

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

RICHARD FEIST & TERRIE FIEST, : No. 02-00,582
:
Plaintiffs :
:
vs. : Civil Action - Law
:
DIANE L. CAPRIO and SANDRA :
L. ALLEN, : Motion for Contempt and
Defendants : Sanctions

ORDER

AND NOW, this ___ day of July 2003, the Court DENIES the Defendants' Motion for Contempt but **GRANTS** the Defendants' request for the sanction of dismissal of Plaintiffs' Complaint for specific performance to compel the Defendants to sell Plaintiffs the real estate located at 4584 Star Route 973 West, Cogan Station, Lycoming County, Pennsylvania Tax.

The Court enters this Order with reluctance and regret. The Court began a non-jury trial in this on March 5, 2003. Additional time was needed to complete the case, so it was continued to March 25, 2003. On that date, the parties, with the Court's aid, reached a settlement agreement, which was memorialized in the Court Order. The parties agreed that Plaintiffs' would purchase the Defendants' property for \$57,500.00 and closing on the property would be "no later than May 24, 2003." The agreement and Order also contained a provisions concerning the lis pendens that Plaintiffs had

recorded on the Defendants' property during the litigation. These provisions were obviously very important to the Defendants since they insisted on two lis pendens provisions in the settlement Order. The provisions concerning lis pendens in the Order stated:

The Plaintiffs will remove their lis pendens on this property **by** the time of closing. . . .

The lis pendens shall be satisfied by the Plaintiffs **within sixty (60) days** of today's date **and by no later than the time of closing.**

Order dated March 25, 2002 (emphasis added).

The window of opportunity for the agreed upon sale was May 24, 2003. Clearly, the agreement required the Plaintiffs to remove the lis pendens on the Defendants' property by the time of closing.

The closing was initially scheduled for May 12, 2003, well in compliance with the agreed upon Order. However, the closing did not go forward on this date because the Plaintiffs, based on information from Mr. Feist's brother, became concerned that the Defendants had somehow damaged the property. Therefore, Plaintiffs demanded a further physical inspection of the property. The Defendants actually appeared for the closing of May 12, 2003 at the scheduled time, but because of this problem, the closing did not proceed.

Subsequently, the parties were able to agree to a

time for Mr. Feist to physically inspect the property on May 15 and Mr. Feist's fears were allayed. The parties then endeavored to reschedule the closing. The Defendants suggested Saturday, May 24, 2003, this because of their work schedule and because they had a planned paid vacation from May 15-19, 2003.

Because of the acrimony between the parties throughout the litigation, Plaintiffs' counsel, Robin Read, Esquire became suspicious of the Defendants' motives in scheduling the closing on Saturday, May 24, which was the Saturday of Memorial Day weekend. The Lycoming County Courthouse was closed on Monday May 26, Memorial Day. Therefore, filing of the mortgage and other legal papers could occur not until Tuesday, May 27, 2003.

Ms. Read, however, was not aware that Defendant Allen called Mr. Feist and offered to reschedule the closing to Monday May 19, because the Defendants had cancelled their planned vacation. Mr. Feist had his own work commitments, so he decided to leave the closing as scheduled for Saturday, May 24.

Ms. Read had prepared a praecipe to satisfy the lis pendens pursuant to the Court agreement and planned to file it on Friday, May 23, 2003 in the courthouse. However, when Ms. Read talked to Joseph Luke of WNB Bank, the bank loaning the

Feists the money for the purchase of the property, Mr. Luke indicated some discomfort with the Saturday closing date. Mr. Luke had some concerns regarding the mortgage "hanging out there" until Tuesday when the documents would be filed. However, Mr. Luke talked to his supervisors and then communicated to Ms. Read that they would close on Saturday, May 24.

The Defendants, in their correspondence of May 8, 2003 to Attorney Read, again reiterated their concern about the lis pendens stating:

We will further require proof prior closing that the Lis Pendens was marked satisfied of record.

Defendants' Exhibit 3. However, Ms. Read decided she would not file the satisfaction of the lis pendens on Friday, May 23. Mr. Luke of the WNB Bank was present on Saturday at the scheduled closing time and was ready to proceed. Mr. Luke did not request that the lis pendens be withheld at the closing.

All the parties appeared for the closing on May 24.

Unfortunately, the closing did not proceed to a conclusion. When the Defendants' attorney learned that the lis pendens was not removed or satisfied, she complained to Ms. Read. Ms. Read indicated she would file the satisfaction of the lis pendens on Tuesday, May 27, 2003 if the closing proceeded. The Defendants were not satisfied with this response and the

closing ended without the property being sold to the Plaintiffs.

The Court does not in any way feel Attorney Read was acting in contempt of the Court's Order. Ms. Read is well respected by the Court and was not acting contemptuously of the Court.

Regretfully, the Court cannot say that the Plaintiffs complied with the Order. The Plaintiffs delayed the closing from May 12 to May 24, the very last day of to close under the Order. The Defendants showed some flexibility in offering to move the closing up May 19 to avoid concerns about a Saturday closing on a holiday weekend. Plaintiffs did not accept this invitation.

The lis pendens provision in the Order was important to the Defendants. They insisted on this provision being included in the March 25 Order and agreement, and their insistence led to removal of the lis pendens being covered in the Order twice. Without such provisions, the Defendants would not have entered into the settlement on March 25, 2003. They also insisted on this concept in their letter of May 8, 2003. Defendants' Exhibit 3.

Unfortunately, this case has been colored by the parties' suspicions about each others' motives and the attorneys, instead of quelling or controlling these

suspensions, joined into the attitude. The Court cannot resurrect the agreement of sale beyond the deadline of May 24. The Court does not believe the closing on May 24 continued into May 27 so as to allow the Plaintiffs to satisfy the lis pendens on May 27, 2003.¹ The Court cannot compel the Defendants to settle the case by extending time to close on this transaction, although the Court wishes it had such power.

While the Court agrees with the Defendants that the closing time for sale of the property has expired, the Court is frustrated that they will not show the flexibility once more to settle this case by allowing the sale to be completed.

Since the Court finds no bad motive in Plaintiffs' action, it will not award attorney fees. Nevertheless, Plaintiffs' complaint for specific performance and the lis pendens are **DISMISSED** and Defendants may retain the \$1,000 deposit, because the sale was not consummated due to Plaintiffs' failure to comply with the Order of March 25, 2003.

By The Court,

Kenneth D. Brown, Judge

¹ In fact, the satisfaction of the lis pendens was not filed on May 27 and has not been filed as of this date.

cc: Robin Read, Esquire
Denis Dieter, Esquire
Work File
Gary Weber, Esquire (Lycoming County)