enforcement. Pham's affirmative defenses did not negate the purchase agreement.

¶ 21 Chung established a valid, binding and enforceable contract to purchase real estate existed; she was ready, willing and able to purchase the property; and Pham refused to execute the sale. We find the trial court did not err when it granted partial grant of summary judgment to Chung on her breach of contract claim and found she was entitled to specific performance of the contract.

¶ 22 CONCLUSION

¶ 23 For the foregoing reasons, the judgment of the circuit court of Peoria County is affirmed.

¶ 24 Affirmed.