

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2009 CA 0314

**KATHLEEN B. THALLER, ROSE A. EVANS,
HELENE HUDDLESTON AND GINA CURSAIN**

VERSUS

MICHAEL D. HAYDEL

Ⓟ
JAW
V6W by JAW

Judgment Rendered: December 23, 2009

On Appeal from the 22nd Judicial District Court
In and For the Parish of St. Tammany
Trial Court No. 2006-14589, Division "J"

Honorable William J. Knight, Judge Presiding

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Michael D. Haydel

BEFORE: WHIPPLE, HUGHES, AND WELCH, JJ.

HUGHES, J.

This is an appeal from a district court judgment finding a contract to purchase a condominium invalid, as having been signed by the seller after the purchasers' offer had expired, and ordering the return of the purchasers' deposit. For the reasons that follow, we reverse the district court and render judgment in favor of the seller.

FACTS AND PROCEDURAL HISTORY

On August 15, 2005, plaintiffs, Kathleen B. Thaller, Rose A. Evans, Helene Huddleston, and Gina Cursain, signed an offer to purchase a Biloxi, Mississippi condominium for \$570,150.00, which stated that the offer expired at 5:00 p.m. on August 22, 2005. The plaintiffs paid a deposit of \$114,030.00 to their realtor. The seller, Dr. Michael D. Haydel, signed the purchase agreement, agreeing to the terms, but did not date the document.

The condominium was under construction at the time Hurricane Katrina struck the Gulf coast on August 29, 2005, but it was not damaged. However, the realtor's office, where the original contract signed by the parties was on file, was destroyed and the original document was lost. Nevertheless, the parties continued to act in accordance with the agreement, making use of a copy of the document, and the deposit was remitted to Dr. Haydel in October 2005 in accordance with the terms of the agreement.

Construction of the condominium continued with no complaint by plaintiffs until May of 2006, when plaintiffs visited the site for an inspection, and at that time, they voiced a complaint that the second bedroom was irregularly shaped and too small. On May 29, 2006, via counsel, plaintiffs sent Dr. Haydel a demand letter asking for a return of their deposit and requesting that it be mutually agreed that the purchase agreement be declared null and void; plaintiffs claimed they were

misinformed about the two-bedroom unit. Dr. Haydel did not comply with plaintiffs' demands.

On September 15, 2006, the plaintiffs filed suit against Dr. Haydel, a resident of St. Tammany Parish, seeking to recover the \$114,030.00 deposit, contending their offer to purchase had expired prior to Dr. Haydel's acceptance, rendering the acceptance untimely and the contract a nullity.

Maintaining the validity of the agreement, Dr. Haydel filed a reconventional demand on October 10, 2006, seeking a declaratory judgment that the purchase agreement was a valid and binding contract and asserting that the plaintiffs had breached the contract by refusing to proceed with the sale of the property. Dr. Haydel additionally sought, as a remedy for the breach, the forfeiture of the \$114,030.00 deposit, as liquidated damages pursuant to the contractual provisions, along with interest, court costs, and reasonable attorney fees.

Following trial of the matter, the district court ruled in favor of the plaintiffs, stating that Dr. Haydel failed in his burden to show that the untimely signed purchase agreement was subsequently ratified by plaintiffs; the district court declared the agreement null and void and ordered the return of plaintiffs' \$114,030.00 deposit, with interest and court costs. Dr. Haydel's reconventional demand was dismissed.

Dr. Haydel now appeals, asserting the following assignments of error: (1) the district court erred in holding the purchase agreement null and void and ordering the return of plaintiffs' deposit; (2) the district court erred in holding that defendant's acceptance of the purchase agreement was untimely; (3) the district court erred in holding that plaintiffs' actions did not

constitute tacit ratification under LSA-C.C. art. 1843;¹ (4) the district court erred in failing to consider other code articles on confirmation by partial performance, acquiescence, and/or silence; (5) the district court erred in failing to hold that plaintiffs were estopped from asserting nullity of the purchase agreement; and (6) the district court erred in dismissing defendant's reconventional demand.

LAW AND ANALYSIS

On appeal, Dr. Haydel contends the district court applied the wrong burden of proof, asserting that under LSA-C.C. art. 1831² the plaintiffs had the burden to prove the purchase agreement was null; he further asserts that plaintiffs failed in this burden by relying on facsimile transmission dates appearing on the document copies to establish the agreement was not timely signed by him. Dr. Haydel also asserts that the lost document procedures set forth in LSA-R.S. 13:3741³ were not complied with. Further, Dr. Haydel

¹ Louisiana Civil Code Article 1843 provides:

Ratification is a declaration whereby a person gives his consent to an obligation incurred on his behalf by another without authority.

An express act of ratification must evidence the intention to be bound by the ratified obligation.

Tacit ratification results when a person, with knowledge of an obligation incurred on his behalf by another, accepts the benefit of that obligation.

² Louisiana Civil Code Article 1831 provides: "A party who demands performance of an obligation must prove the existence of the obligation. A party who asserts that an obligation is null, or that it has been modified or extinguished, must prove the facts or acts giving rise to the nullity, modification, or extinction."

³ Louisiana Revised Statute 13:3741 provides: "In every case where a lost instrument is made the foundation of a suit or defense, it must appear that the loss has been advertised within a reasonable time in a public newspaper and proper means taken to recover the possession of the instrument; provided, that advertisement of a lost note shall not be necessary in any case where a surety bond given by a person who owns property liable to seizure, and who is domiciled in the parish where the security is to be given, or a commercial bond issued by an insurance company licensed to do business in the state of Louisiana, is furnished to protect the maker and/or his endorsers of said note from loss resulting from said note falling into the hands of a holder in due course provided that the bond must be in amount equal to the face of the note plus twenty-five percent thereof."

contends that because LSA-C.C. art. 1837,⁴ the comments thereto, and pertinent jurisprudence do not require all parties to an act under private signature to sign such an agreement as long as consent is otherwise expressed, the communication of his acceptance of the purchase offer validated the contract even if his signature thereon was untimely. Finally, Dr. Haydel argues that actions by plaintiffs' real estate agent resulted in plaintiffs' ratifying any relative nullity that existed in the purchase agreement in accordance with LSA-C.C. arts. 1842-43, 2031, and LSA-R.S. 9:3891(1).⁵

In ruling against Dr. Haydel, the district court issued the following reasons for judgment:

On or about August 15, 2005, plaintiffs signed an offer to purchase from defendant condominium unit number 705 in the Sea Breeze Condominium Development. The offer stated that "this offer expires at 5 o'clock PM, central time 8/22/05, if not accepted, countered, or rejected by seller, by that time." Defendant Michael Haydel contends that the document was faxed to him on August 23, 2005 and that he signed it. Of course, Hurricane Katrina struck the Gulf Coast on August 29, 2005, and the original document was destroyed. A down payment of \$114,030.00 was paid by plaintiffs contemporaneous with the signing of the offer to purchase. These funds were deposited with plaintiffs' real estate agency; and on October 11, 2005, plaintiffs' agent wrote a check payable to GCID, the defendant's broker, in the amount of the original down payment, and in turn that payment was transferred to defendant.

⁴ Louisiana Civil Code Article 1837 provides: "An act under private signature need not be written by the parties, but must be signed by them." Comment (b) of LSA-C.C. art. 1837 provides: "This Article is not intended to change the jurisprudential rule that an act under private signature is valid even though signed by one party alone, when the party who signed it asserts the validity of a commutative contract contained in the writing against a party who did not sign it but whose conduct reveals that he has availed himself of the contract."

⁵ Louisiana Civil Code Article 1842 provides: "Confirmation is a declaration whereby a person cures the relative nullity of an obligation. . . . Tacit confirmation may result from voluntary performance of the obligation." Louisiana Civil Code Article 1843 provides, in pertinent part: "Tacit ratification results when a person, with knowledge of an obligation incurred on his behalf by another, accepts the benefit of that obligation." Specifically, Dr. Haydel asserts that plaintiffs' realtor, Rick Marshall, having received the purchase agreement after he (Dr. Haydel) had signed it, despite any untimeliness of that signature, failed to raise any objection to the performance of plaintiffs' obligations under that agreement and allowed his company to transmit plaintiffs' deposit to Dr. Haydel. See LSA-R.S. 9:3891(1), which provides: "'Agency' means a relationship in which a real estate broker or licensee represents a client by the client's consent, whether express or implied, in an immovable property transaction."

In May 2006, the plaintiffs indicated that the second bedroom of the unit was not the size that they thought it would be and expressed their dissatisfaction with the contract. By letters dated June 28, 2006 and August 18, 2006, the plaintiffs, through their counsel, state that Unit number 705 is not a two bedroom unit, that plaintiffs were misinformed and that plaintiffs request the return of their deposit.

On September 15, 2006, plaintiffs filed suit for return of the deposit. Defendant answered the suit and filed a reconventional demand seeking a declaratory judgment declaring that the purchase agreement between the parties is a valid and binding contract and that he is entitled to accept the deposit as liquidated damages for the plaintiffs' breach of the agreement.

The issues presented for the Court's review are as follows:

1. Was plaintiffs' offer to buy timely accepted?
2. Can the actions of the buyer ratify the contract, even if the contract was not signed timely by the defendant?

[Issue No. 1: Was plaintiffs' offer to buy timely accepted?]

The Contract for the Sale and Purchase of Real Estate provided in paragraph six that the offer "expires at 5 o'clock pm central time 8/22/05, if not accepted, countered, or rejected by seller by that time." The Court notes at the outset that plaintiffs had the burden of proving that their offer to buy was not timely accepted by the defendant, and the Court finds that plaintiffs met this burden. At trial, defendant Michael Haydel testified that he was not sure when he signed the Contract for the Sale and Purchase of Real Estate. The Court notes that the faxed document shows, among other fax indicators, an outgoing fax from Michael Haydel on August 24, 2005. Further, Michael Haydel testified that he did not receive the contract until August 23, 2005, and he admitted that although he does not know exactly when he signed the contract, he was not in a position to dispute the time of FAX notations on the document in question. Brittany Hammitt, a realtor involved in the transaction, testified clearly that there were issues over division of the commissions on the sale. After those were resolved, she faxed the offer to purchase to Dr. Haydel on August 23, 2005. Transmittal of the offer occurred after the offer had already expired. She further testified that Dr. Haydel faxed his signed response to her on August 24, 2005. Clearly, given the testimony of both Michael Haydel and Brittany Hammitt on this issue, the Court finds that the contract was not accepted before the expiration date provided in the contract. The contract's language is unambiguous in identifying an expiration date of the offer, and the Court finds that timely acceptance of the offer to buy did not occur.

[Issue No. 2. Can the actions of the buyer ratify the contract, even if the contract was not signed timely by the defendant?]

The next step in the Court's analysis is whether or not the plaintiffs ratified, through their actions, the contract to purchase. The Court notes the party arguing that ratification applies (Dr. Haydel) has the burden of proof on that issue. . . . Louisiana Civil Code article 1843 provides in pertinent part that "tacit ratification results when a person *with knowledge* of an obligation incurred on his behalf by another, *accepts the benefit of that obligation.*" (Emphasis added.) In order to carry his burden of proof, the defendant Michael Haydel must show that the plaintiffs had *knowledge* of the obligation and that they accepted the benefit of that obligation. While it is clear that plaintiffs were experiencing buyer's remorse, whether from a change in the real estate market or because of the layout of the condo, that really is of no moment in deciding this case.

The testimony at trial revealed that plaintiffs did not make any attempts to ascertain whether the offer to purchase had been timely accepted or not; and Ms. Evans testified that she and her partners did not know that the defendant did not timely accept the offer until June 2006. While this may not be good business practice, plaintiffs were under no duty to investigate whether the offer was timely accepted; and given the difficulty of obtaining information after Hurricane Katrina, plaintiffs may well have not been able to obtain the needed information. Plaintiffs could not have ratified a contract when they have no knowledge of the untimely acceptance, and defendant fails in his burden of proof on this issue.

In any event, the defendant who untimely accepted the offer to purchase was certainly the party who was in the best position to know that the acceptance was not timely under the terms of the contract. Further, the defendant was the only person in a position to initiate the inquiry as to whether or not plaintiffs still wished to proceed with the purchase in view of the untimely acceptance of the offer to purchase. This could, and should, have been done by the parties who were aware of the untimeliness, namely defendant Haydel himself and his agent Brittany Hammitt. Since the plaintiffs had no knowledge of the untimely acceptance of the contract, they lacked the requisite knowledge to allow them to ratify the contract in question. Therefore, defendant fails in his burden of proof on this issue.

Based upon the findings herein above, the Court finds that the contract was null and void due to an untimely acceptance, and defendant has failed to carry his burden of proving that the plaintiffs thereafter ratified the contract. Accordingly, the Court finds that plaintiffs are entitled to the return of their deposit in the amount of \$114,030.00 from the defendant Michael Haydel. . . .

With respect to the first issue decided by the district court (i.e. whether plaintiffs' offer to buy was timely accepted), we agree that plaintiffs' offer was not timely accepted by Dr. Haydel, as his acceptance was not transmitted until August 24, 2005.⁶

A contract is formed by the consent of the parties established through offer and acceptance. LSA-C.C. art. 1927. In order for a contract to be formed, an acceptance must be in all things conformable to the offer. An offer must be accepted as made to constitute a contract. **LaSalle v. Cannata Corporation**, 2003-0954, p. 5 (La. App. 1 Cir. 4/2/04), 878 So.2d 622, 624, writ denied, 2004-1100 (La. 6/25/04), 876 So.2d 840.

In this case, the time limit for accepting the offer, as specified in plaintiffs' original offer, clearly was one of the terms of that offer. Thus, the purported acceptance of the original offer, made outside the time limit for that acceptance, was not in accordance with the original offer. See Kent v. Hogan, 2003-2424, p. 5 (La. App. 1 Cir. 10/29/04), 897 So.2d 68, 70. The offer had expired since it was not accepted within the time prescribed. See LSA-C.C. art. 1929.

However, LSA-C.C. art. 1943 is pertinent to this case, and provides: "An acceptance not in accordance with the terms of the offer is deemed to be a counteroffer."

When a purported acceptance of an original offer is made outside the time limit for that acceptance, it constitutes a counteroffer because it is an acceptance not in accordance with the original offer. See Kent v. Hogan, 2003-2424 at p. 5, 897 So.2d at 70. This new offer must be accepted in

⁶ Dr. Haydel testified that he could not remember the date on which he signed the purchase agreement, but he acknowledged that he faxed the signed purchase agreement to his realtor on August 24, 2005.

order to become a binding contract. See LaSalle v. Cannata Corporation, 2003-0954 at p. 5, 878 So.2d at 624.

In the instant case, when Dr. Haydel submitted his August 24, 2005 "acceptance," which was outside the stated term for acceptance provided in the plaintiffs' offer, it constituted a counteroffer. Plaintiffs did not respond with an *express* written acceptance of this counteroffer. Nevertheless, the plaintiffs' \$114,030.00 deposit was thereafter remitted to Dr. Haydel in October 2005 by plaintiffs' realtor in the form of a written check. The plaintiffs' realtor was specifically authorized to deliver the deposit to Dr. Haydel in "Addendum # 1" to the purchase agreement, which provided, in pertinent part:

The down payment specified in [paragraph] # 1 will be \$114,030. This deposit will be paid by certified check funds or wire transfer to Owen & Co. [t]rust account. This amount will be non-refundable & disbursed to seller at time contract is signed & accepted by both parties. . . .

See also LSA-R.S. 9:3891 et seq.

Under the facts of this case, we deem the delivery of this deposit to have constituted acceptance by plaintiffs of Dr. Haydel's counteroffer. We further find that the written purchase agreement prepared by the plaintiffs and/or on their behalf, along with Dr. Haydel's counteroffer, and the written check delivered by plaintiffs' realtor in payment of the deposit to Dr. Haydel, constituted the written contract signifying agreement of the parties, and created a binding contract between the parties.

The testimony presented in this case revealed that the parties believed a contract had been formed. While the exact nature and extent of the plaintiffs' statements and/or actions following the signing of the purchase

agreement were not fully disclosed at trial, as plaintiffs did not communicate directly with either Dr. Haydel or his realtor and plaintiffs' realtor, Rick Marshall, was unable to recall many pertinent facts during his deposition testimony, the circumstances in evidence all point to the conclusion that plaintiffs acted in accordance with their belief that they had contracted with Dr. Haydel to purchase the property at issue.

Rick Marshall testified that though he could not recall specifically, he thinks he would have talked to plaintiffs (his clients) in August 2005 following signing of the purchase agreement because "they would want to know about the contract." When asked by counsel whether he would have remembered if plaintiffs had asked him to get their deposit back if the purchase agreement had not been signed prior to the expiration date, he stated he would have recalled such a request and that he did not recall receiving that type of request. Mr. Marshall further testified that following Hurricane Katrina he was contacted by plaintiffs and they discussed "the business of the agreement[,] . . . was the condominium development even still there, [and] . . . what was going on at this point."

Only one of the plaintiffs, Rose Avegno Evans, testified in this matter. Ms. Evans confirmed Mr. Marshall's testimony that she did call him after Hurricane Katrina to inquire about the progress of the construction of the condominium. When asked whether she had previously inquired on August 22, 2005 (the purchase agreement deadline for acceptance) whether the offer had been accepted, Ms. Evans stated that she was attending a social event at that time and "that deadline was not in our minds." Though Ms. Evans acknowledged that she has been a real estate agent since 1977, she

maintained she was "not acting as a real estate agent[, she] was a client at the time."⁷ Ms. Evans stated that it was her realtor's duty to notify her.

Ms. Evans further testified that she first visited the physical premises of the condominium in the Spring of 2006, at which time she expressed dissatisfaction with the condominium because of a perceived deficiency in the size of the second bedroom. Ms. Evans admitted that the original reason that she and the other plaintiffs did not want to go through with the purchase of the condominium, after the Spring 2006 viewing, was "because it was not a two-bedroom unit that could be rented as a two-bedroom unit." Ms. Evans indicated that because of the small size of the second bedroom, it would be classified as a "demi." She also admitted that since the condo was intended to be a rental property, she was also concerned, in deciding whether to go through with the sale, about available financing, insurance costs, and post-Katrina conditions in the area. To illustrate her concerns, Ms. Evans stated, "How can you rent something to people and say it's a beach unit and you can't go into the water because there's refrigerators and stoves and bathtubs in it?"

Ms. Evans testified that she did not request a return of the deposit in 2005 because she "did not know that the contract was not binding at that time."

The June 28, 2006 letter sent by plaintiffs' counsel to Dr. Haydel stated in pertinent part:

⁷ Despite these assertions, a "Referral Agreement" was appended to the purchase agreement at issue listing "ReRe Avegno" as a referring broker who was to collect twenty (20%) percent of the sales commission. Plaintiff Rose Avegno Evans admitted that she was to receive this share of the commission as a "professional courtesy" from Rick Marshall. Ms. Evans' name also appears in correspondence filed into the record as "Rose (Re-Re) Avegno Evans."

Our position is that our clients dealt only with the representatives of GCID Realty, Inc. They were misinformed. That misinformation has led to the subject purchase agreement between you and our clients.

Unit # 705 is not a two bedroom unit. At the time the subject purchase agreement was effected, our clients were deliberately misinformed by your representative.

We believe this misinformation was critical to our clients[] desire to purchase Unit # 705. Inasmuch as Sea Breeze cannot deliver to you and you cannot deliver to our clients the condo [u]nit they were led to believe that they had agreed to purchase, we believe that contract is a nullity.

We ask, therefore, that you authorize the return of our clients deposit and that we mutually agree that the purchase agreement is null and void.

On August 18, 2006 a "Mutual Release of Earnest Money Deposit" form was forwarded to Dr. Haydel, requesting that he return plaintiffs' deposit. It was not until the petition in this matter was filed that plaintiffs first pointed to the failure of Dr. Haydel to return a timely acceptance of the original purchase offer as an alleged basis for nullity of the contract.

The evidence in this case shows that the plaintiffs were unconcerned about enforcing the August 22, 2005 deadline for acceptance by Dr. Haydel of their original offer to purchase his condo. And, when Dr. Haydel's "acceptance," which we deem to have been a counteroffer, was received on August 24, 2005, plaintiffs made no effort to prevent their deposit from being forwarded to Dr. Haydel as authorized under the terms of the purchase agreement. The plaintiffs' actions demonstrated their intent to create a binding agreement to purchase Dr. Haydel's condominium. Therefore, we conclude that the district court erred in failing to find that a valid contract existed between the parties, and in ordering the return of the plaintiffs' deposit.⁸

⁸ Having decided the merits of Dr. Haydel's appeal on this basis, we find it unnecessary to address his remaining assignments of error on the main demand.

We further conclude the district court erred in failing to make an award on Dr. Haydel's reconventional demand, in which he claimed liquidated damages for the plaintiffs' refusal to go forward with the sale of the condominium. The purchase agreement provided that in the event of the buyers' (plaintiffs') breach the seller has the option of selecting the following remedies: "(a) accept the earnest money deposit as liquidated damages and this contract shall then be null and void; or (b) enter suit in any court of competent jurisdiction for damages for the said earnest money deposit; or (c) enter in any court of competent jurisdiction for specific performance." Additionally, the contract provided: "If it becomes necessary to insure the performance of the conditions of this contract for either party to initiate litigation, then the losing party agrees to pay reasonable attorneys' fees and court costs in connection herewith." Dr. Haydel has requested as a remedy for plaintiffs' breach the first option; i.e. retaining the deposit as liquidated damages. Consequently, we rule herein in his favor on the reconventional demand and order that the amount previously paid to him as a deposit, \$114,030.00, shall be retained by him as liquidated damages, and the contract to sell Unit 705 in the Sea Breeze Condominiums, 1899 Beach Boulevard, Biloxi, Mississippi, is hereby declared null and void. We decline to award attorney's fees as no proffer was made concerning the amount of attorney's fees incurred by Dr. Haydel.

We further note that the parties have submitted a joint motion to supplement the record with the district court clerk of court's notice to the parties of the district court's signing of an amended judgment in the matter. We grant the motion to supplement.

CONCLUSION

For the reasons assigned, the judgment rendered by the district court in favor of plaintiffs is hereby reversed and judgment is rendered in favor of defendant, Michael D. Haydel, against plaintiffs, Kathleen B. Thaller, Rose A. Evans, Helene Huddleston, and Gina Cursain, declaring the \$114,030.00 deposit previously paid by plaintiffs to defendant forfeited in his favor; the contract of the parties is hereby declared null and void. All costs of this litigation are to be borne by plaintiffs. Further, we grant the joint motion to supplement the record on appeal.

JUDGMENT REVERSED AND RENDERED; MOTION TO SUPPLEMENT GRANTED.