

MANDATE

Niedermeir

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the day of two thousand and five.

PRESENT:

JON O. NEWMAN
JOSÉ A. CABRANES
PETER W. HALL

Circuit Judges



-----x
CLIVE GRAY,

Plaintiff-Appellant,

v.

PAGE STEGNER and LYNN STEGNER,

Defendants-Cross-Defendants-Appellees,

PETER REINKE, Executor of the Estate of PENNY RAINEY,

Defendant-Cross-Claimant-Appellee.

-----x

APPEARING FOR APPELLANT:

THOMAS C. NUOVO (Richard A. Lang, *on the brief*),
Bauer, Gravel, Farnham, Nuovo, Parker & Lang,
Burlington, VT

APPEARING FOR APPELLEES:

MATTHEW T. DALY, Daly & Daly, P.C., Burlington, VT

JUDITH A. SALAMANDRA CORSO, Reid & Balivet,
Danville, CT

No. 05-0705

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U.S. DISTRICT COURT
DISTRICT OF VERMONT
FILED

ISSUED AS MANDATE JAN 6 2006

Appeal from a judgment of the United States District Court for the District of Vermont (Jerome J. Niedermeier, *Magistrate Judge*).

UPON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court be and it hereby is **AFFIRMED**.

Plaintiff Clive Gray appeals from a judgment of the United States District Court for the District of Vermont (Jerome J. Niedermeier, *Magistrate Judge*), entered March 2, 2005, granting defendants' motion for summary judgment and dismissing plaintiff's complaint. We assume the parties' familiarity with the underlying facts and procedural history.

Plaintiff brought the instant diversity action seeking specific enforcement of a right of first refusal and the voiding of a sale transferring certain property from defendants Page and Lynn Stegner to defendant Penny Rainey. In an opinion dated January 14, 2005, Magistrate Judge Niedermeier rejected plaintiff's claims, concluding, *inter alia*, that (1) the operative language in the deed gave plaintiff a preemptive right to purchase the property in question, *Gray v. Stegner*, No. 03 Civ. 92, Opinion & Order, at 13-19 (D. Vt. Jan. 14, 2005); (2) once an offer to purchase the property had been made by defendant Rainey, plaintiff's preemptive right ripened into an option to purchase the property at the same price and under the same material terms as Rainey, *id.* at 22-23; (3) plaintiff failed to exercise his option to purchase the property "in a proper and timely manner" because he had not, at any time, proposed "an alternative, definite, closing date" as part of his purported offer to purchase, *id.* at 24-28; and (4) plaintiff's failure to act was not excused by any actions taken by the Stegners in an effort to frustrate plaintiff's performance, *id.* at 29-35. As a result, the Magistrate Judge granted defendants' motion for summary judgment, denied plaintiff's motion for summary judgment, and dismissed plaintiff's case in its entirety. *Id.* at 37.

Based on our independent assessment of the parties' submissions, the applicable case law, and the record on appeal, we conclude that the court below did not err in dismissing plaintiff's complaint.¹

¹ We note, in this regard, that the Magistrate Judge erred in concluding that "there is no evidence that [plaintiff] attempted to obtain an appraisal after the initial attempt in October [2002]," *Gray*, No. 03 Civ. 92, Opinion & Order, at 33-34. *See* Aff. of Clive Gray, Mar. 12, 2004, Ex. L (plaintiff's letter of November 13, 2002 "request[ing] that [the Stegners] authorize the bank's appraiser . . . to access the property in order to conduct the appraisal"); *id.* Ex. P (email of November 22, 2002 by plaintiff's attorney referring to "the Stegners['] refus[al] to allow the appraiser access to the property" in October 2002); *id.* Ex. V (email of December 17, 2002 by plaintiff's attorney noting that "the last time [plaintiff] tried to arrange for an appraiser to visit the property, [the Stegners] declined to permit the visit," and stating "[t]hat's one thing we need to address ASAP in order to move this along").

The Magistrate Judge's erroneous *factual* finding, however, does not undermine the validity of his *legal* conclusion that plaintiff "would still not be entitled to relief," inasmuch as plaintiff "never provided an alternative, firm closing date" as part of any concrete offer to purchase the Stegner property. *See Gray*, No. 03 Civ. 92, Opinion & Order, at 34-35; *see also id.* at 34 n.8 ("The Stegners' attorney was still communicating with [plaintiff's] attorney in the middle of December, but [plaintiff] never offered a definite date for closing."). In short, by failing to provide a firm closing date, plaintiff failed to match a term that was not only a "material" element of the Rainey offer, but that also was independent of plaintiff's repeated requests to conduct an appraisal. *See id.* at 27 ("After [plaintiff] rejected the closing date in [the] purchase and sale contract[,] it was incumbent upon him to offer an alternative date. . . . By failing to either match the material terms of the Rainey offer or even to present definite alternative terms, Gray rejected the option.").

Accordingly, for substantially the reasons stated by the Magistrate Judge, the judgment of the District Court is hereby **AFFIRMED**.

FOR THE COURT,
Roseann B. MacKechnie, Clerk of Court

By *Roseann B. MacKechnie*

A TRUE COPY
Roseann B. MacKechnie, CLERK
by *Angela Hester*
DEPUTY CLERK