THIRD DIVISION
March 20, 2019

No. 1-17-3055

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ROBERT MEDINA,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 16 CH 12036
	)	
CHESTER J. DANKOWSKI,	)	
and PEDRO SALINAS,	)	
	)	
Defendants-Appellees	)	
	)	
(CHRISTINE A. KOLACZEWSKI,	)	Honorable
	)	Sanjay Tailor,
Defendant).	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Justices Ellis and Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: The judgment of the circuit court of Cook County is affirmed; the mortgage contingency clause in a contract for sale of real estate was not for the sole benefit of plaintiff-purchaser, therefore plaintiff could not unilaterally waive that provision in the contract; sellers did not agree to waive the contingency and demanded strict compliance, which plaintiff failed to perform, resulting in automatic termination of contract; absent valid contract to purchase property, plaintiff had no claim to quiet title. Because the issues raised in the motions to dismiss were questions of law capable of determination on the pleadings, no abuse of discretion occurred in denying plaintiff's motion for discovery.

¶ 2 Plaintiff, Robert Medina, filed a three-count complaint against defendants, Chester J. Dankowski, Christine A . Kolaczewski, and Pedro Salinas, to recover for Dankowski and Kolaczewski's alleged breach of a contract to sell a parcel of real estate to plaintiff or to have them perform the contract, and to quiet title to the property at issue in plaintiff against Salinas, who purportedly purchased the property from Dankowski and Kolaczewski. Dankowski[1] filed a motion to dismiss plaintiff's complaint on the grounds the contract terminated when plaintiff failed to satisfy the mortgage contingency clause in the contract, and Salinas filed a motion to dismiss the complaint for failure to state a claim against him. Following a hearing, the circuit court of Cook County granted defendants' motions. Initially the court granted the motions without prejudice to plaintiff's right to replead, but the court later granted plaintiff's motion to make the dismissal with prejudice and final and appealable.

¶ 3 This appeal followed.

¶ 4 BACKGROUND

¶ 5 The complaint alleged that in April 2015 Dankowski and Kolaczewski (hereinafter, "sellers")[2] entered into a contract with plaintiff to sell real estate to plaintiff. Plaintiff attached a copy of the contract to the complaint. The contract lists the address of the property in Chicago and a purchase price of $196,500. The contract contains the following relevant language:

> "This Contract is contingent upon Purchaser securing within 08-21-2015 (___) days of acceptance hereof a written mortgage commitment on the real estate herein ***. *** In the event Purchaser is unable to secure such loan

---

[1] Plaintiff obtained a default judgment against defendant Kolaczewski, who is not a party to this appeal.

[2] Although defendant Kolaczewski is not a party to this appeal, to avoid unnecessary confusion we will continue to refer to Dankowski's arguments as those of "sellers."

> commitment, Purchaser shall provide written notice of same to Seller or Seller's attorney. Seller may, at Seller's option, within an equal number of additional days, procure for Purchaser such a commitment or notify Purchaser that Seller will accept a purchase money mortgage upon the same terms. In the event neither Purchaser nor Seller secure such loan commitment as herein provided within the time allowed, then this Contract shall become null and void and all earnest money shall be returned to Purchaser."

The contract also contains an integration clause that reads:

> "This Contract and any Riders attached hereto shall constitute the entire agreement and understanding between Seller and Purchaser, and there are no other agreements, representations, or understanding, oral or written, between the parties with respect to the subject matter of this Contract. No alteration, modification, or amendment to this Contract shall be valid unless in writing and signed by all parties."

¶ 6 The contract set December 17, 2015, as a closing date. In a letter dated November 17, 2015, the sellers agreed to "an extension of the mortgage contingency until November 30, 2015, and an extension of the closing date until December 17, 2015." (According to sellers' motion to dismiss and the affidavit attached thereto, this was the second extension of the mortgage contingency date and closing date.) The complaint alleged in paragraph 16 that plaintiff "did not indicate that he was unable to secure the necessary financing pursuant to the Contract." In paragraph 17 of the complaint, plaintiff alleged: "Plaintiff stated that he could timely close without regards to the mortgage commitment contingency." Later, the complaint alleged that "[o]n December 4, 2015, [plaintiff] stated to [sellers] that he had the funds to close despite the statements of the mortgage lender indicating that he needed more time. Plaintiff alleged that on

December 7, 2015, sellers unilaterally and unlawfully cancelled the contract. Plaintiff attached sellers' December 7, 2015 correspondence from sellers' attorney purporting to cancel the contract (hereinafter, "cancellation letter") to the complaint, which reads, in pertinent part, as follows:

> "I have discussed Luis Aillon's [(plaintiff's lender's agent)] December 4, 2015, email with my clients who do not agree to grant any further extensions of the mortgage contingency and closing date in the above transaction and hereby cancel said contract declaring same null and void and of no further legal effect.
>
> Please execute and return the bottom portion of this letter and the attached contract cancellation agreement evidencing your agreement that the contract has been terminated."

¶ 7 Plaintiff alleged he obtained a mortgage commitment "which was suitable under the Contract" on December 10, 2015, and he was "ready, willing and able to close the transaction." The mortgage commitment is attached to the complaint. Plaintiff's mortgage commitment states a loan amount of $229,000 and lists a property address in Addison. The complaint alleges sellers did not close the transaction on the agreed date.

¶ 8 Plaintiff's complaint alleged that on February 12, 2016, plaintiff contacted sellers by mail indicating he was ready and willing "to accept closing and allowing them a chance to cure." Plaintiff attached a February 12, 2016 correspondence from plaintiff's attorney to sellers' attorney to the complaint. Plaintiff's February 12 letter states, in pertinent part, as follows:

> "[Y]ou state that your clients did not agree to any further extensions on the contract and attempt to cancel the contract. Unfortunately, you cannot cancel the contract when our clients waive the mortgage commitment contingency.

> The closing date was set for December 17, 2015. On December 7, 2015, you attempted to cancel the contract, before the closing date and refused to take calls or respond to Buyer's attorney.
>
> On December 17, 2015, [plaintiff] was ready, willing and able to buy the subject property based on the contract terms.
>
> Notice is hereby given that Buyer is ready, willing and able to close on this property. Demand is made that you contact our office to schedule a closing date for this property as soon as possible within the next two weeks."

¶ 9 Plaintiff also attached to the complaint a correspondence dated February 17, 2016, from sellers' attorney to plaintiff's attorney. Sellers' February 17, 2016 correspondence states, in pertinent part, as follows:

> "I have reviewed your correspondence of February 12, 2016, with my clients. The sellers were never informed that the buyer waived the mortgage commitment contingency. Further, the buyer's mortgage broker sent my office an email which stated on December 4, 2015, that the buyer would not be able to close until January 30, 2016. My office then sent your client's attorney our December 7, 2015, correspondence which followed up numerous telephone discussions that no further contract extensions would be granted and seeking to cancel the contract.
>
> On December 11, 2015, lender sent an email which sought a contact amendment and a modification of the closing date till the end of 2015. At no time prior to February 16, 2016, when we received your letter dated February 12, 2016, were the sellers given any indication, written or otherwise, that the buyer was

'ready, willing and able' to close this transaction on December 17, 2015. Frankly, it is disingenuous for you to claim otherwise now.

The property is now under contract to another buyer. If you have any questions or concerns, please contact me."

¶ 10 Plaintiff alleged that on February 29, 2016, sellers unlawfully sold the property to defendant Salinas (hereinafter, "third-party buyer"). On March 8, 2016, plaintiff filed the contract to purchase the property between plaintiff and sellers with the Cook County Recorder of Deeds. On March 9, 2016, third-party buyer recorded a deed to the subject property.

¶ 11 The complaint alleges sellers or their attorney knew plaintiff was seeking to enforce the contract before sellers closed on the sale of the property to third-party buyer. Plaintiff's claims for breach of contract and specific performance (counts I and II, respectively) against sellers asserts that plaintiff "has fully complied with the terms of the [contract]" and by "failing to move forward with the agreed upon closing date, [sellers] are in breach." Plaintiff's claim to quiet titled (count III) alleged sellers contracted to sell the property to third-party buyer "knowing that [plaintiff] sought to enforce the Contract." Plaintiff also alleged, on information and belief, that third-party buyer "knew or should have known that [plaintiff] was attempting to enforce the contract."

¶ 12 On April 6, 2017, sellers filed a motion to strike and dismiss plaintiff's complaint pursuant to section 2-619(a)(9) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(9) (West 2016)). Sellers' motion stated the "undisputed facts necessary for the Court to consider for the purposes of this Motion are gleaned from the verified allegations and exhibits contained in Plaintiff's Complaint *** and the Affidavit of [sellers' attorney] in the terminated real estate transaction." Sellers' motion asserts plaintiff failed to secure financing on or before the extended November 30, 2015 mortgage contingency date, and as a result the contract "expired by its terms

on December 1, 2015." To support that assertion, sellers relied on the allegation in paragraph 16 of plaintiff's complaint that "Plaintiff did *not* indicate that he was unable to secure the necessary financing pursuant to the Contract." (Emphasis added.) and the following averment in sellers' attorney's affidavit:

> "13. At no time before the expiration of the modified mortgage contingency provision of November 30, 2015 was I nor Sellers, ever advised that Plaintiff had obtained a mortgage commitment to satisfy the modified mortgage contingency provision of the Contract. As a result, the contract expired by its terms on December 1, 2015. [Citation.]
>
> 14. Despite the termination of the Contract by its terms on December 1, 2015, on December 4, 2015, my office received an e-mail from Mr. Luis Aillon ('Mr. Aillon'), Plaintiff's lender's representative, confirming that Plaintiff did not have a loan commitment as of the November 30, 2015 modified mortgage contingency deadline.
>
> 15. Further, after receiving Mr. Aillon's correspondence, on December 4, 2015 Sellers also received a text message from Plaintiff confirming that he had spoken to Mr. Aillon and that he did not have financing and could not close the transaction until late January, 2016."

Sellers' motion also asserts that on December 7, 2015, sellers advised plaintiff that the contract was terminated. In support of that claim, sellers rely on the copy of sellers' December 7, 2016 correspondence to plaintiff's attorney (see *supra* ¶ 6) and the following averment in sellers' attorney's affidavit: "18. On December 7, 2015, I wrote to [plaintiff's attorney] advising that the Contract was terminated."

¶ 13 Sellers claim that prior to plaintiff's attorney's correspondence dated February 12, 2016, plaintiff never advised sellers or sellers' attorney that plaintiff waived the mortgage contingency provision of the contract. Sellers' motion also points to language in the contract requiring that modifications to the contract had to be in writing and signed by all the parties, and assert plaintiff never requested or obtained a written modification to the contract striking the mortgage contingency. Sellers' attorney averred as follows:

> "26. Plaintiff never sought any amendment in writing—nor did the parties ever agree to and sign any such writing—to effect a formal waiver of the expressed mortgage contingency provision of the Contact. Absent a signed writing required by the Contract, it is impossible for Plaintiff to have waived the mortgage contingency provision.
>
> 27. In any case, Plaintiff never advised the undersigned or Sellers in any manner at any time prior to [plaintiff's attorney's] February 12, 2016 correspondence that Plaintiff waived the mortgage contingency provision of the Contract. On February 17, 2016 I sent correspondence to [plaintiff's attorney] advising her of that fact."

¶ 14 Sellers' motion argues plaintiff's complaint should be dismissed in its entirety based on the automatic termination of the contract under the mortgage contingency clause due to plaintiff's failure to obtain a mortgage loan commitment by November 30, 2015. Sellers argue that in light of the termination of the contract, when plaintiff filed the complaint there did not exist any contract to be specifically performed or any basis to seek damages. Sellers further argue plaintiff did not effectively waive the mortgage contingency clause because a waiver would constitute an "alteration, modification or amendment to the Contract" and the contract required such changes to be "in writing and signed by all parties." Sellers' motion argues that

because "no written modification was ever presented or executed by Plaintiff and Sellers," the contract was not modified to strike the mortgage contingency provision. Thus, the passing of the November 30, 2015 mortgage contingency deadline without plaintiff having obtained a loan commitment to purchase the property triggered the automatic termination in the mortgage contingency clause and the contract became null and void. Additionally, sellers argue that because plaintiff's interest in the property arose exclusively from the contract and the contract terminated by its own terms, plaintiff has no rights or interests in the property and his quiet title claim fails as a matter of law. Alternatively, sellers' motion argues plaintiff was not in fact ready, willing, and able to close on the sale of the property on December 17, 2015. Sellers point to the language in the contract stating the contract is contingent on plaintiff securing a mortgage commitment on the property at issue and note that the loan commitment plaintiff's complaint claims is "suitable under the contract" relates to a different property. Sellers argue plaintiff did not obtain suitable financing pursuant to the contract and is not ready, willing, and able to close the transaction.

¶ 15 After sellers filed their motion to strike and dismiss supported by sellers' attorney's affidavit, plaintiff filed a motion pursuant to Illinois Supreme Court Rule 191(b) (eff. Jan. 4, 2013) to deny or to stay sellers' motion to dismiss. Plaintiff argued the court should deny sellers' motion because it is supported by an affidavit "which improperly contains legal conclusions," and the affidavit makes claims about facts that are outside of plaintiff's control, and plaintiff is "unable to provide an affidavit answering the allegations raised in the affidavit of [sellers' attorney.]" Alternatively, plaintiff argued the trial court should stay the motion to allow for discovery.

¶ 16 Specifically, plaintiff argued the affiant drew a legal conclusion with regard to the meaning of the mortgage contingency clause, and the conclusion, contrary to the allegation in the

complaint, that plaintiff did not waive the mortgage contingency clause. Plaintiff's motion to deny or stay sellers' motion to dismiss states plaintiff's belief that correspondence, negotiations, or other information outside of plaintiff's control would demonstrate the parties' intent with regard to the mortgage contingency clause. According to plaintiff, at issue in this case is "whether or not the parties intended for the notice requirement under the mortgage Contingency clause to release the Plaintiff from liability under the contract if suitable financing could not be acquired *or* render the Contract null and void." (Emphasis added.) Plaintiff's motion stated he believes it was the former and that Illinois case law supports him, but the affiant concluded the latter, thus information in sellers' or sellers' attorney's possession regarding the intent of the parties surrounding the mortgage contingency clause would be relevant to address the seeming disparity. Plaintiff further argued sellers were in possession of correspondence, documents, and other information that would show that sellers engaged in a bad faith cancellation of the contract.

¶ 17 Third-party buyer also filed a motion to dismiss pursuant to section 2-619(a)(9) of the Code and section 2-615 of the Code (735 ILCS 5/2-615 (West 2016)). For his motion to dismiss pursuant to section 2-619, third-party buyer joined in the motion to dismiss filed by sellers. Third-party buyer's motion pursuant to section 2-615 alleges he is the current of-record owner of the property, having purchased the property from sellers "following expiration, termination, and/or extinguishment of the Contract with Plaintiff by its terms," and plaintiff's only basis for invalidating his deed is the terminated contract. Third-party buyer argues the face of the complaint reveals he is a *bona fide* purchaser who took without notice of any enforceable claim to the property. Third-party buyer argues he did not have record notice of any claim by plaintiff at the time he purchased the property from sellers, and that plaintiff did not have a meritorious claim to the property of which third-party buyer could have taken notice.

¶ 18 Third-party buyer argues the face of the complaint reveals he did not have record notice of any claim by plaintiff because, based on the allegations in the complaint, third-party buyer's purchase of the property and execution of the deed completed before plaintiff recorded the then-terminated contract between plaintiff and sellers. Third-party buyer argues it is clear from the face of the complaint plaintiff did not have a valid claim to the property because the contract terminated by its own terms, plaintiff did not allege he produced a mortgage loan commitment prior to the termination date of the contract (upon the expiration of the mortgage contingency period), and plaintiff alleged nothing that would entitle plaintiff to close the sale without regard to the mortgage commitment contingency. Thus, third-party buyer argues, even if he had actual knowledge of the terminated contract, "that would not deprive him of *bona fide* status because Plaintiff did not then or thereafter have any valid, existing claim to the Property." Third-party buyer's motion argues that when plaintiff recorded the contract it was invalid and unenforceable, and notice of the contract could not deprive third-party purchaser of his *bona fide* purchaser immunity.

¶ 19 On July 18, 2017, the trial court entered an order denying plaintiff's motion to deny sellers' motion to dismiss the complaint or, alternatively, for discovery pursuant to Rule 191(b). The court found the issues raised in sellers' motion to dismiss raised a question of law.

¶ 20 Plaintiff filed a response to sellers' motion to dismiss in which he reiterated his argument that sellers' attorney's affidavit improperly attempted to refute plaintiff's well-pled allegations that he was ready to complete the transaction "before the agreed upon closing date" and that he waived the mortgage contingency clause. Plaintiff further asserted that sellers' motion improperly applied the law surrounding mortgage contingency clauses which, according to plaintiff, "have been read to be for the benefit of 'Purchasers,' to protect them from claims of specific performance from 'Sellers.' " Plaintiff admitted that after the mortgage contingency

deadline he "continued to seek an extension to obtain financing." Plaintiff claims this was "to defray the amount for which he was now personally liable under the contract." Nonetheless, plaintiff asserted that "[a]t no point prior to [the mortgage contingency deadline of] November 30, 2015, did Plaintiff ever indicate that he could not obtain financing." Moreover, on December 10, 2015, plaintiff "indicated *** he was ready, willing, and able to close without" the additional extension requested after November 30, 2015. (Specifically requested on December 4, 2015, by plaintiff's mortgage broker.) Plaintiff's response to sellers' motion to dismiss asserted that because plaintiff only sought an extension but never indicated an inability to obtain financing, "the Contract was still in full force and effect with a closing date of December 17, 2015 after the November 30, 2015 Mortgage Contingency date." In response to sellers' assertion the contract terminated by its own terms, plaintiff argues sellers requested an agreed termination of the contract, in improper form, which plaintiff rejected.

¶ 21 Plaintiff's response to sellers' motion to dismiss also argued that the sale of the property to third-party buyer was done with notice of plaintiff's claim. Plaintiff argued that sellers' motion to dismiss at best raised a question of fact and, therefore, should be denied. Plaintiff also filed a response to third-party buyer's motion to dismiss arguing that third-party buyer's motion to dismiss "does nothing but contradict well plead facts" in plaintiff's complaint. Plaintiff argued third-party buyer could not rely on sellers' attorney's affidavit because the affidavit does not mention third-party buyer's notice of plaintiff's claim.

¶ 22 Sellers and third-party buyer filed replies to plaintiff's response to their respective motions. Sellers' reply argued, in part, that plaintiff's purported waiver of the mortgage contingency was actually an impermissible modification of the contract. Sellers argue it was a modification because plaintiff was attempting to "modify and rewrite the Contract and strike the Contract's self-executing termination provision." Sellers argue plaintiff attempted an

impermissible modification because the parties never signed any writing modifying the contract as required by its terms. Sellers concluded the court did not have to go beyond the undisputed facts that (1) there was a valid contract between the parties and (2) the contract was not properly modified to strike the mortgage contingency provision to rule on sellers' motion because unless plaintiff could establish that a writing was not required to strike the mortgage contingency clause (and its automatic termination provision) whether or not plaintiff was "ready, willing, and able to close" the sale [after the mortgage contingency period expired and the contract terminated] is irrelevant. Sellers argue plaintiff cannot rely on his legal conclusion that he unilaterally waived the mortgage contingency clause, and sellers relied on sellers' attorney's affidavit to establish that the parties did not modify the contract in writing and the contract terminated by its terms on November 30, 2015.

¶ 23 Following arguments by the parties, the trial court granted sellers' and third-party buyer's motions to dismiss pursuant to section 2-619(a)(9) and section 2-615, respectively, without prejudice. The trial court held, in part, as follows:

> "THE COURT: [T]he only way that plaintiff can state a claim is if he waived the mortgage contingency and so expressed it to the seller by the date the mortgage commitment was required, which in this case was November 30th.
>
> The complaint does not indicate when that waiver was communicated. It does say in paragraph 17 that the plaintiff stated that he could timely close without regard to the mortgage commitment contingency, but it doesn't say when. And I think that date is a crucial date because if it was after November 30th, I do not believe that the plaintiff can state a cause of action."

¶ 24 Plaintiff filed a notice of appeal. Sellers and third-party buyer filed a motion in the trial court (and subsequently in this court) to dismiss for lack of appellate jurisdiction. Plaintiff then

filed a motion for the trial court to make its dismissal order final, which the court granted. The trial court's order states the dismissal, with prejudice, "is hereby a final order, immediately appealable pursuant to Illinois Supreme Court Rule 304(a)." This court denied sellers' and third-party buyer's motion to dismiss.

¶ 25 This appeal followed.

¶ 26 ANALYSIS

¶ 27 We review the trial court's judgment granting sellers' motion to dismiss pursuant to section 2-619(a)(9) of the Code *de novo*. *Slay v. Allstate Corp.*, 2018 IL App (1st) 180133, ¶ 45. A section 2-619 motion admits the legal sufficiency of the complaint and all well-pled facts and reasonable inferences therefrom, but assets an affirmative matter outside the complaint that bars or defeats the cause of action. *Id*. ¶ 44. "An affirmative matter *** is something in the nature of a defense that negates the cause of action completely or refutes crucial conclusions of law or conclusions of material fact contained in or inferred from the complaint. [Citation.]" (Internal quotation marks omitted.) *Id*. We must construe the pleadings in the light most favorable to the nonmoving party, accept all well-pled facts as true, and draw all reasonable inferences in favor of the nonmoving party. *Id*. ¶ 45. We may only grant the motion if the plaintiff can prove no set of facts that would support a cause of action." *Id*. "We consider, in our review under section 2–619, admissions in the record and exhibits attached to the pleadings. [Citation.]" *Cosman v. Ford Motor Co.*, 285 Ill. App. 3d 250, 261 (1996).

¶ 28 Plaintiff first argues on appeal that the trial court's decision requiring him to expressly waive the mortgage contingency clause to obtain relief was against settled law and the plain language of the contract. Plaintiff argues the mortgage contingency clause formed a condition precedent to the contract for his sole benefit, thus, under Illinois precedent, he could unilaterally waive its protection and choose to be bound to perform the contract regardless of whether he

obtained a mortgage commitment on the property; and the contract contains no language requiring him to give notice of his waiver of the mortgage contingency clause. Sellers argue plaintiff had no right to unilaterally waive the mortgage contingency and did not do so, resulting in termination of the contract. Sellers agree that "it is generally true that a party may unilaterally waive a contract provision that inures to that party's sole benefit" (emphasis omitted) but argues that rule does not apply because a mortgage contingency clause also benefits the seller. Sellers cite *Jones v. Seiwert*, 164 Ill. App. 3d 954 (1987), in which this court found that a mortgage contingency clause benefitted the seller in that case because if the buyer "did not satisfy its terms, [the] sellers could claim the earnest money." *Seiwert*, 164 Ill. App. 3d at 958. However, the contract in this case provided that if the contract became null and void "all earnest money shall be returned to Purchaser."

¶ 29 Plaintiff cited this court to a foreign court's decision that discussed this question in detail. In *Lajayi v. Fafiyebi*, 860 A.2d 680 (S. Ct. RI 2004), the supreme court of Rhode Island found that a mortgage contingency clause was for the mutual benefit of the parties. *Lajayi*, 860 A.2d at 686. The Rhode Island court found the "seller derived a benefit *** through the ability to cancel the sale before the date of closing if it became apparent that buyer would be unable to complete the purchase. Likewise, the provision benefited [the] seller by establishing a deadline after which the seller could assume that buyer intended to complete the transaction." *Id.* at 686-87. Additionally, in *W.W.W. Associates, Inc. v. Giancontieri*, 152 A.D.2d 333, 548 N.Y.S.2d 580 (1989), the appellate division of New York held as follows:

> "In the case of mortgage contingency clauses, this court has held that such clauses are generally for the benefit of both the purchaser and the seller. The purchaser obviously benefits since the mortgage commitment may be necessary in order to finance the purchase. On the other hand, the clause is also for the benefit

> of the seller who wants to limit the period of time in which the property is off the market. In addition, it is reasonable to infer that the seller would prefer the guaranteed financial commitment of a bank rather than the sometime uncertain personal financial obligation of a purchaser (see, *Ting v. Dean*, 548 N.Y.S.2d 357). Where a mortgage contingency clause is for the benefit of both parties, it can be waived only by agreement between the parties or by conduct [citations.]" *Giancontieri*, 152 A.D.2d at 341, 548 N.Y.S.2d at 585, rev'd on other grounds, 77 N.Y.2d 157, 566 N.E.2d 639 (1990).

¶ 30 In *Ting*, the contract to sell property "was to become 'null and void' in the event that the plaintiff-purchasers were unable to obtain a 'firm commitment' for a mortgage." *Ting*, 153 A.D.2d 358, 548 N.Y.S.2d 357, 358-59 (1989). The New York court held the mortgage contingency clause was unambiguous and could not be avoided "on the theory that the provision was inserted into the contract solely for the benefit of the plaintiff-purchasers." The court noted it has held in a number of cases that unless the contract stated otherwise, "such provisions are meant to protect the seller as well as the buyer, on the theory that the issuance of a mortgage commitment to the prospective buyer increases *** the chances that the buyer will in fact be able to perform his obligations in a timely manner [citations.]" *Id.*, 156 A.D.2d at 359, 548 N.Y.S.2d at 360. In *Smith v. Vernon*, 6 Ill. App. 3d 434, 436-37 (1972), this court stated "it is desirable for the protection of *both* parties to include such terms [(the sum of the mortgage, interest rate, and down payment)] in contingency clauses involving a mortgage. In such a way, the *seller* is protected where, for example, the buyer makes only a token effort to secure a loan if he decides he does not want to go through with the deal. The buyer is likewise protected from being forced to accept financing at inflated interest rates." (Emphases added.) *Vernon*, 6 Ill. App. 3d at 436-37. The mortgage contingency clause in the contract in this case contains those terms. Finally,

we acknowledge that in *Perry v. Estate of Carpenter*, 396 Ill. App. 3d 77 (2009), this court found support for the position that mortgage contingency clauses are interpreted to be for the benefit of the purchaser in *Barnes v. Brown*, 193 Ill. App. 3d 604 (1990). However, the only support for that proposition in *Brown* is the unsupported statement that the "real estate purchase contract contained a 60-day financing contingency clause for the benefit of [the] plaintiffs." *Brown*, 193 Ill. App. 3d at 607-08. The *Brown* court did not analyze the mortgage contingency clause, which contained a provision that if the plaintiff's "failed to notify the Seller of the failure to obtain financing, it would be presumed that the Buyers had secured financing and would complete the purchase." *Id*. at 608. Despite the *Perry* court's finding, we find the mortgage contingency clause in *Brown* benefitted both parties in that the seller in that case under that contract could enforce the sale against the purchaser based on the purchaser's failure to notify the seller of an inability to obtain financing.

¶ 31 Based on the foregoing authorities, we hold as a matter of law that the mortgage contingency clause in the contract in this case did not inure solely to the benefit of plaintiff. Rather, the clause benefitted both plaintiff and sellers.

¶ 32 Because the mortgage contingency clause did not inure solely to plaintiff's benefit, plaintiff was not authorized to unilaterally waive its provisions. *O'Brien v. Kawazoye*, 27 Ill. App. 3d 810, 817 (1975) (provision intended for the benefit of both parties could not be unilaterally waived by one of them); *Greeling v. Abendroth*, 351 Ill. App. 3d 658, 664-65 (2004) (each party benefitted by the condition must waive the condition). Absent plaintiff's waiver of the mortgage contingency clause, what is left is the language of the contract that states "[i]n the event neither Purchaser nor Seller secure such loan commitment as herein provided within the time allowed, then this Contract shall become null and void and all earnest money shall be returned to Purchaser." There is no dispute plaintiff did not secure a loan commitment as

provided in the contract. Plaintiff admitted he obtained alternate financing to complete the sale. Sellers did not expressly agree to waive the mortgage contingency clause, nor did sellers' conduct indicate a waiver of strict compliance with the clause. *Cf. Barnes*, 193 Ill. App. 3d at 610-11 (holding sellers waived strict compliance with time and notice provisions in contract related to financing contingency where "there was continued acquiescence in [the buyers'] delay in obtaining financing" for a period of three months after expiration of contingency period). Sellers notified plaintiff that sellers were declaring the contract null and void seven days after the contingency period ended. Plaintiff argues sellers did not cancel the contract at that time, but merely requested an agreed cancellation of the contract. We disagree.

¶ 33 Sellers' December 7, 2015 correspondence with plaintiff's attorney states unequivocally that sellers "hereby cancel said contract declaring same null and void and of no further legal effect." We do not agree the fact sellers asked plaintiff's attorney to evidence her "agreement that the contract has been terminated" raises a question of fact as to whether sellers cancelled the contract. Regardless, sellers' letter is not indicative of acquiescence to a waiver of strict compliance with the mortgage contingency clause. *Barnes*, 193 Ill. App. 3d at 610 ("A party may waive strict compliance with the written terms of a real estate contract by her conduct or words inconsistent with a claim afterwards asserted."). Under that clause, as sellers correctly argue on appeal, the contract terminated by its own terms. *Id*. Sellers' letter also distinguishes this case from *Nyder v. Champlin*, 401 Ill. 317 (1948). In that case, the sellers waited thirty days after the expiration of the contingency period to complain that the buyer had failed to obtain a proper financing commitment under the contract. *Nyder*, 401 Ill. at 321. Further, at that time, the sellers "had done nothing in furtherance of their obligation under the contract" to furnish the buyer with a certificate of title, abstract, or merchantable title guaranty policy. *Id*. at 322. The *Nyder* court held that under those facts there was no merit to the contention that the buyer was

required to obtain a commitment for the full amount stated in the contract within the time allotted. *Id*. In this case, sellers did not delay declaring the contract null and void and plaintiff was not waiting for sellers' performance of a contract obligation. In this case, in contrast to *Nyder*, we cannot say it would be inequitable to find the contract terminated because plaintiff failed to comply with the mortgage contingency clause.

¶ 34 We have construed the pleadings and exhibits on file in a light most favorable to plaintiff, and we find that plaintiff can prove no set of facts that would support a cause of action for breach of contract or specific performance against sellers. The pleadings and exhibits on file demonstrate that the mortgage contingency clause was for the benefit of plaintiff and sellers, plaintiff could not unilaterally waive the clause, sellers did not agree to waive the clause, and plaintiff failed to strictly comply with the clause by not securing a mortgage in accordance with the contract. Thus, the contract terminated upon the failure of the clause, and plaintiff has no right to damages or specific performance. The trial court properly granted sellers' motion to dismiss.

¶ 35 The trial court also properly denied plaintiff's motion for discovery pursuant to Rule 191(b).

> "A trial court is afforded great latitude in ruling on matters of discovery. [Citation.] We will not disturb a trial court's ruling on discovery matters unless it abuses its discretion. [Citations.] The trial court abuses its discretion only where its ruling is arbitrary, fanciful, or unreasonable or where no reasonable person would take the view adopted by the trial court. [Citation.]" *Crichton v. Golden Rule Insurance Co.*, 358 Ill. App. 3d 1137, 1150 (2005).

Plaintiff argued information in sellers' or sellers' attorney's possession regarding the intent of the parties surrounding the mortgage contingency clause would be relevant and sellers were in

possession of correspondence, documents, and other information that would show that sellers engaged in a bad faith cancellation of the contract. The trial court denied plaintiff's motion because the defendants' motions to dismiss raised a question of law. The court did not abuse its discretion. "We look to the language of the contract to determine the parties' intent and construe the contract as a whole, 'viewing each provision in light of the other provisions.' [Citation.] 'Where the terms of an agreement are clear and unambiguous, they will be given their plain and ordinary meanings, and the parties' intent must be determined from the language of the agreement alone.' [Citation.]" *Shapich v. CIBC Bank USA*, 2018 IL App (1st) 172601, ¶ 18. Both the question of the parties' intent surrounding the mortgage contingency clause and, consequently, the termination of the contract, were capable of determination as a matter of law from the pleadings and exhibits on file. We find no abuse of discretion in the denial of plaintiff's Rule 191(b) motion.

¶ 36 Plaintiff's complaint against third-party purchaser is premised upon the existence of a valid contract between plaintiff and sellers at the time sellers completed the sale of the property to third-party purchaser. For the reasons discussed above, the contract was null and void at the time of the sale to third-party purchaser. Therefore, it is clearly apparent plaintiff can prove no set of facts that would entitle plaintiff to relief against third-party purchaser. *Baird and Warner Residential Sales, Inc. v. Mazzone*, 384 Ill. App. 3d 586, 590 (2008) ("a motion to dismiss pursuant to section 2-615 should not be granted unless it is clearly apparent that no set of fats can be proved that would entitle the plaintiff to recovery").

¶ 37 We recognize that sellers filed their motion to dismiss based on the affirmative matter that plaintiff failed to provide notice of his inability to obtain a mortgage commitment, and we have held that the pleadings, exhibits, and admissions on file demonstrate that the parties did not agree to waive the mortgage contingency clause and plaintiff failed to strictly comply with the

contingency clause by not obtaining a mortgage commitment on the property that is the subject of the contract within the contingency period. We may still affirm the trial court's judgment. On review of a section 2-619 motion, "appellate courts do not give a trial court's judgment deference, but instead review the matter *de novo*." *Toombs v. City of Champaign*, 245 Ill. App. 3d 580, 583 (1993). *De novo* review means this court performs the same analysis that a trial judge would perform, and we may affirm a dismissal on any basis present in the record supporting dismissal. *Donkle v. Lind*, 2018 IL App (1st) 171915, ¶ 29.

> "While section 2-619 motions, like those under section 2-615, attack defects appearing on the face of the pleadings, that ground should be coupled in the motion with a ground based on matter not appearing of record. [Citation.] In practice, however, our courts have not limited section 2-619 motions in this manner, and such motions are normally allowed even though a defect on the face of the pleadings might be the only ground. [Citation.] This practice allows for some degree of overlap between motions to dismiss brought under section 2-615 and those brought under section 2-619. [Citation.]
>
> * * *
>
> According to the letter of section 2-619(a), affirmative matter is to be supported by affidavit. In practice, however, some affirmative matter has been considered to be apparent on the face of the pleading. Such motions to dismiss are thus peculiarly within the area of confluence between section 2-615 and section 2-619(a)(9)." *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 485 (1994).

In this case, the affirmative matter defeating plaintiff's claim against sellers is apparent on the face of the pleadings, as is plaintiff's inability to state a claim against third-party purchaser. Accordingly, the trial court's judgment is affirmed.

¶ 38 CONCLUSION

¶ 39 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 40 Affirmed.