UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-2773
Summary Calendar

IN THE MATTER OF: WINDSOR PROPERTIES, INC.

Debtor.

BOB YARI,

Appellant,

VERSUS

WINDSOR PROPERTIES, INC.,

Appellee.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-91-2281)

(February 26, 1993)

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

This is an appeal from a district court's order affirming a bankruptcy court's decision disallowing the claim of Appellant, Bob Yari. Yari filed a claim in the Appellee's Chapter 11 proceedings, seeking damages for an alleged breach of contract. When his petition was denied Yari appealed to the district court, which affirmed the bankruptcy court's decision. Likewise, we find no error and affirm.

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[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

I.

Bob Yari negotiated to purchase the Windsor Plaza Shopping Center from Windsor Properties, Inc. ("Windsor"). An earnest money contract between them was signed by Windsor on August 10, 1989, and by Yari on August 12, 1989. Under this agreement, Yari would purchase the property for $ 15 million. Additionally, the contract called for Yari to deliver $150,000 in earnest money within two days of the effective date of the contract. Before this earnest money was paid, Windsor notified Yari by telegram that the agreement was cancelled.

Windsor thereafter instituted bankruptcy proceedings under Chapter 11. 11 U.S.C. §§ 1101-1174 (1979 & Supp. 1992). The bankruptcy court approved a sale of the shopping center to a third party for $ 18 million. Yari then filed proof of claim for breach of contract, contending that he was entitled to $ 3 million in damages as a result of Windsor's repudiation of the earnest money contract and the subsequent sale of the property. The bankruptcy court granted summary judgment against Yari. The district court affirmed, holding that the earnest money contract failed for want of consideration.

II.

Although this is an appeal from a district court's review of the bankruptcy court's order, "at this stage we engage in a review of the bankruptcy court's findings just as we would in an appeal coming from a trial in the district court." In re Killebrew, 888

F.2d 1516, 1519 (5th Cir. 1989). Findings of fact are accepted if not clearly erroneous, and issues of law are reviewed de novo. Id.

III.

Appellant argues that "the affirmative covenant contained in the contract that Yari would pay earnest money was sufficient consideration to form a contract." Appellant's Brief at 5. The district court concluded that the contract did not call for the mere promise to pay the earnest money, rather actual payment was necessary as consideration to support the option.

The parties conceded that the contract at issue is an option contract.[2] If no consideration is paid, an option to purchase realty is revocable during its term. Riley v. Campeau Homes (Texas), Inc., 808 S.W.2d 184, 188 (Tex. Ct. App. -- Houston 1991, writ dism'd); Hott v. Pearcy/Christon, Inc., 663 S.W.2d 851, 853 (Tex. Ct. App. -- Dallas 1983, writ ref'd n.r.e.). The general rule is that mutual reciprocal obligations between contracting parties are sufficient consideration to create a binding contract. Id. However, reciprocal obligations are not sufficient consideration for an option contract. See Baldwin v. New, 736 S.W.2d 148, 151 (Tex. Ct. App. -- Dallas 1987, writ denied); Hott, 663 S.W.2d at 853. Consequently, the offeror of the option is free to revoke its offer "unless and until an independent consideration is paid." Id.

In the instant case, it is undisputed that Yari received

[2] Both parties apparently conceded this point in the district court. Since this issue was not contested on appeal, we accept this characterization of the contract.

notice of the cancellation of the option to purchase before any money changed hands. Nevertheless, Yari advances the argument that his covenant to pay earnest money suffices as valid consideration to support the option to purchase, citing Martin v. Xarin Real Estate, Inc., 703 F.2d 883 (5th Cir. 1983), and Hudson v. Wakefield, 645 S.W.2d 427 (Tex. 1983). Both of these cases are distinguishable from the present dispute.

In Martin, the contract provided that "[s]imultaneously with the execution hereof, [Xarin] has deposited as earnest money ... the sum of $50,000.00 in cash." Martin, 703 F.2d at 885 (emphasis added). Likewise, in Hudson, the contract recited that "Purchaser has delivered to Freestone County Title, Fairfield, Texas, the sum of $5,000.00 the Escrow Deposit ...." Hudson, 645 S.W.2d at 428 n.5 (emphasis added). In both of these cases the earnest money was paid by checks which were later returned for insufficient funds. Both of the contracts at issue, however, clearly contemplated that consideration was paid for the purchase options.

The agreement in this case instead recites that "Within Two (2) days after the Effective Date hereof, Purchaser will deliver ..." the required earnest money (emphasis added). No consideration was given to secure the option, and Windsor effectively cancelled the agreement before consideration was paid. See Hott v. Pearcy/Christon, Inc., 663 S.W.2d 851, 853-54 (Tex. Ct. App. -- Dallas 1983, writ ref'd n.r.e.) (payment to be made within sixteen days from contract's effective date; cancellation notice given prior to tender of payment terminates option); cf. Culbertson v.

Brodsky, 788 S.W.2d 156, 157-58 (Tex. Ct. App. -- Fort Worth 1990, writ denied) ($5,000 check left with title company not valid consideration because title company forbidden to cash check until expiration of the option).

IV.

The failure of consideration is fatal to the contract at issue. Because the vendor timely cancelled the option to purchase, the nudum pactum is unenforceable. The judgment of the district court is AFFIRMED.