

Astor Street Financial, LLC v. Green
Conn.Super.,2007.
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UNPUBLISHED OPINION. CHECK COURT
RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of Fairfield.
ASTOR STREET FINANCIAL, LLC et al.

v.
Randall GREEN.
No. 066000402S.

May 2, 2007.

Begos Horgan & Brown LLP, Westport, for Astor
Street Financial, LLC, Fred Latsko.
Wofsey Rosen Kweskin & Kuriansky, Stamford, for
Randall Green.

[ARNOLD](#), J.

*1 The defendant has moved for summary judgment on the first, second and third counts of the complaint which allege specific performance, breach of contract regarding an option and breach of contract regarding a purchase and sale agreement. The plaintiffs have objected to the defendant's motion for summary judgment and have, in turn, also filed a cross motion for summary judgment.

The plaintiffs' action involves a parcel of property located at 124 Old Battery Road, Bridgeport, Connecticut ("the property"). The plaintiff, Astor Street Financial, LLC. (Astor) is an Illinois limited liability company in Chicago, Illinois. The plaintiff Fred Latsko (Latsko) resides in Illinois. The defendant Randall Green (Green) resides in Minnesota. The complaint alleges that Green acquired title to the subject property on or about July 6, 2004, and currently hold legal title to the property. Thereafter, on or about July 8, 2004, Green executed a written "Option to Purchase Real Estate" (Option) conveying to James Graca (Graca) "the exclusive and irrevocable right and option ... to purchase the property in accordance with a "Purchase and Sale Agreement." Graca, on or about July 7, 2004, assigned to Battery Road Development, LLC (BRD) "all of his rights as Optionee in and to the Option to Purchase the subject real property." Pursuant to a Security Agreement (Security Agreement) made July 6,

2004, Graca "assigned and granted" Astor and Latsko a continuing security interest in Graca's BRD membership interest to secure certain monies that Graca owed to Astor. Pursuant to the terms of the Security Agreement, Graca assigned to Latsko and Astor "the right to exercise the option granted to BRD" for as long as the liability remained unpaid.

It is alleged that the option's stated term was 372 days from the date of execution by both parties or approximately July 6, 2004 though July 13, 2005. The option provided that written notice of the exercise of the option to Green in accordance with the option's notice provision within 3 business days of the expiration of the option was a valid and effective exercise of the option. The option also provided for the holder of the option to make a \$250,000 payment within 8 months of the date of the option,^{[FN1](#)} and this deposit would be applied toward the purchase price, if, in fact it was timely paid.

[FN1](#). Approximately March 7, 2005.

It is alleged that on or about March 3, 2005, Astor Street and Latsko timely exercised, in accordance with the option's notice provision, their right to purchase the property pursuant to the purchase and sale agreement. Astor Street and Latsko deposited a check for \$250,000 with, and payable to the Chicago Title and Trust Company. Astor Street and Latsko claim that they requested that Green contact them to schedule a closing date for the conveyance of the property. Despite being "at all times ready, willing and able to perform the terms and conditions of the Purchase and Sale Agreement," the plaintiffs claim that Green has failed to convey the property to Astor Street and/or Latsko.

I

Standard of Law

*2 The law regarding the granting of a motion for summary judgment is well-settled. "A Motion for Summary Judgment is designed to eliminate the delay and expense of litigating an issue where there is no real issue to be tried." [Wilson v. New Haven, 213 Conn. 277, 279, 576 A.2d 829 \(1989\)](#). "In deciding a motion

for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party.” Hertz Corp. v. Federal Ins. Co., 245 Conn. 374, 381, 713 A.2d 820 (1998). In ruling on a motion for summary judgment, the court's function is not to decide issues of material fact, but rather to determine whether any issues exist. Nolan v. Borkowski, 206 Conn. 495, 500, 538 A.2d 1031 (1988). The moving party has the burden of demonstrating the absence of any genuine issue of material fact. Hertz Corp. v. Federal Ins. Corp., *supra*, 245 Conn. at 381. “The opposing party must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact.” *Id.* “A material fact is a fact which will make a difference in the result of a case.” Suarez v. Dickmont Plastics Corp., 229 Conn. 99, 639 A.2d 507 (1994).

The test used by the court is to determine if the moving party would be entitled to a directed verdict if the same set of facts were presented at trial. Connell v. Colwell, 214 Conn. 242, 246-47, 571 A.2d 116 (1990). A directed verdict is properly rendered if a trier of fact cannot reasonably and legally find in any fashion other than that directed. Santopietro v. New Haven, 239 Conn. 207, 225, 682 A.2d 106 (1996).

II

Discussion

The defendant claims he is entitled to summary judgment because the undisputed facts show:

(1) the plaintiffs failed to pay the required option fee to the defendant according to the terms of the option agreement; (2) the plaintiffs failed to close on the purchase by the deadline set forth in the purchase and sale agreement; and (3) the option agreement is unenforceable by operation of General Statutes § 47-33a.^{FN2} In support of the motion, the defendants have submitted a copy of the option agreement, the purchase and sale agreement and the aforementioned security agreement. The defendant has also submitted various affidavits, copies of correspondence and the deposition testimony of Latsko.^{FN3}

^{FN2} Sec. 47-33a. Action on agreement to sell real estate.

(a) No interest in real property existing under an executory agreement for the sale of real property or for the sale of an interest in real property or under an option to purchase real property shall survive longer than one year after the date provided in the agreement for the performance of it or, if the date is not so provided, longer than eighteen months after the date on which the agreement was executed, unless the interest is extended as provided herein or unless action is commenced within the period to enforce the agreement and notice of lis pendens is filed as directed by section 52-325.

(b) The interest may be extended only by re-execution of the written agreement or by execution of a new written agreement, provided the agreement, whether re-executed or newly executed, shall be recorded as directed by sections 47-10 and 47-17. The period provided by this section shall not otherwise be extended, whether because of death, disability or absence from the state or for any other reason. Upon the expiration of an interest the title to property affected by the interest shall not thereafter be considered unmarketable because of the expired interest.

(c) Nothing in this section shall be construed to limit or deny any legal or equitable rights a party may have under the agreement except the right to have the agreement specifically enforced.

^{FN3} The plaintiff has submitted the deposition testimony of Randall Green and a copy of a letter from Jeffrey W. Lambert, dated Friday, June 17, 2005 at 3:58 p.m. This letter appears to have been sent by electronic e-mail.

The defendants argue that the option provided for a non-refundable option fee in the amount of \$500,000. Graca did pay the initial payment of \$250,000, which is referred to in the option as the “Initial Installment.” The option further provides that the balance of the option fee (\$250,000) was to be paid within eight months “of the date hereof.” The date of the signing of the option agreement was July 8, 2004.^{FN4} The option further

provides that upon the exercise of the option the purchase of the subject real estate “shall be completed” in accordance with the terms of the purchase and sale agreement, which was attached to the option agreement at the time of the signing of the option agreement. The purchase and sale agreement dated July 8, 2004 and signed by Graca as the Buyer and Green as the Seller, provides that the sale and purchase would be consummated at a location of the Buyer's choosing and that the closing date means “any date set by Buyer for the closing between July 8, 2005 and August 8, 2005.” It also provides that the Buyer had no right to close on the purchase prior to July 8, 2005. The purchase price set forth in the purchase and sale agreement was \$2,500,000.

FN4. The option agreement was signed by Randall Green (Optionor), and James Graca (Optionee). It was also signed by a representative of Battery Road Development, LLC who acknowledged that the option revoked and superceded an option between Green and Graca, dated July 2, 2004, and further, that a Purchase Agreement between Green and Battery Road Development, LLC is ‘null and void.’

*3 On or about March 3, 2005, the plaintiffs wrote to Green purporting to exercise the option, but instead of paying Green the remaining \$250,000 installment payment as provided in the option agreement, the plaintiffs delivered a check for \$250,000 to the Chicago Title Insurance Company payable to the Chicago Title Insurance Company (Chicago). Latsko instructed Chicago to hold the check pending further instructions. The defendants argue that since sending the March 3, 2005 letter, the plaintiffs did not contact Green concerning a closing of title on the subject property and did not select a closing date as required by paragraph 4(A) of the purchase and sale agreement. The plaintiffs also have never instructed Chicago to deposit the \$250,000 check, which has since “gone stale”; nor have the plaintiffs replaced the check.

Further, the defendant argues that during a June 2005 conversation between Green, Latsko and Graca, Latsko indicated that he did not intend to close. At approximately the same time the plaintiffs' lawyer in Chicago, Illinois informed Green's real estate attorney

that the plaintiffs would not close unless a tenant at the subject property vacated the premises prior to closing, despite that neither the option or purchase and sale agreements required Green to deliver the premises free and clear of tenants. Thereafter, the August 8, 2005 deadline for the closing came and went with no efforts of the plaintiffs to close or even schedule a closing date.

Subsequently, by letter dated May 1, 2006, the defendant's counsel wrote to the plaintiffs' Chicago counsel stating that the option had terminated and demanding that the plaintiffs provide a release of the option.^{FN5} The plaintiffs, to date, have not provided a release, despite several demands for them to do so. The plaintiffs then filed this action by way of their complaint dated September 21, 2006.

FN5. On March 15, 2005, Latsko caused an affidavit to be recorded on the Bridgeport Land Records setting forth Astor Street's claim to have a right to purchase the property under the option.

The plaintiffs do not dispute the evidence proffered by the defendants, except that the plaintiffs claim they have indeed exercised the option by virtue of their letter to the defendant dated March 3, 2005 and that they offered to set a closing date for the subject property. They also agree that they caused an affidavit to be recorded on the Bridgeport Land Records asserting their right to purchase the property pursuant to the option and purchase and sales agreements. In interpreting the rights of the parties under the option and purchase and sale agreements, the plaintiffs ask the court to find that the laws of the State of Minnesota apply,^{FN6} as Minnesota law will show that the March 3, 2005 letter was a “valid and effective” exercise of the option,^{FN7} and that the defendant never terminated the contract.

FN6. Paragraph 10 of the Option Agreement states that the “agreement and the enforcement thereof shall be governed and controlled in all respects by the laws of the State of Minnesota.” Paragraph 2D of the Purchase and Sale Agreement states the same.

FN7. The March 3, 2005 letter signed by Fred

Latsko on behalf of Astor Street Financial, L.L.C., which was addressed to Randall Green reads as follows:

Dear Mr. Green:

Please be advised that the undersigned as assignee of the "Option to Purchase Real Estate" located at 124 Old Battery Road, Bridgeport, Connecticut, hereby exercises the right to purchase the real estate under the purchase and sale agreement. Please contact the undersigned to schedule a closing date. We have deposited the earnest money with the Chicago Title & Trust Company.

Battery Road Development LLC and
James Graca

By: _____
Fred Latsko on behalf of Astor Skeet
Financial as Assignee and Authorized
Representative

As noted earlier herein, the defendant claims he is entitled to summary judgment because the undisputed facts show: (1) the plaintiffs failed to pay the required option fee to the defendant according to the terms of the option agreement; (2) the plaintiffs failed to close on the purchase by the deadline set forth in the purchase and sale agreement; and (3) the option agreement is unenforceable by operation of [General Statutes § 47-33a](#).

*4 Optionees claiming a right to purchase real property under an option must comply strictly with the terms of the option. Our Supreme Court has stated:

The principles that govern the interpretation of an option contract are well settled. To be effective, an acceptance of an offer under an option contract must be unequivocal, unconditional, and in exact accord with the terms of the option. 1A Corbin, *supra*, at 264, p. 523; [Department of Public Works & Buildings v. Halls](#), 35 Ill.2d 283, 285, 220 N.E.2d 167 (1966); [Katz v. Pratt Street Realty Co.](#), 257 Md. 103, 118, 262 A.2d 540 (1970); [Bricker v. Walker](#), *supra*, at 364; annot., 71 A.L.R.3d, *supra*, at 1205. Where there is ambiguity in the language of the agreement, option contracts are generally strictly construed against the optionee. [Pigeon v. Hatheway](#), 156 Conn. 175, 183, 239 A.2d 523 (1968).

(Internal quotation marks omitted) [Smith v. Hevvo Realty Corporation](#), 199 Conn. 330, 339, 507 A.2d 980

(1986). If an option contract provides for payment of all or a portion of the purchase price in order to exercise the option, the optionee, to be entitled to a conveyance, must not only accept the offer but pay or tender the agreed amount within the prescribed time. [Coombs v. Ouzounian](#), 24 Utah 2d 39, 41, 465 P.2d 356 (1970); [Miller v. Carmody](#), 152 Colo. 353, 358, 384 P.2d 77 (1963); see annot., 71 A.L.R.3d, *supra*, at 1205. In such cases, a mere acceptance of the offer, even though unequivocal, is insufficient to exercise the option. [Miller v. Carmody](#), *supra*, at 358-60. The determination of the terms and conditions of [the] option contract must be resolved, in the absence of supplementary evidence of the intent of the parties, by reference to the terms of the contract itself. [Brauer v. Freccia](#), 159 Conn. 289, 293, 268 A.2d 645 (1970); [Texas Co. v. Page 340 Crown Petroleum Corporation](#), 137 Conn. 217, 226, 75 A.2d 499 (1950).

(Internal quotation marks omitted) *Id.* at 339-40.

Paragraph 2 of the Option Agreement provides: "The balance of the Option Fee, being \$250,000.00 ('Final Installment') shall be payable by the Optionee to the Optionor within 8 months of the date hereof. The Final Installment shall be applied to the Purchase Price if the entire Option Fee has been paid. In the event that the Final Installment of the Option Fee is not timely paid. Optionor shall have the right to terminate this Option upon written notice to the Optionee."

Therefore, in order to exercise the option and proceed to purchase the property pursuant to the option and the purchase and sale agreement, the plaintiffs were required to pay the sum of \$250,000 to the defendant Green, no later than March 8, 2005, which was eight months following the date of the Option Agreement. By letter dated, March 3, 2005, Latsko notified Green that the plaintiffs were exercising their rights under the option and purchase and sale agreement. The plaintiffs requested that Green contact them to schedule a closing date.^{FNS} However, as evidenced by this letter, there is no dispute that the plaintiffs did not pay the \$250,000 option fee to Green. Instead plaintiff Latsko gave a \$250,000 check to the Chicago Title Company with instructions to hold the check pending Latsko's further instructions. Chicago Title never deposited the check, and Latsko never provided Chicago Title with further instructions regarding the check. Indeed, Chicago Title

still holds the check. The defendant (Optionor) pursuant to Paragraph 2 of the Option Agreement had a right to terminate the Option Agreement by sending written notice to the plaintiffs (Optionee).

[FN8](#). See note 7.

*5 Paragraph 5 of the Option Agreement provides in relevant part:

Any and all notices given in connection with this Agreement shall be deemed adequately given only if in writing and personally delivered or sent registered or certified mail, postage prepaid, return receipt requested, to the party or parties for who such notices are intended ... A written notice shall be deemed to have been given to the recipient party on the earliest of: (I) the date it shall be delivered to the applicable party or delivered to the address required by this Agreement ... [FN9](#)

[FN9](#). When a contract designates the method of providing notice of acceptance of an option, the language of the contract should control. See [Getty Refining & Marketing Co. v. Zwiebel](#), 604 F.Supp.774, 777 (D.Conn.1985).

A review of the documentary evidence provided to the court reveals that the defendant's counsel sent a letter dated May 1, 2006 to the plaintiffs' counsel informing the plaintiffs of their failure to pay the \$250,000 option installment payment to the defendant and further notifying the plaintiffs that "the option has expired." [FN10](#) This letter indicates that the method of delivery to plaintiffs' counsel was via facsimile and e-mail. Subsequently, by letter dated September 6, 2006, the defendant's counsel notified plaintiffs' counsel in Chicago, Illinois, that the option had expired (1) as a matter of law pursuant to [General Statutes § 47-33a\(a\); \(2\)](#) because the balance of the option fee had not been paid to the defendant/optionor. This letter also informed the plaintiffs that the plaintiffs had failed to close or exercise reasonable efforts to close by the "closing date" as set forth in the Purchase and Sale Agreement that had been attached to the Option Agreement. [FN11](#) The September 6, 2006 letter was sent via facsimile, e-mail and certified mail, return receipt requested. [FN12](#)

[FN10](#). The May 1, 2006 letter also notified the plaintiffs of Astor Street's failure to close by the "Closing Date" as defined in the Purchase and Sale agreement. The letter demands a "release of the option" from the plaintiffs, as the plaintiffs had recorded an affidavit on the Bridgeport Land Records on March 15, 2005. See note 5, herein.

[FN11](#). The "closing date," as defined in the Purchase and Sale Agreement was any date set by the Buyer between July 8, 2005 and August 8, 2005 with time being of the essence.

[FN12](#). "It is always competent for parties to contract as to how notice shall be given, unless their contract is in conflict with law or public policy. When they do so contract, the giving of a notice by the method contracted for is sufficient whether it results in actual notice or not." [Westmoreland v. General Accident Fire & Life Assurance Corp.](#), 144 Conn. 265, 270, 129 A.2d 623 (1957).

The plaintiffs argue that the terms of the option and the Purchase and Sales Agreements should be controlled by Minnesota law and that choice of law provisions are valid and enforceable. [Pollak v. Danbury Mfg. Co.](#), 103 Conn. 553, 131 A. 426, 428 (1925). Under Minnesota law, "[g]enerally, interpretation of the terms of a contract is a question of law that this court reviews de novo. [Art Goebel, Inc. v. N. Suburban Agencies, Inc.](#), 567 N.W.2d 511, 515 (Minn.1997). When interpreting a contract, its language is to be given its plain and ordinary meaning. [Brookfield Trade Ctr., Inc. v. County of Ramsey](#), 584 N.W.2d 390, 394 (Minn.1998). "We interpret a contract's terms in the context of the entire contract, and we interpret a contract to give meaning to all of its provisions. An option [contract] must be construed strictly in favor of the maker and must be accepted according to its terms." (Internal quotation marks and internal citations omitted.) [Edina Development Corp. v. Hurre](#), 670 N.W.2d 592, 596-97 (Minn.App.2003); [Abrahamson v. Abrahamson](#), 613 N.W.2d 418, 423 (Minn.App.2000). The plaintiffs claim that their letter of March 3, 2005 meets the requirements of paragraph 4 of the Option Agreement [FN13](#) despite the fact that the \$250,000 final installment payment was tendered to Chicago Title and not the defendant pursuant to Paragraph 2 of said Option

Agreement.

[FN13](#), Paragraph 4 reads:

This Option shall be deemed validly and effectively exercised upon written notice of the exercise hereof to Owner within three (3) business days of the expiration date of the Option or any extension thereof. In the event the Optionee fails to exercise the Option and within the time periods set forth above, then this Option shall be deemed to have expired and to be of no further force and effect and all rights and obligations of either party to the other under this Option Agreement shall expire.

*6 The court agrees that the plaintiffs' argument that they could properly exercise the Option without paying the final \$250,000 installment of the required Option Fee is illogical. The Option Fee was by its nature a fee to be paid at the time the Option was exercised. If the plaintiffs could wait until the closing to make this \$250,000 payment, the payment would have been designated as part of the purchase price. The Option Fee is in the nature of a down-payment toward the purchase price, which the defendant would be entitled to retain in the event the plaintiffs did not close in accordance with the Purchase and Sale Agreement. The court has reviewed [Minnesota statutes §§ 559.21](#) [FN14](#) and [559.217](#) [FN15](#) and finds that they do not apply to an action in Connecticut because they are procedural statutes. Choice of law contract provisions apply only to substantive and not procedural matters. Both Connecticut and Minnesota choice of law principles are in agreement on this point. Matters of procedure and remedies are governed by the law of the forum state. "[P]arties may agree that the law of another state shall govern their agreement and [Minnesota courts] will interpret and apply the law of another state where such agreement is made." [Milliken & Co. v. Eagle Packaging Co.](#), 295 N.W.2d 377, 380 n. 1 (Minn.1980). "But matters of procedures and remedies [are] governed by the law of the forum state." (Internal quotation marks omitted) [Davis v. Furlong](#), 328 N.W.2d 150, 153 (Minn.1983). "Therefore, general choice of law provisions, as expressed in contracts, incorporate only substantive law and do not displace the procedural law of the forum state." [Fredin v. Sharp](#), F.R.D. 304, 308 (D.Minn.1997); accord [Desjardins v.](#)

[Jimmy Peak, Inc.](#), Superior Court, judicial district of New Haven at Meriden, Docket No. CV03 0283437S (June 23, 2004, Wiese, J.). The law of the forum and of the situs of the land control the method and procedure of canceling contracts to determine adverse claims. [Wilson v. Kryger](#), 29 N.D. 28, 149 N.W. 721, 722-24 (N.D.1915). If a party seeks specific performance of a contract for the sale of land, and the opposing party claims the contract has been canceled, the procedure for the cancellation of such contract should be determined by the law of the situs of the suit and of the land. *Id.*

[FN14](#). 559.21 Contract termination; notice; service; costs; conditions reads in relevant parts:

Subd. 2a. For post 7/31/1985 contract. If a default occurs in the conditions of a contract for the conveyance of real estate or an interest in real estate executed on or after August 1, 1985, that gives the seller a right to terminate it, the seller may terminate the contract by serving upon the purchaser or the purchaser's personal representatives or assigns, within or outside of the state, a notice specifying the conditions in which default has been made. The notice must state that the contract will terminate 60 days, or a shorter period allowed in subdivision 4, after the service of the notice, unless prior to the termination date the purchaser:

- (1) complies with the conditions in default;
- (2) makes all payments due and owing to the seller under the contract through the date that payment is made;
- (3) pays the costs of service of the notice, including the reasonable costs of service by sheriff, public officer, or private process server; except payment of costs of service is not required unless the seller notifies the purchaser of the actual costs of service by certified mail to the purchaser's last known address at least ten days prior to the date of termination;
- (4) except for earnest money contracts, purchase agreements, and exercised options, pays two percent of any amount in default at the time of service, not including the final balloon payment, any taxes, assessments, mortgages, or prior contracts that are assumed

by the purchaser; and

(5) if the contract is executed on or after August 1, 1999, pays an amount to apply on attorneys fees actually expended or incurred, of \$250 if the amount in default is less than \$1,000, and of \$500 if the amount in default is \$1,000 or more; or if the contract is executed before August 1, 1999, pays an amount to apply on attorneys fees actually expended or incurred, of \$125 if the amount in default is less than \$750, and of \$250 if the amount in default is \$750 or more; except that no amount for attorneys fees is required to be paid unless some part of the conditions of default has existed for at least 30 days prior to the date of service of the notice.

Subd. 3. Notice defined. For purposes of this section, the term "notice" means a writing stating the information required in this section, stating the name, address and telephone number of the seller or of an attorney authorized by the seller to accept payments pursuant to the notice and the fact that the person named is authorized to receive the payments, stating a mailing address and a street address or location where the seller or the attorney will accept payment pursuant to the notice ...

Subd. 4. Law prevails over contract; procedure; conditions. (a) The notice required by this section must be given notwithstanding any provisions in the contract to the contrary, except that earnest money contracts, purchase agreements, and exercised options that are subject to this section may, unless by their terms they provide for a longer termination period, be terminated on 30 days' notice, or may be canceled under [section 559.217](#). The notice must be served within the state in the same manner as a summons in the district court, and outside of the state, in the same manner, and without securing any sheriff's return of not found, making any preliminary affidavit, mailing a copy of the notice or doing any other preliminary act or thing whatsoever. Service of the notice outside of the state may be proved by the affidavit of the person making the same, made before an authorized officer having a seal, and within the state by such an affidavit or by the return of the sheriff

of any county therein.

(c) The contract is reinstated if, within the time mentioned, the person served:

(1) complies with the conditions in default;
(2) if subdivision 1d or 2a applies, makes all payments due and owing to the seller under the contract through the date that payment is made;

(3) pays the costs of service as provided in subdivision 1b, 1c, 1d, or 2a;

(4) if subdivision 2a applies, pays two percent of the amount in default, not including the final balloon payment, any taxes, assessments, mortgages, or prior contracts that are assumed by the purchaser; and

(5) pays attorneys fees as provided in subdivision 1b, 1c, 1d, or 2a.

(d) The contract is terminated if the provisions of paragraph © are not met.

[FN15](#). 559.217 Cancellation of residential purchase agreement reads in relevant parts:
Subdivision 1. Definitions.

(a) For purposes of this section, the terms defined in this subdivision have the meanings given.

(b) "Purchase agreement" means an earnest money contract, purchase agreement, or exercised option whether or not the instrument is subject to [section 559.21](#).

(c) "Residential real property" means real property, including vacant land, occupied by, or intended to be occupied by, in the aggregate, one to four families as their residence.

(d) "Suspend" means to temporarily or permanently restrain or enjoin a cancellation proceeding under subdivision 3 or 4 pursuant to the provisions of section 559.211.

Subd. 2. Use of this section.

Either the purchaser or the seller may cancel a purchase agreement for residential real property under this section. If either a seller or purchaser initiates a cancellation proceeding under this section and before completion of the proceeding the other party to the purchase agreement initiates a cancellation proceeding under this section, whether under subdivision 3 or 4, the purchase agreement is deemed canceled as of the date the second cancellation

notice is served upon the other party to the purchase agreement under this section. Either party may later pursue legal remedies at law to recover the earnest money. A court shall make a determination of which party is entitled to the earnest money without regard to which party first initiated the cancellation proceeding and may consider the terms of the canceled purchase agreement in making its determination ...

Minnesota courts have also held that [§ 559.21](#) does not apply to an option to purchase real estate. It applies only to “contracts of actual purchase, and not to agreements which, in their nature, are mere options depending upon some contingency.” *Joslyn v. Schwend*, [85 Minn. 130, 133, 88 N.W. 410 \(1901\)](#). “An option is simply a contract by which the owner of property agrees with another person that he shall have the right to buy the property at a fixed price within a certain time.” *Womack v. Coleman*, [92 Minn. 328, 100 N.W. 9 \(1904\)](#). “An option conveys no title to the thing sold ...” *Id.*

*7 Connecticut courts view the difference between an option contract and a purchase and sale contract in a manner similar to Minnesota courts. “An option contract and a contract of sale are in fact two separate and distinct contracts, namely, an option contract, and an agreement to sell.” *Cutter Development Corporation v. Peluso*, [212 Conn. 107, 110, 561 A.2d 926 \(1989\)](#). “An option, originally, is neither a sale nor an agreement to sell. It is not a contract by which one agrees to sell and the other to buy, but it is only an offer by one to sell within a limited time and a right acquired by the other to accept or reject such offer within such time.” (Internal citations omitted.) *Id.* “The distinction between a contract to purchase and sell real estate and an option to purchase is that the contract to purchase and sell creates a mutual obligation on the one party to sell and on the other to purchase, while an option merely gives the right to purchase within a limited time without imposing any obligation to purchase.” *Id.*; see also 77 Am.Jur.2d, Vendor and Purchaser 28.

[Minnesota statute § 559.217](#) is also not applicable as [§ 559.217](#) applies by the plain meaning of its terms only to “exercised options.” The plaintiffs by their failure to pay the \$250,000 Option Fee installment payment, cannot be said to have properly exercised their option.

The plaintiffs do not dispute that if Minnesota law does not apply, then Connecticut General [§ 47-33a](#) applies and would bar the plaintiffs' action. [Section 47-33a](#) provides in substance that no interest under an executory agreement for the sale of real property or under an option to purchase real property shall survive longer than one year after the date provided in the agreement for performance. The court agrees with the defendant that [§ 47-33a](#) governs the mechanics of the remedy in Connecticut and is a statute of limitation because it provides a deadline within which a party must seek to enforce its rights. Therefore, the statute is procedural and applies to this action. The Purchase and Sale Agreement provides for a closing date no later than August 8, 2005. The one-year period set forth in [§ 47-33a](#) expired on August 8, 2006.

The plaintiffs have not properly exercised their rights under the Option Agreement and thus, cannot enforce any rights they may have under the Purchase and Sales agreement, despite possible issues of fact, as to whether the plaintiffs were indeed, ready, willing and able to close. The court does note that it finds no evidence that the plaintiffs communicated any desire at any time to close on any date certain.

Accordingly, for the reasons set forth herein, the defendant's motion for summary judgment is hereby granted, and the plaintiffs' cross motion for summary judgment seeking specific performance under the option and purchase and sale agreements is denied.

Conn.Super.,2007.
Astor Street Financial, LLC v. Green
Not Reported in A.2d, 2007 WL 1470220
(Conn.Super.)

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