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Rutherford Holdings, LLC v. Plaza Del Rey

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California law is quite unclear on what happens when the buyer didn't pay on time, time was of the essence, but the seller hadn't sent out any drop dead warnings. Below is a comment on a recent case on that issue.

Nonperformance of purchase agreement by both parties did not void agreement's requirement to return deposit if a party failed to close the sale.

Rutherford Holdings, LLC v. Plaza Del Rey (2014) 223 CA4th 221

Rutherford entered into a purchase agreement with Plaza Del Rey (PDR) to buy a mobile home park located in Sunnyvale from PDR for \$110 million. Under the agreement, Rutherford provided a \$3 million deposit to PDR that was refundable unless PDR materially breached the purchase agreement or failed to close the sale. The agreement also included a liquidated damages provision, under which PDR would be entitled to retain the deposit as liquidated damages if Rutherford breached the agreement. Neither party performed on the closing date. Rutherford sued to recover the deposit on breach of contract, money had and received, unjust enrichment, conversion, and promissory fraud claims. The trial court granted PDR's demurrers and Rutherford appealed the judgment.

The court of appeal reversed. Regarding the breach of contract claim, the parties disagreed on whether the nonperformance of contractual duties amounted to a failure to close under the purchase agreement. The court of appeal agreed with Rutherford's interpretation of the contractual terms, which included that returning the deposit was independent of Rutherford's promise to tender the full purchase price, meaning that Rutherford's own nonperformance did not excuse PDR's failure to return the deposit. Since Rutherford did not include this interpretation in its complaint, the court of appeal ruled that Rutherford could amend its complaint because the trial court erred by granting the demurrer on the breach of contract cause of action. Regarding the liquidated damages provision in the agreement, the nonperformance of both parties did not entitle PDR to retain the deposit as liquidated damages.

The court of appeal held that the trial court improperly sustained the demurrer as to Rutherford's "money had and received" claim because the court of appeal agreed with Rutherford that the \$3 million deposit was part of the purchase price for the property, and thus consideration for PDR's promise to transfer the deed at closing. Since PDR did

not perform its promise, this supported a claim for money had and received. The court of appeal also found that the trial court erred in sustaining the demurrer for the unjust enrichment claim because Rutherford adequately alleged that PDR was unjustly enriched by retaining the deposit.

As to the conversion and promissory fraud claims, the court of appeal held that the trial court correctly sustained the demurrers because Rutherford did not sufficiently allege the claims.

THE EDITOR'S TAKE: Sellers often believe that, if the buyer does not deposit all of the required money into escrow by the closing date specified in the sales contract, they are thereby entitled to withdraw from the deal and sell to someone else. They usually also believe that they can retain the first buyer's deposit, as well as the profit made from reselling to a second buyer at a better price. That may be, but the entire field is quite complicated.

Even if the contract provides that time is of the essence (and contains no inconsistent language allowing the broker or the escrow agent to extend the deadlines), a seller runs the risk of being herself in breach if she preemptorily withdraws from the deal simply because the buyer was late. Too many cases hold that the seller must do more to be entitled to withdraw, such as sending an advance warning notice, or herself tendering a deed into escrow. While there are some decisions that hold a contract does just fall apart on its own after the deadline passes (see, e.g., *Pittman v. Canham* (1992) 2 CA4th 556, reported at 15 CEB RPLR 152 (Apr. 1992)), there are just as many that rule the other way (see, e.g., *Ninety Nine Invs., Ltd. v. Overseas Courier Serv.* (2003) 113 CA4th 1118, reported at 27 CEB RPLR 47 (Mar. 2004)). The fact that both of those two opposing decisions were cited in *Rutherford* in the same paragraph is some indication of how uncertain this area is. (See my Midcourse Corrections column, *On Making and Breaking Contracts*, 27 CEB RPLR 12 (Jan. 2004), as well as my Editor's Take on *Ninety Nine Invs.*, at 27 CEB RPLR 48 (Mar. 2004) and on my website, RogerBernhardt.com.) Any seller's prospects of withdrawal improve with (1) good provisions in the contract, (2) good language in a subsequent drop-dead letter, and (3) a good tender at the time set for closing.

This case was made even more complicated by the fact that instead of seeking specific performance, the buyer sought restitution of its deposit, which dragged in the unusual language of this liquidated damages clause. All in all, all this decision shows is that firm advice is hard to give. – *Roger Bernhardt*