

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2009 CA 1100

CAROL PETRANEK

VERSUS

MARTHA TEMPLES AND
TRICOU & ASSOCIATES, INC.

Judgment Rendered: February 12, 2010.

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On Appeal from the
21st Judicial District Court,
In and for the Parish of Tangipahoa,
State of Louisiana
Trial Court No. 2007-2328

Honorable Bruce C. Bennett, Judge Presiding

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BEFORE: CARTER, C.J., GUIDRY AND PETTIGREW, JJ.

Guidry, J. concurs on all other reasons.

CARTER, C. J.

On September 7, 2006, plaintiff-buyer, Carol Petranek, and defendant-seller, Martha Temples, executed a written contract to buy and sell 9.25 acres of vacant land in Tangipahoa Parish for \$67,500.00. Pursuant to the terms of the contract, the sale was to be consummated on or prior to October 12, 2006, at plaintiff's expense, provided that if curative work in connection with the title was required, the time of sale was automatically extended for a period of no more than sixty days, which expired on December 12, 2006. The contract provided further that there would be no extension exceeding sixty days without the parties' mutual written consent. The contract also declared that defendant was to deliver to plaintiff a merchantable title, and her inability to do so within the time stipulated, rendered the contract null and void, reserving, however, plaintiff's right to demand the return of her \$2,000.00 deposit and to recover the actual costs she incurred in processing the sale. Additionally, the contract required plaintiff to order and pay for a satisfactory survey of the property prior to the sale. Breach of the contract by either party, for any reason other than the inability to deliver a merchantable title, entitled the non-breaching party to demand specific performance.

After the contract was signed, an examination of title by plaintiff's attorneys for her lender revealed some uncertainty as to the boundaries of the property, the dedication of roads accessing the property, and the applicable subdivision restrictions as to parcels of land comprising less than ten acres. In a title opinion letter dated September 27, 2006, the lender and both parties were notified of the title requirements that needed to be cured prior to the closing date, as well as the necessity of a survey showing the lot

dimensions. No curative measures were taken by defendant in connection with the title prior to the October 12, 2006 date stipulated in the contract for execution of the sale, nor were any curative steps taken within the sixty-day automatic extension, which ended on December 12, 2006. Furthermore, plaintiff did not order or pay for a survey at any time prior to expiration of the sixty-day extension. However, on December 20, 2006, plaintiff sent a letter to defendant, attempting to memorialize a verbal agreement that allegedly occurred between the parties via telephone conversation on December 19, 2006, when the parties orally agreed to extend the contract until January 29, 2007, for the purpose of obtaining a clear, merchantable title and survey. In spite of this attempt on plaintiff's part to extend the terms of the contract, defendant did not sign the letter outlining the extension, but instead, returned plaintiff's \$2,000.00 deposit by certified mail. A closing on the act of sale never occurred.

Plaintiff filed a petition for specific performance, and alternatively damages, on August 1, 2007, alleging that defendant breached the contract to sell the property. Defendant answered, denying any breach of contract and alleging that the contract expired before any closing could occur. After a bench trial on the merits, the trial court rendered judgment in favor of defendant, dismissing plaintiff's claim with prejudice and at her cost. The trial court, in oral reasons for judgment, found that plaintiff's reservations regarding the title were not substantial enough to render the title unmerchantable, that plaintiff did not meet her obligation of providing a survey as required by the contract, and that a closing was never scheduled prior to the expiration of the contract on December 12, 2006. The trial court also found that plaintiff's efforts to extend the contract in writing after it

expired were not relevant and advised plaintiff to cash her deposit check that was returned to her by defendant. Plaintiff appealed, arguing in one assignment of error that the trial court erred when it decided that the contract was null and void, because defendant had unilaterally disregarded the contract. Defendant did not answer the appeal.¹

Plaintiff does not question the trial court's conclusion that the title was merchantable. Rather, plaintiff argues that the trial court erred in finding that the contract had expired when defendant failed to deliver merchantable title within the specified time. Plaintiff maintains that the contract is null and void only if defendant is unable to deliver merchantable title because of incurable defects. We find no merit to plaintiff's position.

After the parties received notice of the title opinion that had been issued to plaintiff's lender and the listed requirements for curing the title, neither party successfully performed their obligations under the contract (cured title, survey, necessary funds, and closing) before the automatic sixty-day extension expired on December 12, 2006. There was no evidence of a mutual written agreement to extend the contract beyond the stipulated time period for closing as was clearly provided for in the contract.² Furthermore, there was no evidence of a scheduled closing date where either party was prepared to perform their obligations under the contract. Therefore, the trial

¹ Defendant did not file an independent appeal or answer plaintiff's appeal to assert her claim for costs and attorney fees associated with defending plaintiff's appeal. Thus, defendant's request in her brief for costs and attorney fees is not properly before this court and is accordingly denied. See LSA-C.C.P. art. 2133; **Starr v. Boudreaux**, 07-0652 (La. App. 1 Cir. 12/21/07), 978 So.2d 384, 392.

² The contract stated: "**DEADLINES** Time is of the essence and all deadlines are final except where modifications, changes, or extensions are made **in writing and signed by all parties.**" (Emphasis added.) Additionally, in the "**CURATIVE WORK/REPAIRS**" section, the contract provided that "in no event shall such extension exceed sixty (60) days without the **written consent of all parties.**" (Emphasis added.)

court was correct when it decided that the contract expired or lapsed on its own before an act of sale took place. See Poissenot v. Guildcraft Homes, Inc., 394 So.2d 660, 663 (La. App. 1 Cir. 1980).³

Generally, when a closing does not occur by a specified date, the party responsible for the delay may not demand specific performance. **Deleon v. WSIS, Inc.**, 31,602 (La. App. 2 Cir. 2/26/99), 728 So.2d 1046, 1050. It appears that both parties in this case were responsible for the delay since neither performed their obligations under the contract before the extended deadline of December 12, 2006. Therefore, neither party may demand specific performance of the contract. Even if defendant had performed the curative work required in the title opinion letter, plaintiff still had the obligation to order and pay for a survey of the property, which she did not do before the December 12, 2006 deadline. In fact, the record reflects that plaintiff still had not completed her obligation of obtaining the survey before defendant returned her deposit or by January 29, 2007, the date that plaintiff maintained was the agreed-upon extended deadline for closing on the sale.

Likewise, we find no merit to plaintiff's argument that she is entitled to a damage award for the difference in price that she paid for another piece of property that she purchased after the sale of defendant's land did not occur. The contract does not allow for such a damage award in the case of a breach. Furthermore, in light of our affirming the trial court's reasoning that the contract expired, we find the trial court did not abuse its discretion when

³ We distinguish the case relied on by plaintiff, **Hammond Asphalt Co., Inc. v. Ponder**, 303 So.2d 851, 853 (La. App. 1 Cir. 1974), writ refused, 307 So.2d 628 (La. 1975), because in that case the purchaser had met all obligations incumbent upon him under the agreement, but the seller refused to furnish merchantable title within the time called for in the contract. Unlike the facts in **Hammond Asphalt**, both parties failed to perform their contractual obligations in this case, and the trial court specifically found that the title was merchantable in this case.

it ruled that plaintiff was not entitled to costs and attorney fees incurred after the contract had expired.

For these reasons, we find no manifest error or error of law in the trial court's decision, and we hereby affirm the trial court's judgment and issue this memorandum opinion in accordance with Uniform Rules – Courts of Appeal, Rule 2-16.1B. All costs of this appeal are to be paid by plaintiff, Carol Petranek.

AFFIRMED.

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 **GUIDRY, J., concurs and assigns reasons.**

GUIDRY, J., concurring.

The purchase agreement signed by the parties provides the following clause relative to curative work of the title or repairs of the property subject to the purchase agreement:

CURATIVE WORK/REPAIRS In the event curative work in connection with the title is required, and/or if repairs are a requirement for obtaining the loan(s) upon which the agreement is conditioned, the parties agree to and do extend the date for passing the Act of Sale to a date not more than sixty (60) days *following completion of curative work/repairs*; but in no event shall such extension exceed sixty (60) days without the written consent of all parties. [Emphasis added.]

Based on my reading of the provision, and particularly the emphasized language, I believe the determination by the majority that an automatic extension of the date for passing the act of sale (i.e. the date of the closing) to a date not more than sixty days from the date originally set for closing is incorrect. A plain reading of the quoted provision clearly provides that the extension is granted not only for sixty days, but also for whatever time period is needed to complete any curative work or repairs required to be performed. Thus, a determination of whether the purchase agreement was automatically extended turns on whether curative work or repairs

were required to be performed. I agree with the trial court's finding that curative work was not required to be performed in this case.

The property subject to the purchase agreement in this matter was vacant land. On September 27, 2006, a title opinion was issued by the law firm of Andry & Andry listing six requirements for which the law firm asserted there needed to be compliance and four of which needed to be "cured" prior to closing. One of the four requirements was the submission of a survey, which, according to the purchase agreement, was to be ordered and paid for by Ms. Petranek. Other than the completion of a survey, nothing else relative to Ms. Temple's title to the property was performed; yet, following the completion and submission of the survey, Ms. Petranek's lender was willing to go forward with the closing. The completed survey is dated February 12, 2007.

Based on this evidence, obtained mainly from Ms. Petrank's testimony at trial, I believe the trial court was correct in finding that the title was not unmerchantable; and as such, I believe the purchase agreement expired when the parties failed to pass the act of sale on or before the original closing date of October 12, 2006, since no grounds existed for extending the date for closing. For these reasons, I respectfully concur in the majority opinion affirming the dismissal of Ms. Petranek's claim.