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Seller's withdrawal for buyer's late performance:
Ninety Nine Invs. v Overseas Courier Serv., 2003
Roger Bernhardt

Buyer was entitled to specific performance of agreement for sale of apartment buildings when seller's failure to comply with escrow instructions prevented buyer's timely performance of financing condition.

Ninety Nine Invs., Ltd. v Overseas Courier Serv. (Singapore) Private, Ltd. (2003) 113 CA4th 1118, 6 CR3d 891

Ninety Nine Investments and Overseas Courier Service (OCS) each had a 50-percent interest in two apartment buildings. In October 1999, Ninety Nine and OCS entered into an agreement under which Ninety Nine would purchase OCS's 50-percent interest in the buildings, thereby dissolving the partnership. The agreement provided that the transactions would be handled through two separate escrows and that the escrows would close on or before January 14, 2000; the agreement also provided that Ninety Nine would obtain new financing and that time was of the essence. However, OCS did not deposit signed escrow instructions into the escrows until Monday, January 11, 2000. OCS also failed to deposit other required documents into the escrows until January 14, or provide other missing information, all of which made it impossible for the escrows to close on January 14. Although Ninety Nine had fulfilled all conditions required by the lender, the loan did not fund on January 14, because OCS's instructions were not received until January 11. On January 14, OCS found out that no funds had arrived and the escrows would not close that day. On January 15, OCS gave written notice of cancellation of the escrows. Ninety Nine sued for specific performance. The trial court denied specific performance and awarded judgment for OCS, finding that OCS's conduct did not prevent Ninety Nine from fulfilling its financing obligation.

The court of appeal reversed, holding that Ninety Nine was ready, willing, and able to perform, but that its performance was prevented by OCS. The court explained that, to obtain specific performance, Ninety Nine had to show an excuse for its own nonperformance. The court then determined that substantial evidence did not support the trial court's factual findings that OCS's failure to comply with its escrow obligations did not prevent Ninety Nine's performance. The court pointed out that undisputed evidence in the record established that an escrow holder will not ask a lender to prepare loan documents until the escrow is ready to close and that the escrow was not ready to close on January 14 because OCS failed to deposit the necessary documents, such as rent roll statements and its own articles of incorporation, that the instructions specifically required it to deposit.

The court rejected OCS's argument that Ninety Nine failed to meet its financing obligations because it failed to fulfill certain loan conditions by January 14. The court pointed out that the loan officer in charge of the transaction testified that, as of the scheduled January 14 closing date, Ninety Nine had fulfilled all of its loan conditions and had done nothing to prevent funding by that date, and that the only outstanding conditions were escrow obligations. The court also stated that, regardless of the actual date on which the loan documents were signed and notarized,

i.e., even if it was after January 14, the escrows failed to close on January 14 because of OCS's actions: The failure of Ninety Nine to submit notarized loan documents on January 14 had no causal effect on the inability of the escrows to close before the submission of OCS's notice of termination.

The court also rejected the notion that Ninety Nine failed to perform because nothing prevented it from depositing cash into the escrows on January 14. The court pointed out that there was no requirement that Ninety Nine tender cash, and the escrow instructions expressly gave Ninety Nine the option of securing financing, which it was indisputably in the process of doing.

Further, the "time is of the essence" clause did not give OCS the right to cancel the escrows. Under the covenant of good faith and fair dealing, neither party could frustrate the other party's right to receive the benefits of the contract. Under the circumstances, OCS was not entitled to unilaterally cancel the escrows when it did.

THE EDITOR'S TAKE: I said in my column in the last issue (27 CEB RPLR 12 (Jan. 2004)) that I was skeptical about the decision in *Pittman v Canham* (1992) 2 CA4th 556, 3 CR2d 340, which held that real estate sale contracts automatically end if either party fails to fully perform by the declared closing date. The judges writing this opinion share that skepticism, preferring—probably out of respect for their colleagues—to describe the *Pittman* result as "an aberration in the facts" rather than "an aberration in the law." Well, as long as *Pittman* is no longer taken too seriously, the explanation really does not matter. In the ordinary case, when the buyer is failing or has failed to perform on time, the seller is advised to affirmatively warn the buyer (of her intent to withdraw from the contract) and then affirmatively withdraw.

And, under the facts involved here, we can safely add that a seller who hopes to withdraw for untimely performance by her buyer had better be sure not to put obstacles in his way. Slowing him down just slows the clock as well. —*Roger Bernhardt*