

Summary of SC91523, JAS Apartments, Inc. v. Mohamad Ali Naji, et al.

Appeal from the Jackson County circuit court, Judge Robert M. Schieber
Argued and submitted Oct. 5, 2011; opinion issued Nov. 15, 2011

Attorneys: JAS Apartments was represented by Paul D. Sinclair and Miriam E.C. Bailey of Polsinelli Shughart PC in Kansas City, (816) 421-3355; and the Najis were represented by Theresa Shean Hall of Manz Swanson & Mulhern PC in Kansas City, (816) 472-5310.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A man who owned property with his wife contracted to sell the property but was unable to secure his wife's consent to the sale. The seller sued, and the man filed counterclaims. A trial court determined the contract self-terminated, but an appeals court disagreed, remanding (sending back) the case for a specific determination of whether language in the preliminary commitment from the title insurance company that the seller's spouse must join in the real estate transaction is a "requirement" that the seller must satisfy for the title company to issue a title policy insuring marketable title or an "exception" causing the buyer, who did not object in a timely fashion, to accept title subject to the spouse's marital interest. On remand, the circuit court concluded that the buyer's failure to object in a timely fashion constituted a waiver of its right to object. In a decision written by Judge Zel M. Fischer and joined by all participating judges, the Supreme Court of Missouri reverses the circuit court's judgment and remands the case. The circuit court misinterpreted the appeals court's mandate and misapplied the law in failing to determine, based on the record and the interpretation of the contract, that the spouse's signature was a requirement and not an exception. This Court must remand again so the circuit court can determine the appropriate remedy for the seller's breach of contract and can consider the buyer's claim for attorneys' fees. Judge Michael M. Pritchett, presiding judge of the 36th Judicial Circuit (Butler and Ripley counties), sat in this case by special designation to fill a then-vacancy on the Court.

Facts: Mohamad Ali Naji and his wife bought an apartment building in Kansas City with other individuals but later bought out their partners. By November 2002, property was titled solely in Naji's name subject to a deed of trust securing a loan with a remaining principal balance of about \$500,000. Naji listed the property for sale. About a year later, JAS Apartments Inc. offered to buy the property. The parties' brokers, apparently unassisted by legal counsel, used a standard form contract issued by the Kansas City Metropolitan Board of Realtors and added a few non-uniform provisions. Naji accepted the offer and signed the agreement as an individual without noting his marital status or informing his wife. Shortly thereafter, he learned his wife enjoyed owning the building and simply did not want to sell it. Naji told his broker to communicate to JAS that his wife did not want to sell the building but that he would continue to try to obtain her consent. In January 2003, Naji obtained a preliminary commitment from a title company, which provided that upon closing of the transaction and recording of the deed, Chicago Title would issue a title policy if certain requirements were met. At the time of the transaction, Chicago Title listed both exceptions and requirements on one schedule B (rather than breaking them into separate schedules). One of the 19 items listed in schedule B stated, "The spouse, if any, of ...

Naji must join in the proposed agreement.” As the February 2003 closing date approached, Naji repeatedly sought his wife’s consent to the sale, but shortly before the closing, he informed an attorney for JAS that his wife would not sign the contract. JAS regarded the lack of consent from Naji’s wife as a default by Naji and, instead of appearing at the closing, JAS sought to enforce the contract by extinguishing the wife’s marital interest. Naji filed a counterclaim for breach of contract for JAS’s refusal to close as scheduled.

The circuit court determined that, because Naji was unable to secure his wife’s consent to the contract, he was unable to deliver a marketable title, effectively terminating the contract and leaving neither party in default. Both parties appealed. The court of appeals reversed the judgment and remanded the case. It held that the contract had not self-terminated and that, based on the record from the circuit court, it could not determine whether Chicago Title had intended the wife’s participation in the transaction to be an “exception” as opposed to a “requirement” for issuing the title insurance policy. The appeals court remanded expressly for the circuit court “to consider whether ... Naji breached the agreement and, if so, what the appropriate remedy should be.” On remand, after the parties introduced testimony and evidence as to the “exception versus requirement” issue, the circuit court determined that the item in schedule B regarding the wife’s participation “could be converted into an exception that would carry over to the title policy.” The court concluded that, because JAS had not objected in writing in a timely fashion to this particular item, it had waived its right to receive marketable title and, therefore, had breached the contract when it failed to close the transaction as scheduled. JAS appeals.

REVERSED AND REMANDED.

Court en banc holds: (1) The circuit court erroneously construed the appeals court’s opinion and mandate. The question the circuit court was to have answered on remand was: What was item 15 during the contract’s 10-day review period – requirement or exception? If JAS is deemed to have waived all objection to the defect by failing to object to an exception within the 10-day review period, then JAS, as the buyer, was obligated to proceed to closing and accept a title encumbered by that defect with no title policy protection as to that defect. If, however, the burden was on Naji, as the seller, to address a requirement to the satisfaction of the title company so that a title policy would be issued insuring marketable title and Naji did not do so, then Naji, as the seller, breached the contract.

(2) As a matter of law, the evidence presented to the circuit court on remand was that the item requiring the wife’s signature was a requirement at the time the title commitment was issued and, therefore, was a requirement during the 10-day review period. Unlike an exception to coverage, which a buyer can choose to accept or object to, a requirement that inures to the buyer’s benefit is not a matter that any seller under a real estate contract reasonably could expect a buyer to object to such that failure to object would permit non-performance of the requirement. This conclusion is supported by the testimony presented on remand as well as by industry custom and recognized practice. The item here was a requirement in the initial title commitment. Because Naji did not perform this requirement, Chicago Title would not issue a title policy insuring marketable title as Naji contractually was obligated to provide to JAS. By advising that he was unable to secure his wife’s participation in the transaction just before closing, Naji anticipatorily breached the contract. It does not matter that Chicago Title could have converted the signature

requirement to an exception because JAS never agreed to modify the contract with Naji and to accept title to the property subject to the wife's marital interest.

(3) The circuit court's misinterpretation of the appeals court's mandate and failure to determine, based on the record and the interpretation of the contract, that the signature of Naji's spouse was a requirement and not an exception constitutes a misapplication of law that requires this Court to reverse the circuit court's judgment. This Court must remand again so the circuit court can determine the appropriate remedy for Naji's breach of contract. The circuit court will have the power to assess whether specific performance (forcing Naji to perform according to the terms of the contract) remains an appropriate remedy and, if not, to award JAS damages as compensatory relief. The remedy the circuit court fashions also will require consideration of JAS's claim for attorneys' fees.