

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

DOROTHY F. BARTLEY,

Plaintiff

v.

MAIN STREET MORTGAGE COMPANY,

Defendant

Civil No. 96-276-P-C

GENE CARTER, District Judge

MEMORANDUM OF DECISION

This action relates to the real property located at 232 Ocean Avenue Kennebunkport, Maine. The property was previously owned by Brian Bartley and later conveyed to the Cape Arundel Realty Trust on May 30, 1990.¹ Stipulated Rec. (Docket No. 25) ¶ 1; Stipulated Rec. Exhibit 1. On September 6, 1991, following a payment default by Brian Bartley, Main Street Mortgage Company ("Main Street") and its predecessor, G.E. Capital Mortgage Corporation, as holders of an outstanding mortgage on the property, commenced a foreclosure action against the property and a deficiency claim against Brian Bartley. Stipulated Rec. ¶ 2. As a resolution to the foreclosure and deficiency actions, Cape Arundel Realty Trust offered to deed the property to Main Street in lieu of foreclosure, and Brian Bartley offered to pay to Main

¹The trustees of Cape Arundel Realty Trust included Brian Bartley, his mother, Dorothy F. Bartley, and her husband, James C. Bartley.

Street \$500 in complete settlement of all claims.² Stipulated Rec. ¶ 3.

By letter dated March 4, 1996, Main Street, through its counsel, Daina J. Nathanson, agreed to the terms of the transaction by which Cape Arundel Realty Trust would deed the property to Main Street and Brian Bartley would pay \$500. Stipulated Rec. ¶ 4; Stipulated Rec. Exhibit 2. The deed-in-lieu-of-foreclosure and the \$500.00 check were sent to Attorney Nathanson on May 15, 1996. Stipulated Rec. ¶ 5; Stipulated Rec. Exhibit 3. According to the terms of the deed in lieu of foreclosure agreement, the deed from Cape Arundel Realty Trust was to be held in escrow pending the exchange of mutual releases by the parties. Stipulated Rec. ¶ 6; Stipulated Rec. Exhibit 4.

Sometime prior to July 23, 1996, Attorney Timothy Norton, representing Plaintiff Dorothy Bartley, spoke by telephone with Attorney Nathanson and indicated that Mrs. Bartley, because of her familiarity with the property, was interested in purchasing the property in her own name. Stipulated Rec. ¶ 7. Attorney Norton conveyed by telephone an oral offer by Mrs. Bartley for purchase of the property for \$185,000. Stipulated Rec. ¶ 7. Several days after that telephone conversation, Attorney Nathanson contacted Attorney Norton and indicated that Main Street required any offer to purchase to be in writing; Main

²As part of the settlement, Mrs. and Mr. Bartley agreed to discharge Cape Arundel Realty Trust from a junior mortgage they held on the property. Stipulated Rec. ¶ 3.

Street would then respond to any such offer also in writing.

Stipulated Rec. ¶ 8. Attorney Norton drafted and sent to Attorney Nathanson, in response to those instructions, a letter dated July 23, 1996, which set forth Plaintiff's proposal to purchase the property for \$185,000. Stipulated Rec. ¶ 9;

Stipulated Rec. Exhibit 5. In that letter, Norton stated:

"Please have your client consider this proposal and if it is acceptable, I would be happy to work with you toward finalizing a formal Purchase and Sale Agreement." Stipulated Rec. Exhibit 5.

By letter dated July 31, 1996, Main Street Mortgage advised Attorney Nathanson that it rejected the \$185,000 offer from Plaintiff, but that it would be willing to agree to a sales price of \$260,000.³ By fax transmittal dated August 1, 1996, Attorney Nathanson transmitted the July 31, 1996, letter, in its entirety, to Attorney Norton. Stipulated Rec. ¶ 10; Stipulated Rec. Exhibit 6. The letter also included the statement: "All other terms and conditions of the sale would have to be negotiated once a formal contract is presented." Stipulated Rec. Exhibit 6.

By letter dated August 5, 1996, Attorney Norton advised Attorney Nathanson that Plaintiff accepted Defendant's counterproposal of \$260,000 as a purchase price for the property. Stipulated Rec. ¶ 11; Stipulated Rec. Exhibit 7. The letter also stated: "I would appreciate it if you would forward to me a

³Main Street also advised Attorney Nathanson that the \$500 check from Brian Bartley had been returned for insufficient funds. Stipulated Rec. ¶ 10. Brian Bartley subsequently provided substitute funds. Stipulated Rec. ¶ 10.

purchase and sale agreement in a form agreeable to your client and I will review it on behalf of Mrs. Bartley." Stipulated Rec. Exhibit 7. This was the extent of the communication between the parties between July 23 and August 5, 1996.

After receipt of the August 5, 1996, letter, Main Street conveyed the terms upon which it would agree to sell the property to Plaintiff. Stipulated Rec. ¶ 13; Stipulated Rec. Exhibit 8. Among other things, the terms required acceptance by 5:00 p.m. on August 7, 1996. After 5:00 p.m. on August 7, 1996, Attorney Nathanson sent Attorney Norton a letter indicating that Main Street's offer had been revoked. Stipulated Rec. ¶ 14; Stipulated Rec. Exhibit 9. Attorney Norton, by letter dated August 13, 1996, sent Attorney Nathanson a proposed Purchase and Sale Agreement on behalf of Plaintiff. Stipulated Rec. ¶ 15. That agreement was signed by Plaintiff and accompanied by a \$10,000 check purporting to be an earnest money deposit. Stipulated Rec. ¶ 15; Stipulated Rec. Exhibit 10. By letter hand-delivered to Attorney Norton on August 15, 1996, Defendant rejected Plaintiff's August 13, 1996, offer and returned the \$10,000 check. Stipulated Rec. ¶ 16; Stipulated Rec. Exhibit 11.

The parties have presented this case to the Court for decision on the above stipulated facts. The issue is simply whether the correspondence reflects that a meeting of the minds of the parties was achieved on all the essential terms of an enforceable contract for the purchase and sale of the subject realty. Plaintiff contends that all the essential elements of a

contract are present and requests that the Court order the Defendant to specifically perform its contract with Plaintiff transferring title to the Ocean Avenue property to Plaintiff. Defendant, on the other hand, argues that there were unresolved essential elements to the formation of a contract: (1) the amount and nature of the earnest money deposit, (2) the lack of contingencies in the contract, and (3) a relatively quick closing.

In an action for specific performance, Plaintiff has the burden of proving the existence of the contract and its terms, and must show either full performance on her part or that she has offered to perform, or is ready, willing, and able to perform. See, e.g., Graham County Electric Cooperative, Inc. v. Safford, 322 P.2d 1078 (Ariz. 1958); Glave v. Brandlein, 196 So.2d 780 (Fla. 1967). Unless the terms of the contract, the consideration on which it was founded, and the time of its execution are clearly established, or if there is reasonable doubt as to any of these things, equity will not grant relief, for fear of doing greater wrong than by leaving the parties to their legal remedy. See, e.g., Dalzell v. Dueber Watch Case Mfg. Co., 149 U.S. 315 (1893); Cleborne v. Totten, 57 F.2d 435 (D.C. Cir. 1932). The Maine Law Court has stated on more than one occasion the requirements for a legally binding agreement between two parties: "the parties must have mutually assented to be bound by all of the material terms [of the agreement]; the assent must be reflected and manifested in the contract, either impliedly or

expressly; and the contract must be sufficiently definite to enable the court to determine its exact meaning and fix exactly the legal liability of the parties." Roy v. Danis, 553 A.2d 663, 664 (Me. 1989); Smile, Inc. v. Moosehead Sanitary District, 649 A.2d 1103, 1105 (Me. 1994). There must be a "meeting of the minds" of the parties respecting all material terms and provisions of the contract. Oullette v. Bolduc, 440 A.2d 1042, 1045 (Me. 1982); Zamore v. Whitten, 395 A.2d 435, 440 (Me. 1978).

In this case, no binding agreement exists between Main Street and Mrs. Bartley because, on this record, there was no mutual assent on the essential terms of the contract. While the price and the specific property involved are certainly essential terms to a contract for the sale of real property, these are not always the only essential terms. To a large extent, the specific material terms of a real estate contract depend for their content on the desires of the parties to the contract. Although clearly terms additional to those agreed on in the negotiation were contemplated, none of those additional terms or conditions were ever finally agreed upon by the parties. In this case it is clear that the price and the specific property were not the only material terms the parties intended.

All of the parties' correspondence discloses an intent to execute a formal purchase and sale agreement. Mrs. Bartley's first offer to purchase provides: "[H]ave your client consider this proposal and if it is acceptable I would be happy to work with you toward finalizing a formal purchase and sale agreement."

Stipulated Rec. Exhibit 5. In its response of July 31, 1996, Main Street made clear its intent to begin the negotiating process, with agreement on other terms to necessarily follow, stating: "All other terms and conditions of the sale would have to be negotiated once a final contract is presented." Stipulated Rec. Exhibit 6. Mrs. Bartley's attorney also recognized that not all the essential terms had been agreed upon in his August 5 letter: After accepting Main Street's counteroffer of \$260,000 as the purchase price for the property, he then requested that Main Street's attorney "forward . . . a purchase and sale agreement in a form agreeable to [Main Street] and [he would] review it on behalf of [Mrs. Bartley]." Stipulated Rec. Exhibit 7.

Maine law is clear that an instrument which leaves material terms and conditions to be agreed upon and which contemplates the execution of a final contract does not itself constitute an enforceable contract. Ault v. Pakulski, 520 A.2d 703, 705 (Me. 1987); Orcutt v. Feis, 298 A.2d 758 (Me. 1973); Masselli v. Fenton, 157 Me. 330, 336, 172 A.2d 728 (Me. 1961). The Restatement of Contracts is also in accord with this principle. "[I]f either party knows or has reason to know that the other party regards the agreement as incomplete and intends that no obligation shall exist until other terms are assented to or until the whole has been reduced to another written form, the preliminary negotiations and agreements do not constitute a contract." Restatement (Second) of Contracts, § 27 Comment (b) (1981). The record here demonstrates the parties intent not to

be contractually bound until a written instrument had been executed. Even if Mrs. Bartley herself did not intend to include other terms, it was clear from the July 31 letter that Main Street did not intend there to be a binding agreement until the other terms were negotiated and a formal purchase and sale agreement was executed by both parties. Where the parties to a sales contract contemplate a written contract, the minds of the parties will not be considered as having fully met until the writing itself is agreed on and executed.

In its August 7, 1996, letter, Main Street stated the terms that would be required in a purchase and sale agreement. Those terms included a \$50,000 nonrefundable deposit; a purchase and sale agreement without contingencies (including clear and marketable title); conveyance by quitclaim deed without covenant; and a closing within nine business days. It is obvious from this record that the parties did not reach agreement on those additional provisions.⁴ Stipulated Rec. Exhibit 8. Essential for specific enforcement would be proof that the terms which the parties considered essential were before the court. Without agreement on the other terms, the Court would be attempting to order execution of an agreement which does not contain material terms.⁵ The Court will not enumerate those terms which

⁴On August 13, 1996, Mrs. Bartley sent a certified earnest money check for \$10,000 to Main Street (in an effort to bind the parties).

⁵Plaintiff has submitted an affidavit of Gordon T. Holmes,
(continued...)

constitute material terms which must be agreed upon. The general principles of contract formation must be applied factually in each case.

Because the parties did not form an enforceable contract, the Court does not need to reach the parties' arguments relating to the statute of frauds.

⁵(...continued)

Jr., a licensed Maine real estate broker since 1975, who states that in his opinion the material terms -- price and property identification -- of a contract have been reached and that "industry standard[s]" would fill in the remaining terms. Aff. Holmes ¶ 4. Holmes does not state that the terms he seeks to incorporate apply in every situation. Rather, he qualifies his opinion, stating that these terms are "largely consistent from transaction to transaction." Holmes Aff. ¶ 3. The affidavit does not persuade the Court. The specific terms missing from the parties negotiations in this case prevent the Court from filling in those missing terms.

Defendant submitted the affidavit of Michael A. Jacobson, a licensed real estate broker and auctioneer, to support its position. Pending before the Court is Plaintiff's Objection to Affidavit Testimony of Michael A. Jacobson (Docket No. 26). The Court will endorse Plaintiff's motion as moot because Mr. Jacobson's testimony was not necessary to the decision in this matter.

Accordingly, the Court hereby orders that Plaintiff's
Complaint be DISMISSED with prejudice.

So ORDERED

GENE CARTER
District Judge

Dated at Portland, Maine this 2d day of July, 1997.