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DISTRICT II

July 22, 2020

To:

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You are hereby notified that the Court has entered the following opinion and order:

2019AP1552

Eileen Robarge v. Stoney Ridge Homes LLC (L.C. #2019CV237)

Before Neubauer, C.J., Reilly, P.J., Gundrum, J.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Eileen Robarge appeals the circuit court's dismissal of her complaint, upon summary judgment, against Stoney Ridge Homes, LLC. She filed her suit seeking specific performance, specifically, an order forcing Stoney Ridge to sell to her real estate located at 1197, 1199 and 1201 Edelweiss Lane, Sheboygan, Wisconsin (the Property) pursuant to a real estate agreement entered into between her and Stoney Ridge. Based upon our review of the briefs and record, we

conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm.

Background

On or about March 27, 2019, Stoney Ridge entered into an agreement to sell the Property to Robarge. When Stoney Ridge also entered into a subsequent agreement to alternatively sell the property to Doneff Companies, LLC, Robarge's agreement became the primary contract ("the Robarge Primary Contract") and Doneff's became the secondary. Stoney Ridge subsequently terminated the Robarge Primary Contract pursuant to the financing and inspection contingencies therein. This termination led to Stoney Ridge's contract with Doneff becoming the primary contract and Robarge filing this suit seeking an order forcing Stoney Ridge to sell the Property to her. Doneff intervened, seeking an order directing Stoney Ridge to sell the Property to it instead of Robarge. All parties moved for summary judgment with the issue being whether Stoney Ridge lawfully terminated the Robarge Primary Contract. The court granted Stoney Ridge's motion and Doneff's motion and denied Robarge's. Robarge appeals.

Discussion

As relevant to this case, under the Robarge Primary Contract, Stoney Ridge could lawfully terminate the contract if the requirements for doing so were met under *either* the financing *or* inspection contingency. Thus, to prevail on appeal, Robarge must show that Stoney Ridge wrongfully terminated the contract under *both* contingencies.

Reviewing summary judgment decisions, we apply the same methodology as the circuit court and consider legal issues independently. *Krug v. Zeuske*, 199 Wis. 2d 406, 411, 544

N.W.2d 618 (Ct. App. 1996). Where, as here, all parties have moved for summary judgment “we generally consider the facts to be stipulated, leaving only questions of law for resolution.” See *id.* (citation omitted). Furthermore, “[t]he interpretation and application of a contract to undisputed facts present a question of law, which we review independently.” *Maryland Arms Ltd. Partnership v. Connell*, 2010 WI 64, ¶21, 326 Wis. 2d 300, 786 N.W.2d 15. We conclude Stoney Ridge lawfully terminated the Robarge Primary Contract pursuant to both the financing and inspection contingencies, and therefore, the circuit court did not err in dismissing Robarge’s suit.

Financing Contingency

Under the financing contingency, for Stoney Ridge to be bound to the sale with Robarge, Robarge needed to deliver a “written ... loan commitment” to it by midnight on April 26, 2019, or if she failed to meet that deadline, at least prior to Stoney Ridge delivering a written notice of termination to her.

While Robarge *verbally* told Stoney Ridge prior to April 26, 2019, that her lender had approved her loan, it is undisputed that she failed to provide a “*written ... loan commitment*” from the lender before the deadline.¹ (Emphasis added.) At 1:49 p.m. on April 29, 2019, Robarge’s lender sent an email from the “Assistant Vice President Commercial Real Estate” to Stoney Ridge and Robarge stating, “We are all approved, conditions have been cleared and are ready to close by the 8th of May.” At 4:26 p.m., Robarge also provided Stoney Ridge with a

¹ Stoney Ridge did not, however, immediately deliver to her a written notice of termination of the agreement.

letter from that same assistant vice president, along with the “Senior Vice President” for the lender, which letter identified itself as a “proposal” for a loan, indicated “[t]his proposal will serve only as an outline of most of the material terms and conditions of the proposed mortgage loan,” and, most importantly, clearly stated that “[t]his proposal is *not a commitment to lend* and is subject to further due diligence, which Lender may deem necessary to close.” (Emphasis added.) At 5:05 p.m., Stoney Ridge delivered to Robarge its notice of termination of the Robarge Primary Contract.

Robarge insists Stoney Ridge’s notice of termination was ineffective for terminating the agreement because, she claims, the April 26, 2019 email and letter constituted deliverance of a “written ... loan commitment” to Stoney Ridge prior to Stoney Ridge delivering its written notice of termination to Robarge. We disagree as the letter clearly conveyed that Robarge had only received a “proposal” from the lender, “*not a commitment to lend,*” and thus, not a “loan commitment.” (Emphasis added.) Because Robarge had not delivered to Stoney Ridge a written loan commitment by the time Stoney Ridge delivered its 5:05 p.m. notice of termination to Robarge, Stoney Ridge properly terminated the Robarge Primary Contract pursuant to the financing contingency.

Inspection Contingency

Under the Robarge Primary Contract, the inspection contingency would automatically be satisfied and thus afford no basis for terminating the agreement, unless Robarge delivered to Stoney Ridge by April 26, 2019, “a copy of the inspection report(s) and a written notice listing the Defect(s) identified in the inspection report(s) to which [Robarge] objects.” If Robarge did deliver such documentation, then Stoney Ridge would have the choice to either cure the defects

or terminate the contract by either delivering written notice that it would not cure the defects or failing to timely deliver notice of its election to cure the defects.

On April 24, 2019, Robarge delivered to Stoney Ridge an inspection report of the Property along with photos of specific property items and a spreadsheet, prepared by Robarge, which listed specific property items and included a corresponding column labeled “Correction Needed.” As memorialized in an April 26, 2019 email, communications then took place from April 24 through April 26 between Robarge and Stoney Ridge regarding Robarge requesting a \$5000 credit “for the smaller inspection items” and also wanting Stoney Ridge to “address” specific items from the spreadsheet that were identified as “Safety Concerns” and “repairs needed for insurance purposes.”² On April 29, Stoney Ridge informed Robarge that it was not willing to cure the items identified by Robarge, so Robarge could either waive the inspection contingency or Stoney Ridge would move on to Doneff as the purchaser for the Property. Stoney Ridge received no contingency waiver prior to its 5:05 p.m. notice to Robarge terminating the Robarge Primary Contract.

Robarge claims she never triggered the inspection contingency provision affording Stoney Ridge the option to terminate the agreement because her April 24 email providing the inspection report, photographs, and spreadsheet identifying “Correction[s] Needed” did not meet the contract language that “a copy of the inspection report(s) and a written notice listing the Defect(s) identified in the inspection report(s) to which [Robarge] objects.” More specifically, she acknowledges providing an inspection report but claims she never provided “a written notice

² As Robarge acknowledges in her brief-in-chief, this email specifically provides that “Buyer [Robarge] would like the following addressed by Seller.”

listing the Defect(s) identified in the inspection report(s) to which [Robarge] objects.” We disagree. If Stoney Ridge had any doubt the inspection report, photographs, and spreadsheet were identifying defects Robarge was requesting Stoney Ridge to correct in order to proceed with the sale, her April 24 through April 26 communications, memorialized in the April 26 email, clarified that she was objecting to items in the report she viewed as defective and needing “correction” and was seeking a “credit” and/or correction of these items in order to advance with the sale. Robarge triggered the inspection contingency, allowing Stoney Ridge to choose between satisfying her request for a credit and/or correction of the objected-to items or terminating the Robarge Primary Contract. It chose the latter and was entitled to do so.

Conclusion

Based upon the foregoing, we conclude that Stoney Ridge properly terminated the primary contract with Robarge, thereby making Stoney Ridge’s contract with Doneff primary. Thus, the circuit court did not err in granting summary judgment to Stoney Ridge and Doneff and dismissing Robarge’s complaint seeking specific performance.

Therefore,

IT IS ORDERED that the order is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals