

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

HORTENSE RAMOS

Case No. 83-11584 K

Debtor

CARL L. BUCKI, as Trustee of the
Estate of HORTENSE RAMOS

Plaintiff

-vs-

AP 90-1129 K

MOLLIE SOTERO

Defendant

Trustee Carl L. Bucki has moved for summary judgment under F.R.Civ.P. Rule 56 and Bankruptcy Rule 7056 against Mollie Sotero in the amount (it appears) of \$12397.40 plus interest representing the bankrupt estate's share of what would have been the net proceeds of sale of certain real estate (owned by the debtor and a non-debtor co-owner) if defendant Mollie Sotero had consummated her September 29, 1988 agreement (at auction) to buy the property.

The motion is denied because there exists a genuine dispute as to at least one material fact; to wit, were the circumstances met by which the estate was entitled to demand that closing adjustments be calculated as of October 31, 1988?

Despite the language, the clear meaning of paragraph 2 of the document executed by the Trustee's agent and by the defendant on September 29, 1988 is this: The seller (the Trustee) expected to be ready to close on October 31, 1988. If he was not so ready, then the parties could agree to a later date, and clearly the buyer would not be forced to adjust as of October 31, 1988 if the seller needed more time; but once the seller was ready to close, the seller expected to be able to insist that any delay occasioned by the buyer, be at the buyer's expense relative to tax accruals, etc.

Paragraph 4 of the defendant's affidavit (wherein she states: "It is submitted that there was no deed available on October 31, 1988, and that the sellers were not in a position to close at that time.") appears to be devoid of personal knowledge (F.R. Evidence 602), and her recitations regarding what Stephen Townsend, Esq. told her in this regard are hearsay.

However, Exhibit #4 to the Trustee's Motion for Summary Judgment suggests that it was not until December 27, 1988 (at the earliest) that he was authorized under 11 U.S.C. § 363(b) to convey the property. I cannot determine from the record before me whether, or to what extent, the failure to close on October 31, 1988 was by mutual agreement, by seller's inability, or at buyer's request under circumstances giving rise to seller's right to demand a freeze of the adjustment date. Indeed, it may be that paragraph 2 was waived entirely as a matter of fact or law.

This, of course, becomes critical in light of paragraph 7 of the defendant's affidavit, wherein it appears to be suggested that she might have closed on January 9, 1990 were the seller not then insisting that adjustments be made as of October 31, 1988. (Trustee's Exhibit #5 reflects more than \$2000 in interest alone on taxes from November 1, 1988 to January 9, 1990.)

Therefore, totally apart from the other defenses raised by the defendant (unconscionability, misrepresentation, etc.) there is a mixed question of law and fact as to what the Trustee could rightfully demand from the defendant at the abortive January 9, 1990 closing, in light of communications between the Trustee and the defendant's former attorney. While the failure of the defendant to produce evidence from her former attorney has not been explained, and the record on her behalf might fail to place this question of "ultimate fact" in dispute, I find the dispute within the Trustee's own papers and the records of the Court.

The motion for summary judgment is denied. This adversary proceeding is hereby set for a Calendar Call on April 15, 1992 at 11:30 a.m., to select a date for trial.

SO ORDERED.

Dated: Buffalo, New York
March 30, 1992

/S/ MICHAEL J. KAPLAN

U.S.B.J.