
In The
 Court of Special Appeals
 of Maryland

No. 916

September Term, 2006

JOHN M. ZUPANCIC, *et al.*,

Appellants,

v.

PAUL ABBOTT, *et al.*,

Appellees,

v.

CATHERINE BARTOS,

Appellant.

*On Appeal from the Circuit Court of St. Mary's County, Maryland,
 (Hon. Karen H. Abrams, Judge)*

**REPLY BRIEF FOR APPELLANT
 CATHERINE BARTOS**

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REPLY BRIEF OF APPELLANT CATHERINE BARTOS

The Appellant, Catherine Bartos, by and through her attorneys Christopher T. Longmore and the law firm of Dugan, McKissick, Wood & Longmore, L.L.C.,

hereby submits this Reply Brief, pursuant to Maryland Rule 8-502(a)(3), in the above-captioned matter. While Appellant Bartos and the other parties to this appeal have previously presented a recitation of various facts relating to this appeal, the following is a brief synopsis of the events that are relevant to this Reply.

The operative document is a Sales Contract dated April 24, 2004, as amended on or about June 24, 2004 (the contract, as amended, hereinafter referred to as the "Contract"), relating to that property known as 13945 Cornfield Harbor Drive in Scotland, St. Mary's County, Maryland. *See* E. 684 and E. 629. Appellant Catherine Bartos was listed as the Seller in the Contract and Appellees Elaine Barker and Paul Abbott were listed as the Purchaser in the Contract. As discussed in the testimony at trial, the Appellees selected the law offices of Harris & Capristo ("Settlement Office") to conduct the settlement and the settlement was ultimately scheduled for January 21, 2005. The Settlement Office received a letter purporting to be from a group called the Friends of Cornfield Harbor, LLC ("Friends of Cornfield Harbor Letter") alleging that the group had filed a "lis pendens" to challenge. E. 645 -- 646. Appellant Bartos traveled to the Settlement Office and was present on the date and time selected by the Appellees for settlement. Appellant Bartos was presented with settlement documents on that date that were post-dated by thirty-one (31) days. *See, e.g.,* E. 650-651 (unsigned settlement statement presented to Appellant Bartos on date of scheduled settlement) and E. 648-649 (copy of settlement statement purportedly signed by Appellees on date of scheduled settlement).

The Appellees refused to settle and provide the sales price listed in the Contract to Appellant Bartos as a result of the Settlement Office's receipt of the Friends of Cornfield Harbor. *See* E. 299 – 300 (testimony of Appellee Barker). Appellees also imposed the requirement of Appellant Bartos that she must execute and deliver the deed to the property and the deed must be recorded prior to Appellees providing Appellant Bartos with any funds. The Contract did not provide for any agreement on the part of the parties to close in escrow or that the deed would need to be recorded prior to provision of the settlement proceeds to Appellant. In fact, Appellee Barker and Appellant Bartos had specifically discussed the possibility of closing "in escrow" and Appellant Bartos had expressly informed Appellee Barker that she was not willing to do so. E. 288 – 289 (testimony of Appellee Barker stating that Appellant Bartos informed her she did not want to settle in escrow); E. 691 (copy of Appellee Barker's notes reflecting the same).

An attorney that worked for the Settlement Office filed the lawsuit that gave rise to this appeal on the afternoon of January 24, 2005 – prior to the expiration of the Contract.

I. DESPITE THEIR ASSERTIONS TO THE CONTRARY, APPELLEES DID NOT SEEK A REASONABLE DELAY TO THE SETTLEMENT AND INSTEAD SOUGHT TO IMPOSE REQUIREMENTS ON APPELLANT BARTOS THAT WERE NOT PART OF THE CONTRACT

In their brief, Appellees focus on their argument that they were allowed to delay the settlement so long as their delay was reasonable. *See, e.g.,* Appellees'

Br. at 19 – 21. But this is a red herring because the Appellees never offered to delay the settlement so that it would take place later in a way that comported with the terms of the Contract. The trial court failed to recognize one critical fact – the Appellees did not seek simply the *delay* the settlement, instead they demanded that Appellant Bartos take actions that were not required pursuant to the Contract before they would provide her with the purchase price. Appellees were not willing, and did not indicate any willingness to Appellant Bartos, that they would settle once they had some time to review the title and, if there was no lawsuit filed, they would proceed to settlement. Instead, they demanded, through the settlement attorney's office, that Appellant Bartos go to the courthouse, sign the deed there outside of their presence, and have it recorded before they would agree to perform any of their obligations under the Contract. *See* E. 219 – 221, 225 (testimony of Denise Raley). In order to simply delay the settlement, the Appellees would have had to reschedule the settlement or at the very least indicated a willingness to do so – they did not. They never offered to meet Appellant Bartos again after the scheduled settlement date and time on January 21, 2005. In fact, the Appellees never made any direct contact with Appellant Bartos again, except for Ms. Raley's call mentioned above, until they had their attorneys, who also happened to be the settlement company in this matter, to serve Appellant Bartos with the lawsuit that gave rise to this appeal.

Appellant Bartos was only given two options: (1) to fully perform her obligations under the contract, i.e., execute and deliver the deed to Appellees

through their attorneys on Friday, January 21, 2005 without receiving anything in exchange for the delivery of this deed or (2) meet a "runner girl" from the settlement office, without any settlement attorney present to explain the settlement process to Appellant Bartos, to sign a deed in the middle of the Courthouse on Monday, January 24, 2005 and trust that she would be given the proceeds in such a setting. There is one common thread to both of these options – neither required the Appellees to perform their duties under the Contract, i.e., to provide Appellant Bartos with the purchase price at the time she delivered the deed to the Appellees.

Appellees may in fact have been ready, desirous, prompt and eager to accept a deed to the Property so long as they had every possible assurance that no neighbors had sued them over their planned development for the Property. It was not, however, Appellant Bartos's duty to provide Appellees with such an assurance prior to her receiving the proceeds from the sale of the Property. If the Appellees had desired such an assurance, they should not have entered into a Contract that provided they would receive the Property in "as-is" condition. The requirements imposed by Appellees on Appellant Bartos were not part of the Contract between the parties. The Appellees willingness to settle on the property with these unilateral requirements does not equate a willingness to perform the Contract as it was written and agreed to by the parties. The Appellees simply refused to settle until they had time to see if the "Friends of Cornfield Harbor" would oppose their post-settlement development plans for the property. This was not a "reasonable delay" – it was an express refusal to settle according to the terms

of the Contract and therefore Appellees were not ready, desirous, prompt and eager to settle – at least not according to the terms to which they had agreed in the Contract.

II. THIS HONORABLE COURT SHOULD IMPOSE AT LEAST A MINIMAL DUTY ON PURCHASERS AND TITLE ATTORNEYS TO EVALUATE THE SUBSTANCE OF A COMMUNICATION THAT ALLEGES A LIS PENDENS

Appellees allege in their Brief that the substance of the Friends of Cornfield Harbor Letter was irrelevant because the author of that letter included the magic words “lis pendens” in the letter. Appellee’s Br. at 17. In fact, Appellees state that a review of the actual letter that gave rise to this entire dispute “misses the point.” It is understandable why the Appellees take such a position – a plain reading of the letter reveals that, even if every statement in the letter were true, the described actions in the letter could not constitute a lis pendens under well-settled Maryland law. See E. 645 - 646. The letter states that the author had filed a “lis pendens” “due to the nature of the Abbott/Barker development plans for the property,” challenged a site plan that have been filed with St. Mary’s County’s zoning office, expressed opposition to a variance request that the Appellees were seeking, and address concerns about the environmental impact of the structure the Appellees were seeking to build on the Property. All of these allegations relate to zoning and development issues related to the Appellees’ post-settlement plans to develop the property. The Friends of Cornfield Harbor Letter does not provide even a hint of any title issues with the Property. Maryland law is clear – zoning

violations or development concerns do not constitute a title defect or *lis pendens*. See *Marathon Builders v. Polinger*, 263 Md. 410 (1971) and discussion thereof in Section I of Appellant Bartos's Brief. This is particularly true when, as is the case here, the Contract provided that the property was being sold "as-is." The Appellees made a choice – a choice not to settle in light of this letter.

The Circuit Court erred when it found that just because a letter mentioned the words *lis pendens*, the Circuit Court found that provided a reason to delay the settlement. The Circuit Court seemed to focus on whether it was reasonable for the Appellees to be concerned about the letter. While this would be a reasonable reaction to the letter, any such concern is not a legally permissible reason to fail to perform under the Contract or to impose requirements on the Seller that go beyond those found within the four corners of the Contract. This issue before the Circuit Court, and now before this Honorable Court, is not whether it was reasonable for the Appellees or their settlement attorney be concerned about this letter – it is whether the receipt of the letter gave the Appellees the right to unilaterally change the terms of the Contract and refuse to settle at the appointed date and time. Under Maryland law, it simply did not.

If this Court were to affirm this reasoning, it would potentially be disastrous to the real estate settlement process in Maryland – because anyone could send a letter containing the magic words "lis pendens" to a settlement and delay someone else's settlement. The law must impose at a least a minimal duty on the buyers and their attorneys to read the other words contained in such a letter

and see if it truly threatens a *lis pendens* as that term has repeatedly been considered defined by our State's appellate courts. In this case, as affirmed by the Appellees' own expert, this letter clearly did not.

Mr. Weiner testified that a zoning violation does not constitute a *lis pendens*. Mr. Weiner was asked at trial: "How about if the *lis pendens* alleged that the purchasers proposed building plans for a piece of property were in error? Would that be a *lis pendens* on the title to the property?" He answered "No." E. at 383. When asked if he could recall ever seeing a lawsuit against a potential purchaser of property that was a *lis pendens*, based on his experience of conducting "in excess of five thousand" real estate settlements, he testified that he had not. E. 383 – 384. . The only situation he could imagine such a lawsuit would be if it was a lawsuit relating to the contract itself. *Id.* The Friends of Cornfield did not reference any such situation. The plain language of the letter clearly demonstrates the claims contained therein did not constitute a *lis pendens* and therefore Appellees breached the Contract when they refused to settle in light of the letter.

III. APPELLEES FAIL TO ACKNOWLEDGE THAT APPELLANT BARTOS WOULD HAVE PERFORMED ALL STATUTORY REQUIREMENTS BY EXECUTING AND DELIVERING THE DEED AND THAT SAID CONVEYANCE WOULD HAVE BEEN EFFECTIVE UPON THE DELIVERY OF THE DEED

Appellees do not dispute that they refused to provide Appellant Bartos with any funds until she recorded the Deed. There is no language in the Contract that requires the recording of the deed – either before or after settlement on the Property. *See* E. 684, 629. Appellees ignore this fact, and instead assert that the

fact that the Contract references a revenue stamp imposed the requirement that Appellant Bartos must record the deed before she received any proceeds.

Appellees fail to even address the language of § 3-201 of the Real Property Article of the Maryland Annotated Code, which reads in its entirety as follows:

The effective date of a deed is the date of delivery, and the date of delivery is presumed to be the date of the last acknowledgment, if any, or the date stated on the deed, whichever is later. Every deed, when recorded, takes effect from its effective date as against the grantor, his personal representatives, every purchaser with notice of the deed, and every creditor of the grantor with or without notice.

MD. CODE ANN., REAL PROP. § 3-201. As set forth in this section, there is a clear process and order to conveying the title to property under Maryland law. First, the Seller executes and delivers the deed to the Purchaser. Once the Seller delivers the deed to the Purchaser, the Purchaser causes the deed to be recorded among the Land Records for the appropriate County. *See* MD. CODE ANN., REAL PROP. § 3-101. Appellees suggest in their Brief that Appellant Bartos should have recorded a deed first, and then delivered it Appellees. This simply flies in the face of the provisions of Section 3-201.

In addition, there was no evidence or claim presented to the Circuit Court that the Deed could not have been recorded even if the Friends of Cornfield Harbor Letter was true. In fact, even if there was a truly a lis pendens on the Property, the deed still could have been recorded, and Appellees' interest in the Property would simply be subject to the lis pendens. *See DeShields v. Jack's Liqueurs*, 338 Md. 422, 433 (1995). Therefore, the Appellees' requirement that

Appellant Bartos have the deed recorded before she received any proceeds bore no relationship, reasonable or otherwise, to the allegations in the Friends of Cornfield Harbor Letter and, despite the Appellees assertions to the contrary, was not a reasonable basis for delaying settlement.

Also, neither Appellees, who did not speak or interact with Appellant Bartos at the scheduled settlement, nor the settlement attorney, provided any assurances or explanations to Appellant Bartos as to what would happen if the deed was not recorded for some reason. See E. 148 – 149 (testimony of Mr. Harris stating “I have no recollection of telling her what I would do to the deed if she signed it and didn’t record it.”). As acknowledged by Appellees in their Brief, the signing and delivery the deed at the very least amounted to a contract between Appellant Bartos and Appellees – i.e., an agreement that was effective as of the date of signing that conveyed title to Appellees in the property. Section 3-201 is clear that the effective date of the transfer is the date Appellant Bartos would have signed and delivered the deed, the Appellees’ and their settlement attorney’s failure to provide any indication to Appellant Bartos that we would have the deed returned to her if it was not ultimately recorded. In short, the Appellants imposed a requirement that Appellant Bartos fully perform and gave her no explanation of what would happen if the deed was not recorded but the Appellees themselves refused to tender to her.

IV. APPELLEES' DEPOSITING OF FUNDS WITH THEIR ATTORNEYS DID NOT CONSTITUTE A TENDER OF PAYMENT TO APPELLANT BARTOS

Appellees argue that they did tender payment to Appellant Bartos and imply that therefore they fully performed their obligations under the Contract. However, the alleged tender was the provision of two personal checks to the "settlement attorney" for the settlement costs. E. 116 – 120, E. 652 & 653 (copies of checks). These checks for the settlement were never negotiated or deposited in any account. No evidence of this payment was presented to Appellant Bartos when she was present at the settlement office on January 21, 2005. Even more telling is that simultaneous with their "tender" of the funds due under the Contract, the Appellees also paid the same attorney's firm to purportedly represent the Appellees in filing suit against Appellant Bartos for, among other things, damages in the amount of One Hundred Thousand Dollars (\$100,000.00). E. 142 – 147; E. 678; *see also* Appellees' Original Complaint.¹

Given these facts, the provisions of the checks to Mr. Harris cannot be deemed the equivalent of a tender to Appellant Bartos. Appellees provided their attorneys with a check that was never negotiated – but never presented any funds, in the form of check or any other form, to Appellant Bartos. Further, Appellant Bartos was never informed any funds had been provided. In fact, Appellees expressly refused to tender payment to Appellant Bartos – as Mr. Harris informed

¹ As noted in Appellee's Brief, the claims for monetary were later voluntarily dismissed by Appellees prior to the trial of this matter. *See* Appellees' Br. at 2.

Appellant Bartos that they would not tender payment to her unless she performed certain actions that were not part of the Contract.

V. APPELLEES ARE NOT ENTITLED TO THE REMEDY OF SPECIFIC PERFORMANCE BECAUSE THEY WAIVED ANY RIGHT THEY HAD TO THAT REMEDY WHEN THEY REFUSED TO TENDER PAYMENT TO THE APPELLANT BARTOS IN LIGHT OF THE MANY AMBIGUITIES IN THE CONTRACT BETWEEN THE PARTIES

As set forth in Appellant Bartos's Brief, there are many ambiguities in the Contract. Maryland law is well settled that specific performance is not an appropriate remedy. In fact, Appellees point out yet another ambiguous term in the Contract in their reference to the requirement for revenue stamps, which have not been part of the conveyance of real property in Maryland for many, many years.

The Appellees refusal to tender payment highlights the unavailability of the remedy of specific performance in this case. As set forth in the case of *Chambers v. Jordan*, 257 Md. 144 (1970), the only possible way a Plaintiff can successfully assert a specific performance claim when the Contract at issue contains ambiguous terms is by tendering payment to the Seller. The Court noted that "where uncertainties exist in the terms of a contract of sale, specific performance should not be granted when cash is tendered in full payment of the purchase price." *Id.* at 152. In the matter now before this Court, the Purchasers expressly refused to

tender payment and instead chose to impose new conditions on Appellant Bartos before they would tender their performance under the Contract.²

The additional requirements that the Appellees imposed on Appellant Bartos, i.e., requiring that the deed be recorded and confirming that no one had challenged their development plans for the property prior to disbursement, likewise negates any rights Appellees would have of specific performance in this matter. The Maryland Courts have considered the analogous situation where a tender of payment to satisfy a mortgage debt is coupled with additional requirements beyond the tender of the actual amount due. In such cases, the Courts have found that that a mortgagor cannot impose conditions on the provision of payment of its debt under a mortgage, and that the imposition of any such conditions would preclude the mortgagor from seeking the remedy of specific performance. *See Heighe v. Sale of Real Estate*, 164 Md. 259 (1933). This Court is faced with a similar situation here. Even if the Court finds that the provision of the uncashed, personal checks to the Appellees' attorney constituted a tender, it was clearly coupled with the additional requirement that the deed be recorded first and a determination be made that Appellees had not been sued for their post-settlement plans to develop the property. This requirement extinguished any rights Appellees had to the remedy of specific performance in this case.

² In addition, Appellees argue that the Court appropriately implied a duty on Appellant Bartos and that the deed must be recorded before she received the proceeds from the settlement. However, *Chambers* correctly points out that terms of a contract must be expressly stated therein and cannot be implied terms when a party is seeking the remedy of specific performance. *Id.* 150 – 151.

IV. CONCLUSION

As set forth above, and in Appellants' original Brief to this Court, this Honorable Court should grant this appeal because the Appellees were not ready, desirous, prompt and eager because they chose not to settle on the property and did not have a reasonable basis for this decision. Appellees then attempted to impose conditions on the Appellant that were not part of the Contract with sole purpose of assuaging Appellees' concerns while providing no benefits to Appellant Bartos. In addition, the Appellees never tendered payment to the Appellant and therefore waived any right to specific performance given the ambiguities in the Contract.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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I, John C. Kruesi, Jr., being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

I am retained by Dugan, McKissick, Wood & Longmore, L.L.C., Attorney for Defendant-Appellant Catherine Bartos.

That on the **6th Day of December 2006**, I served the within **Reply Brief for Appellant Catherine Bartos** upon:

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via Express Mail, by causing 2 true copies of each, enclosed in a properly addressed wrapper, to be deposited in an official depository of the USPS.

Unless otherwise noted, 15 copies have been hand-delivered to the Court on the same date as above.

December 6, 2006

