



Neutral

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Ft. M Development Corp. v. Inland Credit Corp.

Court of Appeals of New York

November 14, 1977, Argued ; December 14, 1977, Decided

No Number in Original

Reporter

43 N.Y.2d 763; 1977 N.Y. LEXIS 2552; 372 N.E.2d 800; 401 N.Y.S.2d 1012

Fort M Development Corp., Appellant, v. Inland Credit Corporation, Respondent

[*Fort M Dev. Corp. v Inland Credit Corp.*, 54 AD2d 862](#), affirmed.

Prior History: **[**1]** Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered November 18, 1976, which modified, on the law, and, as modified, affirmed a judgment of the Supreme Court (Hilda G. Schwartz, J.), entered in New York County, which, upon a motion by defendant to dismiss the complaint and for summary judgment, granted the motion to the extent of dismissing the second and third causes of action and denied the motion as to the first cause of action. The modification consisted of also granting defendant summary judgment on the first cause of action. The action was based upon the alleged breach by defendant of a mortgage commitment agreement, and in its first, second and third causes of action, plaintiff sought, respectively, the return of the commitment fee paid by it, damages for defendant's failure to fund the commitment, and, in the alternative, specific performance. The mortgage commitment agreement, which was executed August 9, 1973, provided that, in consideration of a \$ 9,600 commitment fee, the commitment would remain in full force and effect for 12 months, and that, as one of the conditions to obtaining the mortgage, personal guarantees **[**2]** would be provided by five named persons and their respective spouses. One of the named prospective guarantors died on November 29, 1973, and, on the basis of his death, defendant declined to close the commitment when requested to do so by plaintiff on June 24, 1974. The Appellate Division held that, since the \$ 9,600 was paid in consideration for keeping the commitment in full force and effect, and defendant had kept it open, it had earned its fee; that, in an executory contract of this sort, performance of which depended on and assumed the continued existence of one or more persons, the death of one or more of those persons extinguished the obligation to perform and that, here, the death of one of the prospective guarantors excused performance by defendant, not because there was no valid enforceable agreement but because of the impossibility of performance of a condition precedent by plaintiff.

Headnotes/Syllabus

Headnotes

Contracts -- Mortgage Commitment Agreement -- Death of Prospective Guarantor

In an action based upon the alleged breach by defendant of a mortgage commitment agreement, which provided that, as a condition to **[**3]** obtaining the mortgage, personal guarantees would be provided by certain guarantors, one of whom died before the commitment was closed, an order of the Appellate Division which affirmed the dismissal of causes of action for damages for defendant's failure to fund the commitment and, in the alternative, specific performance, and which also dismissed the remaining cause of action, for the return of the commitment fee paid by plaintiff, is affirmed on the memorandum at the Appellate Division, which held that defendant had earned the commitment fee by keeping the commitment in full force and effect, and that performance of the agreement by it was excused because of the impossibility of performance of a condition precedent by plaintiff.

Counsel: *Robert G. Kurzman* and *Arthur Elfenbein* for appellant.

Richard H. Abelson, *Samuel Kirschenbaum* and *Rochelle Kerner* for respondent.

Judges: Concur: Chief Judge Breitel and Judges Jasen, Gabrielli, Jones, Wachtler, Fuchsberg and Cooke.

Opinion

[*765] OPINION OF THE COURT

Order affirmed, with costs, on the memorandum at the Appellate [Division \(54 AD2d 862\)](#).