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Question of the Month: Can a buyer recover for damages when unable to show that they were ready, willing and able to close?

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It happens every day, a contract is signed for the purchase of real estate. The contract has a mortgage contingency clause and, if it is a development site, the seller may have to obtain a Certificate of Occupancy. Usually, the mortgage is issued, the Certificate of Occupancy is obtained, the seller sells, the buyer buys, and everyone walks away relatively happy.

Typically, the buyer will either obtain their mortgage commitment, within the allotted time period, and the deal will go close or the buyer will be unable to obtain a mortgage and the deal will be terminated pursuant to the terms of the mortgage contingency.

In one case recently decided by the Court of Appeals, *Pesa V. Yoma Development Group, Inc.*, 18 N.Y.3d 527; 956 N.E.2d 228; 942 N.Y.S.2d 1 (February 9, 2012), The buyer had 60 days to obtain a mortgage, if he was unable to, either party would be able to cancel the contract. In *Pesa*, "essentially nothing happened for more than three years after the contracts were signed. The dwellings were not built and the mortgage commitments were not obtained." The contracts were signed in March 2003. In July 2006 the seller transferred the properties to a related corporation. The seller then attempted to "terminate" the contract in June 2007. The buyers sued for specific performance and damages. Both sides moved for summary judgment. Both sides' motions for summary judgment were denied.

The buyers claimed that the sellers failed to obtain the Certificate of Occupancy and repudiated the contract when they transferred the property to another corporation. The seller claimed that without a showing that the buyer was ready willing and able to close, the buyer could not recover for damages. The Supreme Court granted summary judgment to the buyer and The Second Department affirmed the decision stating, "a purchaser seeking damages for the seller's anticipatory breach of a contract for the sale of real property is not required to establish, as an element of the claim, that it was ready, willing and able to close." The Second Department did say that if the buyer was seeking specific performance it would have to prove it was ready, willing and able to close. In separate cases, the Third and Fourth Departments previously stated that an element of a claim for damages was to establish that the buyer was ready willing and able to purchase.

In this case, The Court of Appeals definitively determined that a showing of being ready willing and able to close is a required element of the cause of action for damages - ie that had the other party not repudiated the contract you could have closed. The burden of proof, proving that the buyer could perform must be met before the buyer is entitled to damages. The buyer, in this case, did not conclusively demonstrate that he could have closed so he was not entitled to summary judgment. Even after four years without obtaining a mortgage the court also stated that it was not conclusive that the buyers would be unable to close and that the issue of their being able to close is an issue of fact, so their motion for summary judgment should have been denied.

Most interestingly, the court determined that the transfer of the properties from the seller to an

affiliated corporation was not a repudiation of the contract. "The transfer of the properties from one entity to another did not, of itself, make it impossible for the seller to close the transaction." The court determined that a transfer between affiliates, even if not done for an innocent reason, in this case in anticipation of litigation, "is not in itself a repudiation."

After almost nine years the parties found themselves in an almost identical place with respect to this transaction, the buyer had not bought and the seller had not sold. The buyer did not have a mortgage and the original seller, while no longer the owner of the property, still was able to sell when the buyer was able to buy.

Hopefully this case is an aberration. What is finally clear is that a buyer has to be ready willing and able to buy, and hopefully the selling party in the contract is the party who has the right to sell.

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