

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2008 CA 2534

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TANGI HOMES & PROPERTIES

VERSUS

VIOLA HOMES, INC. AND
BONE CAPITAL INVESTMENTS, INC.

Judgment Rendered: OCT 27 2009

Appealed from the
Twenty-First Judicial District Court
In and for the Parish of Tangipahoa, Louisiana
Trial Court Number 2008-0000194

Honorable Bruce C. Bennett, Judge

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BEFORE: WHIPPLE, PARRO, McCLENDON, HUGHES, AND WELCH, JJ.

Parro, J., dissents and assigns reasons.
McCleendon, J. dissents and assigns reasons.

WELCH, J.

In this concursus proceeding, the defendant/purchaser, Viola Homes, Inc. (“Viola Homes”), appeals a judgment in favor of the defendant/seller, Bone Capital Investments, Inc. (“Bone”), in the amount of \$20,000 plus costs, representing the amount of the deposit made by Viola Homes in connection with an agreement to purchase immovable property, which had been deposited into the registry of the court by the plaintiff, Tangi Homes and Properties, Inc. (“Tangi Homes”). We amend the judgment, and as amended, affirm.

I. FACTUAL AND PROCEDURAL HISTORY

On October 9, 2006, an Agreement to Purchase was prepared on behalf of Viola Homes for the purchase of twenty lots in High Point Gardens Subdivision for the purchase price of \$45,000 per lot (for a total purchase price of \$900,000). The purchase agreement further provided that Viola Homes would pay a deposit to Bone’s agent/broker, Tangi Homes, in the amount of \$1,000 per lot (for a total deposit of \$20,000); that the Act of Sale for the first ten lots would be passed before the purchaser’s notary on October 31, 2006; that the remaining ten lots would be purchased in twelve months; that a “10% Builder Discount [would] be applied at Act of Sales;” and that the seller would have all debris removed from the lots prior to the purchase of the lots. With regard to the breach-of-contract clause, the purchase agreement provided:

In the event PURCHASER fails to comply with this agreement within the time specified, SELLER shall have the right to demand specific performances or, at SELLER’S option, SELLER shall have the right to reoffer the property for sale and may declare the deposit, ipso facto, forfeited, without formality beyond tender of title to PURCHASER. In either event, SELLER shall have the right to recover any costs and/or fees, including expenses and reasonable attorney’s fees, incurred as a result of this agreement or breach thereof.

The purchase agreement was signed by Jean C. “Sue” Viola, as principal and agent for Viola Homes, on October 10, 2006. Bone accepted the offer and

signed the purchase agreement on October 11, 2006. On October 30, 2006, the parties signed an amendment to the purchase agreement, which extended the closing date on the first ten lots to November 20, 2006.

On December 15, 2006, Viola Homes offered another proposed amendment to the purchase agreement, which changed the purchase price from \$45,000 per lot to \$40,000 per lot (for a total purchase price of \$800,000) and removed the 10% builder discount from the purchase agreement. On December 18, 2006, Bone made a counter offer to the proposed amendment, which deleted the debris removal requirement, added that the closing on the first ten lots would be held on December 22, 2006, that the closing on the remaining ten lots would occur within 365 days, and that Viola Homes would pay a \$20,000 non-refundable deposit on those remaining ten lots.

Viola Homes rejected the counter offer with respect to the deletion of the debris removal, but accepted the closing date of December 22, 2006. With regard to the provision concerning the remaining ten lots and the additional deposit, Viola Homes neither specifically accepted nor rejected Bone's counter offer. Notably, however, the original purchase agreement provided that the remaining ten lots would be purchased in twelve months.

On December 20, 2006, the Act of Sale on the first ten lots was passed before Viola Homes' notary, Deborah F. Angle. At the closing, Viola Homes was credited with its previous \$1,000 per lot deposit (for a total credit of \$10,000). On January 15, 2007, Viola Homes provided Bone with an additional deposit of \$10,000, thereby making its total deposit on the remaining ten lots the sum of \$20,000.

The Act of Sale on the remaining ten lots was not passed within 365 days or twelve months of December 20, 2006. The parties do not dispute that the Act of Sale did not go through because Viola Homes was unable to obtain financing;

however, both Viola Homes and Bone claimed that they were entitled to the \$20,000 deposit held in escrow by Tangi Homes. Therefore, Tangi Homes filed this concursus proceeding and placed the \$20,000 deposit into the registry of the court.

After a trial on the merits, the trial court found that the purchase of the lots by Viola Homes was not conditioned upon Viola Homes' ability to obtain financing for the purchase and that Viola Homes ratified the proposed amendment by Bone to the purchase agreement with regard to the \$20,000 non-refundable deposit on the remaining ten lots. With regard to the issue of whether there was a tender of title in accordance with the agreement or whether tender of title was necessary, the trial court took the matter under advisement. Thereafter, the trial court, in written reasons for judgment, found that Viola Homes clearly indicated by words and actions that they would not be able to carry out the purchase of the ten remaining lots; therefore, a formal tender of title would have been a vain and useless act. The trial court also found that because the Act of Sale was required to be passed before the purchaser's notary, a formal tender of title would have been impossible. Lastly, the trial court found that Bone was, at all relevant times, ready, willing, and able to transfer and deliver merchantable title, and Bone was, therefore, entitled to the non-refundable deposit.

On August 18, 2008, the trial court signed a written judgment in favor of Bone and against Viola Homes and the proceeds deposited into the registry of the court in the amount of \$20,000 plus costs, and it is from this judgment that Viola Homes now appeals.

II. LAW AND DISCUSSION

On appeal, Viola Homes asserts that the trial court erred in determining that tender of title was not a condition precedent to declaring its deposit

forfeited. According to the purchase agreement between the parties, the seller, Bone, was given the right, upon breach by the purchaser, Viola Homes, either to seek specific performance or to reoffer the property for sale and declare the deposit forfeited “without formality beyond tender of title” to purchaser. Thus, for Viola Homes’ deposit to be forfeited, all that was required of Bone was to make a tender of title.

A tender of title occurs when the seller gives notice of a definite and reasonable time and place for the sale and goes to it on that date and time, ready and willing to proceed with the sale. See Brooks v. Shipp, 481 So.2d 655, 658 (La. App. 1st Cir. 1985); Thaly v. Namer, 496 So.2d 1211, 1215 (La. App. 5th Cir. 1986). A formal tender is necessary even when the purchaser has communicated that he no longer wants to or is unable to go through with the sale. See Young v. Koehl, 417 So.2d 24, 26 (La. App. 1st Cir. 1982). The apparent purpose of the contractual requirement of tender of title by the seller is to provide the purchaser with an explicit opportunity to comply with his contractual obligation or to declare explicitly or implicitly his refusal to do so, for whatever reason. By providing notice of a definite and reasonable time and place of the sale and by presenting himself at that time and place, the seller has fulfilled the purpose and spirit of the contractual requirement. Kraft v. Baker, 377 So.2d 871, 874 (La. App. 4th Cir. 1979).

However, where the contract provides that the purchaser’s notary is to pass the sale and the purchaser’s notary never sets a time or place for the act of sale to be passed, it is impossible for the seller to make a formal tender of title. See Morrison v. Fineran, 397 So.2d 838, 840 (La. App. 4th Cir. 1981). In a situation where the purchaser’s conduct makes it impossible for the act of sale to be completed, a tender of title is unnecessary, because such conduct constitutes an active breach of the contract. See Bergeron v. Bertrand, 514 So.2d 622,

624 (La. App. 4th Cir. 1987). Therefore, when a party by words or acts has announced that he will not honor an agreement or is otherwise in active breach of the contract, the other party is not required to tender performance, because to do so would be vain and useless. See Liuzza v. Panzer, 333 So.2d 689, 693 (La. App. 4th Cir. 1976).

After a thorough review of the record, we find no manifest error in the factual conclusions reached by the trial court. The trial court's determination that Bone was ready, willing, and able to transfer and deliver merchantable title is supported by the testimony of Robert Bone, the president of Bone, and Stephanie Joyce Youngblood, Bone's real estate broker. Although no definite and reasonable date and time was ever set for the act of sale, nor is there other evidence that title was formally tendered to Viola Homes, we note that the purchase agreement specified that the sale would be passed before Viola Homes' notary. Viola Homes' notary never set a time or place for the act of sale; therefore, it was impossible for Bone to make a formal tender of title. Since Viola Homes' conduct (in failing to set a time or place for the act of sale) made it impossible for the act of sale to be completed, Viola Homes was, therefore, in active breach of the purchase agreement. Thus, tender of title was unnecessary. See Morrison, 397 So.2d at 840; Bergeron, 514 So.2d at 624.

Furthermore, Viola Homes had informed Bone, through Bone's agent, Ms. Youngblood, that Viola Homes could not close on the remaining ten lots within the time previously specified, and had requested, but did not receive, an extension of the time period. Thus, Bone was not required to tender performance, because it would have been a vain and useless act. See Liuzza, 333 So.2d at 693. Accordingly, Bone was entitled to the \$20,000 non-

refundable deposit made by Viola Homes for the ten remaining lots.¹

However, we note that while the trial court's reasons for judgment specifically state "[s]eller gets the money," the judgment signed by the trial court only orders that there be "judgment herein in favor of Bone Capital Investments, Inc., and against Viola Homes, Inc. and the proceeds deposited into the registry of the Court in the full sum and amount of \$20,000.00 ..., together with all costs of these proceedings." Thus, the judgment does not actually specify that the proceeds in the concursus are awarded to the seller, Bone. Accordingly, we hereby amend the judgment, in part, to specifically award Bone the proceeds deposited into the registry of the court in the amount of \$20,000, subject to the other provisions set forth in the August 18, 2008 judgment.

¹ We note that in **Young**, 417 So.2d at 26, we stated that a formal tender of title is necessary even when the purchaser has communicated that he no longer wants to or is unable to go through with the sale. Although **Young** dealt with a tender of title provision that is almost identical to the tender of title provision in this case, we find that **Young** is factually distinguishable from the case before us. In **Young**, suit was brought by prospective sellers against prospective purchasers for breach of a purchase agreement and against a third party that was holding the prospective purchasers' deposit, which was specifically reserved for the sellers in the event of forfeiture of the deposit. The purchase agreement was conditioned upon the purchasers' ability to obtain a loan on terms contractually stipulated. However, because the purchasers were unable to obtain a loan under the terms stipulated and after the purchaser lost his job, the sale was never consummated. The trial court rendered judgment in favor of the sellers and against the purchasers and awarded damages in the amount of the deposit, plus reasonable attorney fees in cost. This court reversed, noting that because the sale was conditioned upon the purchasers obtaining a loan, the purchasers' obligation under the purchase agreement was to make a good faith effort to obtain a loan on the terms contractually stipulated. Based on the evidence in the record demonstrating that the purchasers had attempted to obtain a loan under the terms specified, but the application for the loan was rejected, this court concluded that the purchasers made a good faith effort to obtain a loan. Additionally, this court noted there was also no evidence in the record that a tender of title had occurred, which was necessary even though the purchaser had verbally communicated his unwillingness or inability to go through with the contract.

Thus, in **Young**, because the purchase agreement was conditioned on the ability of the purchasers to obtain a loan, and since the purchasers had made a good faith effort to obtain a loan, the purchasers were *not in active breach* of the contract; therefore, tender of title was necessary for forfeiture of the loan. In this case, the purchase agreement was *not* conditioned on Viola Homes' ability to obtain financing or a loan. Thus, when Viola Homes informed Bone, through its agent that they would not close on the remaining lots within the time specified and failed to set a reasonable date, time, and place for the act of sale, Viola Homes was *in active breach* of the contract. Therefore, we have concluded that tender of title was not necessary because it would have been vain and useless.

III. CONCLUSION

For all of the above reasons, the August 18, 2008 judgment of the trial court in favor of Bone and against Viola Homes is hereby amended, in part, to specifically award Bone the proceeds deposited into the registry of the court in the amount of \$20,000.00, subject to the other provisions set forth in the August 18, 2008 judgment. In all other respects, the August 18, 2008 judgment is affirmed. All costs of these proceedings are hereby assessed to the defendant/purchaser, Viola Homes, Inc.

JUDGMENT AMENDED, AND AS AMENDED, AFFIRMED.

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BEFORE: WHIPPLE, PARRO, McCLENDON, HUGHES, AND WELCH, JJ.

 **PARRO, J., dissenting.**

I disagree with the majority opinion, which ignores a clear contractual provision with an established meaning and creates a jurisprudential exception not previously recognized by this court. I believe the majority opinion is factually and legally incorrect, for the following reasons.

The majority opinion is based on the factual finding that the act of sale was required to be passed before the purchaser's notary; therefore, because the seller could not force the purchaser's notary to take any action, it was not possible for the seller to make a tender of title for the second ten lots described in the agreement to purchase. However, the agreement to purchase does not specify whose notary is to pass the act of sale for the second ten lots. The only language designating the closing attorney is in the "Act of Sale" paragraph, which states that "the Act of Sale, at expense of PURCHASER is to be passed before '*Purchasers Notary*' ... on '*10-31-2006*' or sooner if mutually agreeable." A preceding provision states, "*First 10 lots to Close Oct 31, 2006.*" The italicized wording is handwritten on the contract. When read in context, the contractual requirement of passage of the act of sale before the purchaser's notary applies only to the

sale of the first ten lots, which is the only sale set to close on that date. See Baldwin v. Carroll, 101 So.2d 762 (La. App. 1st Cir. 1958) (contractual obligation to pay realtor's commission for an act of sale to be passed by a certain date did not apply to sales of other properties described in the agreement, which were passed after that date). There is no specification in the agreement before us concerning whether the sale of the second ten lots was also to be passed before the purchaser's notary.

Moreover, as a matter of law, I do not believe that either an implicit or explicit requirement for the act of sale to be passed before the purchaser's notary affects the requirement that the seller must make a tender of title to the purchaser before declaring the deposit forfeited. The cases from this court interpreting the "tender of title" provision require only that a "reasonable place and time" be set and do not engraft a requirement that the "reasonable place" be the same place where the act of sale might have been passed. See Brooks v. Shipp, 481 So.2d 655, 658 (La. App. 1st Cir. 1985); Luna v. Luna v. Atchafalaya Realty, Inc., 325 So.2d 835, 839 (La. App. 1st Cir. 1976). It would have been a simple matter for the seller in this case to send a registered letter to the purchaser, setting a reasonable time and place for the closing, and then appearing there, ready and willing to proceed with the sale. That "reasonable place" may have been at the seller's or purchaser's place of business or at the office of a notary chosen by the seller.

The tender of title provision is in the agreement in order to allow the purchaser a final opportunity to go through with the purchase, if possible, and also in order to forestall exactly this type of litigation. The provision is a clear statement of the seller's obligation, should it decide to retain the purchaser's deposit instead of demanding specific performance of the contract. Had the tender of title been made, there would have been no doubt that the purchaser was unable or unwilling to fulfill its purchase obligation, and there would have been no doubt that the seller had the right to retain the deposit.

Therefore, I respectfully dissent.

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McCLENDON, J., dissents and assigns reasons.

As a matter of law, the "tender of title" provision requires that a definite and reasonable time and place be set for the passing of the act of sale. The purpose of such a requirement is to provide the buyer an explicit opportunity to comply with his or her contractual obligation or to declare his or her refusal to do so. Further, without commenting on whether I believe there should be a "vain and useless act" exception to the requirement of tender of title, the current jurisprudence of this circuit, unlike the fourth circuit, rejects such an exception. See **Young v. Koehl**, 417 So.2d 24 (La.App. 1 Cir. 1982). Unlike the majority, I do not find **Young** distinguishable. Therefore, I respectfully dissent.