MALTA

CIVIL COURT
FIRST HALL

THE HON. MR. JUSTICE
ANTHONY ELLUL

Sitting of the 27 th April, 2012

Citation Number. 1015/2010

Ekaterina Momtcheva

Vs

Danseller Company Limited and Jarrow Limited

On the 7th October 2010 plaintiff filed a sworn application whereby she requested the court to:-

1. Declare that the plaintiff was justified in not purchasing the penthouse in the block of apartments Urban Court, Tiben Street, Swieqi.
2. Declare that defendants are in solidum obliged to refund the money paid on the signing of the promise of sale.
3. Declare that defendants are in solidum obliged to pay the damages suffered by the plaintiff.
4. Condemn the defendants in solidum to pay the plaintiff the sum of twenty one thousand eight hundred

and eighty five euro (€21,885), representing €11,000 deposit paid on the 27th November 2008 and the balance representing expenses and damages suffered by the plaintiff after the preliminary agreement signed.

Defendants replied that:-
1. The defendant does not have a right to claim damages as she did not pursue the procedure contemplated in Article 1357 of the Civil Code.
2. The defendants had offered the payment of the refund.
3. The defendants are still prepared to refund the sum of €11,000.
4. With regards to the expenses, these were incurred by the plaintiff as she was in a hurry to conclude the works in a property which she did not own as yet.
5. The defendants had offered an alternative apartment which is adjacent to the penthouse that the plaintiff was supposed to purchase. They claim that this alternative apartment was larger and they were not asking for an increased price.
6. The claim for damages is exxagerated, and the claim for interest is unfounded.

This case relates to a promise of sale signed on the 27th November 2008 for the purchase of a penthouse in a block of apartments Urban Court, Tiben Street, Swieqi which had not yet been built. Plaintiff paid a deposit of eleven thousand euro (€11,000). The promise of sale was valid up to the 30th June 2009. Subsequently, on the 24th June 2009, 31st July 2009, 31st August 2009 and 30th October 2009, further agreements were signed to extend the period for the publication of the final deed of sale. In the agreement dated 30th October 2009 the parties agreed to *'..... extend the period of validity of the convenium dated 27th November 2008.... relating to sale of property..... Until the 30th April 2010 or until six weeks from the date of the issue of the Full Development Building Permit on the said Penthouse whichever of the said two (2) events is the first to occur'*. Unfortunately the sale never materialized. Plaintiff is claiming refund of the

deposit and damages she claims to have incurred. It transpires that the property was not covered by a building permit (vide testimony of architect Nicholas Sammut Tagliaffero, sitting of the 24th January 2011). An application 912/2010 was pending in appeal when this case was filed on the 7th October 2010. In terms of the agreement dated 27th November 2008, the sale was to take place, amongst other conditions:

(i) *'subject to verification that the immovable property is covered in all respects by all required building permits and that it conforms to such permits and approved plans and to all relevant building and sanitary laws and regulations.'* (clause 6).

(ii) *'The apartment shall be built as per attached plan which is to be in conformity with and covered in all respects by a valid building permit.'* (clause 11).

There is no doubt that the plaintiff was fully justified in refusing to purchase the property. Prior to the filing of the lawsuit the defendants declared that they were willing to refund the deposit in full and final settlement of her claims. Plaintiff refused this offer. In a letter dated 5th October 2010, her legal adviser confirmed that:- *'l-klijenta tieghi hi disposta taccetta t-€13,000 minnek indikati pero' mhux li dawn ikunu ghas-saldu tal-pretensjonijiet taghha.* ***Hija disposta pero' li taghti ricevuta li dawn il-pagamenti jirraprezentaw hlas ghas-saldu biss tad-depozitu izda mhux li m'ghandiex pretenzjonijiet ohra.'***. Plaintiff had no obligation to accept the deposit in full and final settlement of her claims, whereas defendants were legally obliged to refund the deposit and had no right of imposing conditions.

It would have been of no use for the plaintiff to file a request that the defendants are condemned to sell her the property according to the terms and conditions of the promise of sale, since on the date of filing of the lawsuit the matter concerning the building permits had not been settled. The relevant period is the date when the contract of sale was supposed to be published. Any developments which occur during the period that the lawsuit is pending, is irrelevant to establish whether a vendor could honour his promise to sell.

Furthermore, plaintiff had no obligation to accept the offer made by the vendors to take an alternative adjacent apartment, nowithstanding that this might have been larger in size. In an email dated 22nd October 2009 and sent to notary Gambin, she explained that the offer was not acceptable as *'I don't like the lay out of the other one (the most expensive), no matter how better finish it has and how big it is.'*. Plaintiff was fully entitled to make such a decision, and her refusal cannot prejudice the outcome of these proceedings.

In terms of Article 1357 of the Civil Code, a promise to sell creates ***'..... an obligation on the part of the promisor to carry out the sale, or, if the sale can no longer be carried out, to make good the damages to the promisee.'***.

In the court's opinion the fact that plaintiff did not sue for enforcement of the promise of sale, does not mean that this provision of law is not applicable. It is evident that up to the 30th April 2010 the sale could not be carried out under the terms and conditions agreed upon, and this through no fault of the plaintiff. On the 30th April 2010 plaintiff filed a judicial letter against defendants requesting them to transfer the property according to the terms and conditions stipulated in the promise of sale of the 27th November 2008. Defendants were in no position to transfer the property in terms of the agreement since the premises had no valid building permit. The court is aware of various judgments confirming that no damages may be claimed unless the plaintiff requests the enforcement of the promise of sale in terms of Article 1357(2) of the Civil Coe. In the court's view it is unreasonable to argue that the plaintiff has no right to claim damages for the simple reason that she did not include a demand for the defendants to be condemned to transfer the property. There is ample proof that on the 30th April 2010 defendants were not in a position to honour their contractual obligations. As stated in the judgment delivered on the 5th March 2010 by the Court of Appeal (Mr Justice Philip Sciberras) in the case **Alfred Galea et vs Perit Anton Zammit et**:-

'Ovvjament, m'ghandux ghalfejn jinghad illi l-otteniment tal-permess relattiv mill MEPA, ex post facto l-iskadenza

*tal-konvenju, ma jiswiex biex itappan jew ixellef il-motiv gust ta' l-atturi li ma jersqux ghall-pubblikazzjoni ta' l-att ghaliex, kif ukoll pacifikament akkolt, meta wiehed ghandu motiv gust biex jirriselixxi minn weghda ta' xiri ma tistax il-parti l-ohra, bir-rimozzjoni ta' dak il-motiv, wara li jkun skada z-zmien tal-promessa, tobbligah jezegwiha. Ara "**George Xuereb -vs- Carmelo Pace**", Appell Civili, 8 ta' Gunju, 1964.'*.

In the case **Steve Cachia et vs Nicholas Cutajar et**, in a judgment delivered by the Court of Appeal on the 1st July 2005, it was held that *"La darba l-istess konvenuti ma setghux jonoraw l-obbligu taghhom assunti fil-konvenju, u cioe' li jiggarantixxu l-pacifiku pussess, dan il-bejgh ma setghax isir konsegwentement dik il-weghda ma setghetx tigi enforzata u* ***l-uniku rimedju li kellhom l-atturi kien dak ta' risarciment ta' danni minhabba l-inadempjenza tal-istess konvenuti.'.***

Therefore plaintiff had every right not to sue for the enforcement of the promise of sale. The default of the seller to honour his obligation within the agreed time frame and under the terms and conditons as agreed to in the private writing dated 27th November 2008, entitle the plaintiff to request damages.

From the exchange of emails it is evident that plaintiff was being made to believe that the permit issue was a non-issue and that it was only a question of time for the matter to be solved. On this pretext the plaintiff also placed an order for the manufacture of the furniture and paid €3,000 as a deposit. On the 7th April 2010 the Dhalia property consultant (Gordon Attard) informed notary Gambin that *"Daniel has recently re applied to sanction this minor issue that has been holding him back to sign the final deed and is very confident that things will go through this time round."*. Things were far from being as described by Attard.

The plaintiff filed a statement of the money she is claiming from defendants. Having gone through all the evidence, the court is of the opinion that plaintiff is justified in her claim for the:-

i. Refund of €11,000, the sum paid on account of the price on signing the preliminary agreement.
ii. Payment of interest on the sum of €11,000 with effect from when the money was paid to the vendors. Although defendants claim that they have no obligation to refund the interest as long as the promise of sale was binding, they forget that they were in default in their obligation to sell the penthouse under the terms and conditions stipulated in the preliminary agreement. The sale did not materialize through no fault of the plaintiff. The interest qualifies as damages incurred by the plaintiff since she does not have the use of her money. Once the sale could not take place since the building had no valid development permit, the plaintiff refused the refund as payment in full and final settlement. From the letter dated 29th September 2010 it was expressly stated that the plaintiff had to accept *'..... il-flus ghas-saldu u qeghda tirrinunzja ghal kwalsiasi pretensjoni li jista' jkollha rigward l-iskritturi de quo.'*. The plaintiff was justified in her refusal.
iii. Expenses paid to Bathroom Design - €1,150. Having read the transcript of the testimony given by the plaintiff, Antoine Magrin and Daniel Farrugia, the court is morally convinced that the payment was effected by the plaintiff. Furthermore, at the time of payment (18th March 2009) the plaintiff was in Malta. Also relevant is that the plaintiff filed the original receipts of payment (fol. 86b and 86c). The court would presume that Daniel Farrugia would not have given the original invoice had he paid the supplier and had plaintiff not paid him. Furthermore, in terms of the preliminary agreement plaintiff had to pay the expenses for the bathroom and kitchen. Therefore the court concludes that on a balance of probability plaintiff paid the bill and the supplier signed the invoice issued in Daniel Farrugia's name.
iv. Expenses paid to Notary John Gambin - €1,402, as confirmed by the notary.
v. Expenses paid to Architect Nicholas Sammut Tagliaferro - €300.
vi. Payment of a deposit for the purchase of furniture - €3,000. However, the plaintiff is obliged to deliver to the defendant's the furniture and wood which is still in Emanuel Spiteri's possession (fol. 83). The carpenter

(Emanuel Spiteri) confirmed that, *'Id-deposit li hallset fuq il-kcina zammejtu jien u ghadu ghandi u l-ghamara li lhaqt lestejt u l-injam li qattghajt ghall-ghamara ghadu ghandi pero' din kienet kollha made to measure u ma stajtx inbieghom lil haddiehor.'* (fol. 83)

vii. Travelling expenses to Malta in March 2009, June 2009 and October 2010. In this respect plaintiff did not file complete documentation with respect to each visit, although it is not contested that plaintiff was in Malta at the time. The court, after having seen the documents at fol. 123-129, is arbitrio *boni viri* liquidating the sum of €1,400.

viii. Storage of kitchen appliances - €250.

The defendants claim that plaintiff is not entitled to claim a refund of expenses as she took a rash decision to place orders for furnishings in the apartment, at a time when she was still not the owner. The court is not of the opinion that the plaintiff should be penalized for having ordered the furniture prior to the publication of deed of sale. From the emails exhibited, it is evident that the plaintiff was being told that the issue relating to the permit was a minor matter which would be resolved in a short time. In an email dated 29th April 2009, and copied to Daniel Farrugia, the Dhalia representative informed the plaintiff: *'I just spoke to Daniel re: completion date. Your property will be complete in 2 to 3 weeks time. I recommend you book your flight tickets accordingly.'* (fol. 17). In another email dated 29th May 2009, and copied to Daniel Farrugia, the same person wrote: *'So I spoke with Daniel today. The bedroom wall is now up. The remaining things are as follows: The internal doors which you need to choose while you are here, The water and electric metres which can only be applied for and installed with your signature, The painting of the walls which is usually done after you install the air condition unit if you are going to install one....'*. The order for the furniture was placed on the 13th March 2009 (fol. 84). Based on the feedback the plaintiff was receiving, there was no reason for her to doubt what she was being told. Furthermore, at the time she had still not spoken to architect Nicholas Sammut Tagliaferro, and advised that the permit issue was in reality not a minor issue. Therefore the plaintiff should not incur any loss. It

also transpires that all concerned were aware of what the plaintiff was doing and were assisting her get works completed, and at no point in time did they object or express any doubt due to the permit issue.
On the other hand the court will not be upholding plaintiff's request for the payment of:
i. AIP permit - €233. This amount is already included in the notary's bill as confirmed by the plaintiff in the note she filed on the 15th December 2011.
ii. Banks transaction and interest on Retirement Savings - €1,950. No documentary evidence was filed which explains, in a satisfactory manner, the amount being claimed by the plaintiff.
iii. Tax for exceeding weight luggage – €200. No documentary evidence was filed. Furthermore this claim has no relation to defendant's contractual default.
In her second affidavit filed on the 11th March 2011, plaintiff stated that she is insisting on getting a refund for €2,000 paid as a deposit for a contract of works she signed on the date of the promise of sale. In this regards, the court comments as follows:-
(a) This amount was not included in the money claimed by the plaintiff in the sworn application whereby proceedings were commenced. The plaintiff is requesting the payment of €21,885 according to the statement of account Doc. A attached to the judicial act whereby these proceedings were commenced.
(b) It transpires that a judgment was delivered in favour of the plaintiff whereby Daniel Farrugia was condemned to pay her this sum (judgment delivered by the Small Claims Tribunal on the 30th September 2011 in the law suit Ekatarina Momtcheva vs Daniel Farrugia).

For these reasons the court rejects the pleas raised by the defendants and upholds plaintiff's requests although not the full amount claimed, and:-
1. Declares that the plaintiff was justified in refusing to purchase the penthouse in Urban Court, Tiben Street, Swieqi.
2. Declares that defendants are in solidum responsible for refunding the deposit paid by the plaintiff on the 27th November 2008.

3. Declares that defendants are in solidum responsible for damages incurred by the plaintiff due to the breach of the preliminary agreement.
4. Condemns the defendants to pay in solidum to the plaintiff:-

a) Eleven thousand euro (€11,000) paid as deposit, together with interest with effect from the 27th November 2008 up to date of payment;
b) Seven thousand five hundred and two euro (€7,502)[1] as explained above, with interest with effect from the 21st October 2010 (date of notification of the lawsuit).
All costs are at the charge of the defendants in solidum.

< Final Judgement >

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[1] Correction authorized as per decree dated 14th May, 2012.