STATE OF VERMONT

SUPERIOR COURT Washington Unit	CIVIL DIVISION Docket No. 174-4-20 Wncv
CARRIE E. MCCOOL, Plaintiff, v. JOSHUA MACURA, Defendant.	

RULING ON PENDING MOTIONS

This is a partition action involving a residence at 79 Lepage Road in Barre Town, Vermont. On October 4, 2021, the parties entered into a written Settlement Agreement in which the parties resolved all their claims against each other, granted Plaintiff Carrie E. McCool "a very short period of time to close on financing to allow her to buy [Defendant Joshua Macura's] interest in the HOME and discharge all existing secured debts for which he is liable," and providing that, if McCool does not or cannot buy out Macura's interest within that "very short period of time," then "the HOME is to be sold by [Heney Realtors, or some other mutually-agreeable realtor] immediately" (Id. ¶5).

Presently before the Court are Macura's "Emergency Motion to Enforce Settlement Agreement" and McCool's Motion for Relief from Judgment. Macura claims that McCool has breached the Settlement Agreement by refusing to sign a listing agreement with Heney Realtors and by refusing to cooperate with the broker. Macura further contends that McCool has forfeited her right to purchase his interest in the home by failing to meet certain deadlines set forth in the agreement. Macura asks the Court to declare that McCool's right to purchase his interest has terminated, to authorize the broker to proceed with the listing without McCool's signature, and to enjoin McCool to cooperate with the broker in the future. McCool opposes Macura's motion and asks the Court to "remove" the requirement that she list the property with a realtor and to "stay" Macura's "efforts to deny her the opportunity to purchase [his] interests" in the home.

Findings of Fact

As noted earlier, the parties entered into their Settlement Agreement on October 4, 2021. The following day, McCool submitted an application to North Country Federal Credit Union for a $229,000 loan with which to pay off existing mortgages on the home and pay Macura $36,000 for his interest in the home. Two weeks later, on October 19, 2021, the credit union sent McCool a letter stating, "I am pleased to pre-qualify you for re-financing in the amount of $229,000 with an appraised value of $287,000.00" (Exhibit 1). The letter went on to say that the pre-qualification was "contingent upon" verification of the information contained in her application, "a satisfactory appraisal and title work," and the absence of any adverse changes in her financial condition prior to closing (Id.).

Meanwhile, in early October, Lucy Ferrada of Heney Realtors drafted a proposed listing agreement for the home at 79 Lepage Road and submitted it to the parties for signature. The draft proposed to grant Heney Realtors an exclusive right to market the property beginning October 15, 2021, at a listing price of $255,000, and it provided for Heney to receive a commission of 6% of the sales price (Exhibit B). The draft went on to say: "Not to be submitted into MLS until on or before 11/1/21. It is understood that Heney Realtors will not be paid a commission if Carrie McCool purchases the property under the terms and conditions of the attached settlement agreement" (Id., p. 4/4). Macura signed the draft listing agreement on October 13, 2021 (Id), but McCool did not sign it.

On October 8, 2021, McCool sent Ferrada a text message or email saying, "I am not signing any agreements to list my property for sale with Heney Realor [sic] at this time" (Exhibit A). Then, on October 14th or 15th McCool spoke with Ferrada by phone and told Ferrada that she would sign the listing agreement as soon as she received a pre-approval letter from the credit union. Ferrada told McCool that Heney Realtors would need access to the home at 79 Lepage Road for the purpose of taking photos and showing it to prospective buyers. Although McCool received her pre-approval four days later, she never signed the listing agreement, and she has not granted Heney Realtors access to the property. Heney Realtors cannot list the property for sale without McCool's signature on the listing agreement and without access to the property.

On October 28, 2021, the Court held an evidentiary hearing on the pending motions. Jeff Smith of North Country Federal Credit Union credibly testified, and Mcthe Court finds that the first condition of October 19th pre-approval letter has been satisfied, that McCool has been "credit approved" for the loan, and that the only remaining conditions are a satisfactory title opinion and an appraisal showing the property is worth $287,000 or more. If the appraisal comes in at $255,000, instead of $287,000, Smith testified and the Court finds that the credit union would

"try to find a path forward" anyway.[1] Smith further testified and the Court finds that early December is the earliest the credit union could close on the loan to McCool.

The Settlement Agreement that the parties signed on October 4, 2021, contains the following relevant provisions:

> 4. Sale of Property
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> 4.1 The parties will immediately use their best and good faith efforts to engage a mutually-agreeable real estate sales professional, or, if they cannot agree, Heney Realtors ... to immediately begin preparations to list the HOME for sale for the price of $255,000. The parties will at all times fully, immediately and reasonably cooperate with all good faith requests of the Realtor in these and all other regards below.
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> 4.2 The Realtor will list the HOME starting October 15, 2021 unless by that date McCool has caused her lender, North Country, to deliver directly to Macura a pre-approval (the "Pre-Approval") reasonably establishing that North Country is prepared to loan McCool sufficient funds to (1) pay Macura a fixed $36,000 for his interest in the HOME (without reductions of any kind) and (2) pay off the OUTSTANDING OBLIGATIONS..., subject only to a title exam and receipt by North Country of an appraisal of the HOME at or above $255,000. If McCool fails to deliver the Pre-Approval by that date, then McCool's right to purchase Macura's interest will conclusively expire on that date, and the Realtor may proceed to list and accept (or close on) any qualified offer at the price of $255,000....
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> 4.3 Unless the Realtor already is authorized to list the HOME under one of the foregoing provisions, the Realtor will list the HOME starting November 1, 2021 (for $255,000 or any lesser appraised amount), subject to these terms:
>
> 4.4.1 If by October 31, 2021 McCool has (a) caused her lender, North Country, to deliver directly to Macura a final binding commitment reasonably establishing that North Country will loan McCool the Necessary Financing subject only to receipt by

[1] McCool testified that, if the appraisal comes in at less than $287,000, she has arranged for her father to be a co-signor on her loan, and that other options would also be available to still close on the loan.

North Country of an appraisal of the HOME at or above $255,000 ... then the parties will accept any qualified offer the Realtor recommends if it is subject to the right of McCool to close on the Necessary Financing by November 15, 2021 and the Realtor waives any claim for commission if McCool does close by that date.

4.4.2 If the appraisal comes in before November 15, 2021 at below $255,000, or if McCool is unable to close on the Necessary Financing by November 15, 2021, then McCool's right to purchase Macura's interest will conclusively expire at the earlier of such dates, and the Realtor may proceed to accept (or close on) any qualified offer....

4.6.1 Macura will receive for his interest the fixed sum of $36,000, without reduction, regardless of whether the HOME is purchased by McCool or a third party, or when that occurs, or for what price.

Settlement Agreement, pp. 2-3. The Agreement also contains the following provision:

> 5. Purpose, Cooperation, Forbearance. As provided in this Agreement, McCool has a very short period of time to close on financing to allow her to buy Macura's interest in the HOME and discharge all existing secured debts for which he is liable, and, if she doesn't or cannot, the HOME is to be sold by the Realtor immediately. McCool and Macura will fully, immediately and in good faith reasonably cooperate in the implementation of this Agreement and will forbear from actions inconsistent with its spirit.

Id., p. 3. Lastly, the Agreement states that "[t]ime is of the essence as to all dates" (Id., ¶6.2).

Discussion

The Settlement Agreement clearly required McCool to sign the proposed listing agreement by now and to cooperate with Heney Realtors in attempting to market the property. Section 4.1 of the Agreement states that "[t]he parties will immediately use their best and good faith efforts to engage [Heney Realtors] to immediately begin preparations to list the HOME for sale for the price of $255,000)." That same section further provided that "[t]he parties will at all times fully, immediately and reasonably cooperate with all good faith requests of the Realtor...." In addition, section 4.4 provides that "the Realtor will list the HOME starting November 1, 2021 (for $255,000 or any lesser appraised amount," subject to

McCool's right in section 4.4.1 "to close on the Necessary Financing" and buy Macura out "by November 15, 2021" without having to pay a commission.

As noted earlier, McCool denies that she is in breach of the Settlement Agreement. She asks the Court to "remove" the requirement that she list the property with a realtor and "stay" Macura's efforts to deny her the opportunity to close on the financing that she needs to buy out his $36,000 interest in the home and discharge the parties' existing joint debts. Her argument seems to be that she has no obligation to sign a listing agreement or to cooperate with any realtor because she is pursuing the financing needed to refinance the property buy Macura out. She further contends that she has not forfeited the right to buy Macura out because the deadlines set forth in the Settlement Agreement were merely "aspirational," and it is not her fault that the Credit Union is taking so much time to process her application. McCool argues that V.R.C.P. 60(b)(6) empowers this Court to relieve her from any requirement that she cooperate with Heney Realtors or meet the strict deadlines set forth in the Agreement.

There are several problems with McCool's contentions. First, the fact that McCool is pursuing the financing needed to pay off the exiting debts and buy out Macura's $36,000 interest, does not relieve her of the contractual requirement that she "immediately ... engage ... Heney Realtors ... to immediately begin preparations to list the HOME for sale for the price of $255,000," nor does it relieve her from her contractual duty to "fully, immediately and reasonably cooperate with all good faith requests of the Realtor." The Settlement Agreement clearly contemplates that both processes (i.e., McCool's efforts to obtain financing to buy Macura out without incurring a commission, *and* Heney Realtors' efforts to get the property on the market) will go on simultaneously. Indeed, the Agreement expressly provides that Heney "will list the HOME starting November 1, 2021," even though the Agreement gives McCool until November 15, 2021, within which to "close on the necessary financing" (compare sections 4.4 and 4.4.1).

McCool has not pointed to any language in the Settlement Agreement authorizing her to delay listing the property while she pursues her refinancing. Nor is there any inconsistency in requiring McCool to list the property for sale while simultaneously pursing the refinancing needed for her to keep it – the Agreement expressly provides that any qualified offer recommended by Heney will be "subject to the right of McCool to closed on the Necessary Financing by November 15, 2021, and the Realtor waives any claim for commission if McCool does close by that date" (Id., section 4.4.4).

Second, V.R.C.P. 60(b)(6) does not empower this Court to relieve McCool from any contractual requirement that she sign the listing agreement, or cooperate with Heney Realtors, or meet the deadlines set forth in the Settlement Agreement. That

Rule provides that a court "may relieve a party ... from a final judgment, order, or proceeding for ... any ... reason justifying relief from the operation of the judgment." The Vermont Supreme Court has noted that this Rule "is intended to accomplish justice in extraordinary situations that warrant the reopening of final judgments after a substantial period of time." Riehle v. Tudhope, 171 Vt. 626, 627 (2000). The problem with McCool's argument, however, is that there is no final judgment or order from which to grant her any relief.[2] What she seeks relief from is the Settlement Agreement that she entered into to, not a court order. Such relief is not available under this Rule. Sandgate School District v. Cate, 2005 VT 88, ¶7, 178 Vt. 625 (mem.) (Rule 60(b)(6) "may not be used to relieve a party from free, calculated, and deliberate choices he has made.").

Lastly, as noted before, McCool argues that she has not forfeited her right to buy Macura out because the deadlines in the Settlement Agreement were merely "aspirational," and it is not her fault that the Credit Union is taking so much time to process her application. The Court agrees that McCool has not yet forfeited her right to buy Macura out. Under section 4.4.1 of the Settlement Agreement, McCool has until November 15, 2021, within which to close on the financing needed to pay off the joint debts on the property and pay Macura $36,000 for his interest in the property. Thus, she still has a few days left within which to exercise that right. If she misses that deadline, however, the Settlement Agreement clearly provides that her "right to purchase Macura's interest will conclusively expire" (Id. section 4.1.2).

McCool has not pointed to any language in the Settlement Agreement supporting her claim that the deadlines set forth therein were intended to be "aspirational." To the contrary, the Agreement expressly provides that "[t]ime is of the essence as to all dates" (Id., section 6.2). "Where time is of the essence, performance on time is a constructive condition of the other party's duty...." Carter v. Sherburne Corp., 132 Vt. 88, 92 (1974) (citation omitted). Therefore, meeting the November 15th deadline is a condition to McCool's right to buy Macura out without incurring a commission; it is not an "aspirational" deadline.

Nor can McCool use the Credit Union's failure to act more promptly as a means of avoiding the November 15th deadline. Under the doctrine of impracticability, a third party's conduct can sometimes excuse a contracting party's

[2] At oral argument, counsel for McCool argued that the Settlement Agreement should be treated as a final judgment of the Court because the parties intended that it be incorporated into a final judgment. The argument is not persuasive. Neither party has ever asked the Court to incorporate the Settlement Agreement into a final judgment, nor did the Court ever do so. Moreover, when the parties filed the Agreement with the Court, they included a Stipulated Motion, stating that they were filing the Agreement in order to "take this matter off the trial calendar," but that they wanted to keep their suit "on the docket" in case the Court was needed to "back up the deal." The Stipulated Motion went on to say that the parties would jointly move to dismiss this suit once "the settlement concludes."

failure to perform his or her contractual obligations. The general rule is this: "Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged unless the language or the circumstances indicate the contrary." Restatement (Second) of Contracts §261. "Events that come within the rule stated in this Section are generally due either to 'acts of God' or to acts of third parties." Id. cmt. d. If the impracticability is temporary, it suspends, but does not discharge, the obligation to perform. Id. §269.

Vermont applies this doctrine but only sparingly to ensure that it does not swallow contractual obligations. *See* Waterbury Feed Company, LLC v. O'Neil, 2006 VT 126, ¶24, 181 Vt 535 ("A party may defend against a contract action by demonstrating that its performance under the contract is impracticable.... Performance may be impracticable because extreme and unreasonable difficulty, expense, injury, or loss to one of the parties will be involved.... Our cases have applied this principle narrowly so that the impossibility must consist in the nature of the thing to be done and not in the inability of the party to do it." (citations and internal quotation marks omitted)); Agway, Inc. v. Marotti, 149 Vt. 191, 193 (1988) ("It is a defense to a contract action that a party's performance under the contract is 'impracticable' because of a fact of which he has no reason to know and the nonexistence of which is a basic assumption on which the contract was made.... Our cases have recognized only a narrow application of this principle." (citations omitted));

The Court cannot conclude that it was a basis assumption of the parties in entering into the Settlement Agreement that McCool would be able to obtain the required refinancing by November 15th. To the contrary, the language of the Agreement suggests instead a clear recognition that McCool might not be able to obtain her refinancing that quickly. For example, section 5 of the Agreement states: "As provided in this Agreement, McCool has a very short period of time to close on financing to allow her to buy Macura's interest in the HOME and discharge all existing secured debts for which he is liable, and, if she doesn't or cannot, the HOME is to be sold by the Realtor immediately." Similarly, section 4.4.2 states that "if McCool is unable to close on the Necessary Financing by November 15, 2021, then McCool's right to purchase Macura's interest will conclusively expire ... and the Realtor may proceed to accept (or close on) any qualified offer." Therefore, the defense of impracticability is not available to McCool.

It should be noted, however, that, even if McCool fails to get her refinancing in line by the November 15th deadline, she can still purchase the property after that date, so long as she pays off the joint debts and pays Macura his $36,000. The only

practical difference is that Heney Realtors will be entitled to a commission if the property is sold to McCool, or to anyone else, after November 15th.

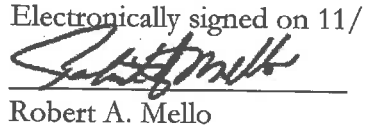
Conclusions and Orders

For the foregoing reasons, the Court concludes and orders as follows:

(1) McCool has breached the Settlement Agreement by refusing to sign the proposed listing agreement with Heney Realtors and by refusing to cooperate with that realtor.
(2) Heney Realtors is hereby authorized to proceed with the listing without McCool's signature.
(3) McCool is ordered to cooperate with Heney Realtors hereafter in its efforts to market and sell the property.
(4) McCool has not yet forfeited her right to buy out Macura's interest pursuant to the Settlement Agreement. She still has until November 15, 2021, to close on the refinancing needed to pay off jointly-owed debts and pay Macura $36,000 for his interest in the property. If she succeeds in accomplishing that by the November 15th deadline, then Heney Realtors will not be entitled to any commission.
(5) If McCool does not meet the November 15th deadline, then her right to buy out Macura's interest pursuant to the terms of the Settlement Agreement will "conclusively expire," but she, like any other member of the public, will still have the right to attempt to purchase the property by making a qualified offer through Heney Realtors, although the realtors would be entitled to a commission pursuant to the listing agreement.
(6) Macura is ordered not to interfere with McCool's efforts to purchase the property. It does not matter to him whether McCool purchases the property or whether someone else does. This is because section 4.6.1 of the Settlement Agreement states that "Macura will receive for his interest the fixed sum of $36,000, without reduction, regardless of whether the HOME is purchased by McCool or a third party, or when that occurs, or for what price." Therefore, he has no legitimate reason for interfering in any way with McCool's attempts to purchase the property.

SO ORDERED this 12th day of November, 2021.

Electronically signed on 11/12/2021 12:28 PM, pursuant to V.R.E.F. 9(d)



Robert A. Mello
Superior Judge