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COVID-19 Incapacitation Insufficient to Excuse Buyer's Obligation to Close on Purchase of Real Estate

A Land Court judge has held that a buyer of real estate could not extend the time for closing where his wife, who was essential to his ability to obtain financing, was gravely ill due to complications from COVID-19. The case is *Martorella v. Rapp, 20 Misc 000153* (Nantucket Land Court, June 1, 2020). While this case may prove to be uniquely tied to its facts, those in the real estate world, including most importantly agents and attorneys, will want to read it as these disputes are sure to arise with greater frequency during the pandemic

Plaintiff Christopher Martorella bought the Nantucket property at auction after the Land Court ordered it sold pursuant to a petition to partition. Soon after he signed the purchase and sale agreement, Martorella's wife became gravely ill and was ultimately placed on a ventilator. Although she was not a party to the P&S, Mr. Martorella needed his wife to co-sign the mortgage loan application, which she could not do on account of her illness. After granting two short extensions, the Commissioner demanded that Mortarella close as scheduled. Mortarella, relying on the doctrine of impossibility of performance, filed a complaint and requested a 90-day temporary restraining order prohibiting the Commissioner from selling the property to another party.

The Court dismissed the complaint. The Court emphasized two critical facts in reaching its decision, which it acknowledged was a "harsh outcome." First, the buyer did not include a financing contingency. Second, the buyer did not in any way communicate to the Commissioner that his wife, although a non-party, needed to be available during the period of the agreement in order for him to perform.

The Court emphasized that impossibility of performance is evaluated as of the time of the contract, not the time of performance. Although the horrifying effects of COVID-19 are unprecedented, the question is whether the risk was beyond the contemplation of the parties at the time of the contract. If it was, the buyer's performance would be excused. Here, the risk was assumed by the buyer when he failed to negotiate a financing contingency. COVID-19 may have been an unforeseen circumstance, but the risk of being unable to obtain financing was not unforeseen. To excuse performance would grant to the buyer a benefit for which he did not bargain.

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