IN THE SUPREME COURT OF TEXAS

NO. 04-0641

NICK DIGIUSEPPE D/B/A SOUTHBROOK DEVELOPMENT CO. AND FRISCO MASTER PLAN, PETITIONERS,

v.

ROGER LAWLER, RESPONDENT

ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS

Argued October 20, 2005

JUSTICE GREEN, joined by CHIEF JUSTICE JEFFERSON, JUSTICE O'NEILL, and JUSTICE JOHNSON, dissenting.

The Court requires an innocent buyer, otherwise excused from his contractual obligations by the seller's breach, to nevertheless prove, in a suit for specific performance, that he could have fully performed those obligations had the seller not breached. ___ S.W.3d at ___. This makes no sense for at least two reasons. First, it provides the breaching seller information he was not entitled to under the contract. A seller entering into a real estate transaction is rarely entitled to know the details of how the buyer intends to finance the transaction. At closing, the buyer will either perform or not, and in the latter event, the contract will provide remedies for the breach. But if the seller breaches the contract before closing and the buyer sues to enforce the deal, the Court now says the buyer must

prove to a fact-finder, at a trial many months or years after the sale was originally supposed to close, that he was, at the time specified by the contract, "ready, willing, and able" to perform. *Id.* at ___. To do this, the innocent buyer will necessarily be required to reveal his plan for financing the transaction—information a seller generally would not be privy to under agreed contract terms.

Second, and perhaps most important, the Court's holding makes no sense because a finding that the buyer was ready, willing, and able to perform at the closing time specified in the contract is irrelevant. Although the Court does not say what the trial court is supposed to do with such a finding, presumably it would order a date for the transaction to close within a reasonable time. But what if the buyer was able to close on the original contract date and is unable to close on the court-appointed date? The whole exercise is rendered meaningless. The only thing that makes sense is to do precisely what the trial court did in this case, which is to set a closing date within a reasonable time after a finding that the seller breached. While it is true that the buyer might gain some benefit by getting a reprieve from the original contract closing date, it is just as likely, particularly in light of today's troubled financial times, that he will be worse off and be unable to close. But at least this has the virtue of being meaningful and of not placing impractical burdens on an innocent party, both features that are lacking in the Court's rule.

The Court's holding will also tend to severely limit or eliminate specific performance as a viable remedy for a seller's breach of a real estate contract. In large transactions, it is doubtful that many non-breaching buyers would be willing to subject themselves and/or their investors to open discovery of financial portfolios on the question of whether the buyer was sufficiently capable of purchasing the property at the time required by the contract. Unscrupulous sellers will be virtually

immunized from the penalty of specific performance, the most severe consequence of breaching a contract of sale, and disorder will be the order of the day in volatile real estate markets. Because the Court's holding lacks common sense and adheres to a misreading of our precedents, I respectfully dissent.[1]

I agree with the Court that it has long been part of the jurisprudence of this state that, to obtain the equitable remedy of specific performance, a party must show himself to have been "ready, willing, and able" to timely perform his obligations under the contract being enforced. *See* ___ S.W.3d at ___; *see also Ratcliffe v. Mahres*, 122 S.W.2d 718, 721–22 (Tex. Civ. App.—El Paso 1938, writ ref'd) (quoting 4 JOHN NORTON POMEROY, JR., A TREATISE ON EQUITY JURISPRUDENCE § 1408, at 2779 (3d ed. 1905)). But it has likewise been a long-standing Texas rule that a non-breaching plaintiff seeking specific performance need only make such a showing by offering to perform in his pleadings. *Burford v. Pounders*, 199 S.W.2d 141, 144 (Tex. 1947). The Court's insistence that a party seek and obtain a jury finding that he is ready, willing, and able to perform before being entitled to the remedy departs from that rule.

Specific performance is an equitable remedy that rests in the sound discretion of the trial court. *Kress v. Soules*, 261 S.W.2d 703, 704 (Tex. 1953); *Am. Apparel Prods., Inc. v. Brabs, Inc.*, 880 S.W.2d 267, 269 (Tex. App.—Houston [14th Dist.] 1994, no writ). Generally, to be entitled to

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[1] In footnote 10, the Court takes the position that DiGiuseppe did not raise or argue that he was not required to prove or obtain a finding of fact that he was ready, willing, and able to perform, suggesting that such an argument should not be addressed in this dissent. ___ S.W.3d at ___. Yet that is the basis for the court of appeals' decision, ___ S.W.3d ___, ___, and the Court provides exhaustive discussion on this very issue in its opinion. *Id.* at ___. In the first issue raised in his petition for review, DiGiuseppe claims that "[t]he court of appeals erred in reversing the trial court's award of specific performance to DiGiuseppe." I believe, as the Court appears to, that DiGiuseppe's issue sufficiently raised the question of whether Texas law requires such proof from a non-breaching buyer.

specific performance, a party must prove that it has complied with all the contract's terms. *Glass v. Anderson*, 596 S.W.2d 507, 513 (Tex. 1980). When a seller breaches a real estate contract, however, we have long held that the buyer need not actually tender the purchase price in order to seek specific performance. *Ward v. Worsham*, 14 S.W. 453, 453 (Tex. 1890).

> The practice in equity in similar cases is not to require a tender or a payment into court of the purchase money. . . . When [the buyer] pleads his right he should offer to pay, and the court, if judgment should be given for him, should decree a payment within a reasonable time, and that, in default of a compliance, his right should cease and be determined.

Id. This has remained the law in Texas for well over 100 years, as the Court recognizes. *See* ___ S.W.3d at ___. Until today, however, the Court has not required a non-breaching buyer to make the "useless and idle" showing of proof of ability to complete the transaction when the seller's repudiation of the contract excused the buyer from tendering the purchase price. *See Burford*, 199 S.W.2d at 145.

The issue of a party's own performance as a condition to obtaining specific performance is a matter to be contemplated by the trial court's judgment, not the jury's verdict. *See Regester v. Lang*, 49 S.W.2d 715, 716–17 (Tex. Comm'n App. 1932, holding approved) (holding it was reversible error for a defendant to argue to the jury that the plaintiff had not paid the purchase money into the court registry, and that specific performance might result in the defendant delivering his property without being paid). "It is sufficient if [the party seeking specific performance] is ready and willing and offers to perform in his pleadings." *Id.* at 717. To require anything more would be futile because, as this Court recognized in *Regester*, the buyer "would be required under a proper decree of specific performance to pay this sum before he could obtain any interest" in the property. *Id.*

We reiterated these principles in *Burford v. Pounders*, instructing that when a seller has refused to perform and the buyer's tender would be futile, "the material consideration is that [the buyer] offered in his pleadings to do equity," and nothing more is required. 199 S.W.2d at 145. The plaintiff Burford was a tenant in possession with an option to buy under a right of first refusal. *Id.* at 141–42. The lessor, ignoring Burford's option, conveyed the property to defendant Pounders. *Id.* at 142. Two months after the sale, Burford attempted to exercise his option, eventually seeking specific performance. *Id.* at 142–43. Burford would not have been able to make payment at the time of the sale to Pounders, but would have been able to pay two months later. *Id.* at 143–44. Because Burford had to exercise the option to buy within a "reasonable time," the issue in the case was whether Burford was required to tender performance within a reasonable time of learning of the sale to Pounders, or whether it was sufficient for Burford to later offer to perform in his pleadings. *Id.* at 144–45. Citing *Regester*, we again emphasized that all that was necessary in such a case is that the party seeking specific performance be ready and willing and offers to perform *in his pleadings*. *Id.* at 144 (citing *Regester*, 49 S.W.2d at 717). And when a party offers in his pleadings to do equity, "[t]he *only* matter remaining to be done by the trial court is to direct that payment be made" and that the sale be completed, awarding the purchaser judgment for title. *Id.* at 145 (emphasis added).

One statement in *Burford*, however, appears to have given rise to the confusion of the lower courts on this issue. Quoting from Corpus Juris, the Court in *Burford* stated that a "complainant ordinarily is entitled to specific performance where he alleges *and proves* that he . . . is ready, able, and willing to perform." *Id.* at 144 (quoting 58 C.J. *Specific Performance* § 316 (1932)) (emphasis

added). After citing that general rule, though, the Court went on to explain the exception that excuses tender for non-breaching buyers, citing additional Corpus Juris sections and comments:

> [Regarding a specific performance suit brought by a purchaser, under a footnote to section 342], it is stated that "In Texas" an actual tender "is not necessary where the purchaser pleads and proves a willingness to pay, but is entitled to relief provided that, within a time fixed in the decree, he shall pay the amount due" . . . . In section 348 it is stated that "whatever difference of opinion may exist as to the original necessity of a tender of the consideration before suit, . . . it appears to be quite well settled that a formal tender is excused where a tender would be useless and idle ceremony"; and that a "tender is also excused where defendant repudiates the contract"; and further that "tender in pleadings (is) sufficient" where plaintiff sets forth that he is ready, able and willing "or . . . pays the consideration into the court." In section 349, . . . it is stated that "the necessity of tender is dispensed with where defendant repudiates the contract, or makes any declaration which amounts to a repudiation . . . . In the following section (350) it is stated that "if a tender of the purchase price or other sums before suit is necessary, it is excused where the vendor or seller has put it out of his power to perform, as where he has conveyed the property . . . to a third person."

Id. at 144–45 (emphasis removed). The Court never returned to any discussion of the general rule that requires proof of ability to pay, instead holding that the seller defaulted and repudiated by selling the property to Pounders. *Id.* at 145. For a non-breaching buyer, "[t]he material consideration is that [he] offer[s] in his pleadings to do equity." *Id.* The court emphasized this rule with italics: "[A]ll that is required in such case is that the plaintiff place himself in favor with the court, *and this may be done by a proper offer in the pleadings.*" *Id.* at 143 (quoting 49 Am. Jur. *Specific Performance* § 144, at 167 (1943)) (italics in original). Because Burford had made the sufficient showing by offering in his pleadings to do equity, the Court held that Burford was entitled to specific performance. *Id.* at 145. The Court later confirmed that holding, saying that *Burford* adopted the substance of the rule that "if, because of defects in the vendor's title, which he fails or refuses to

cure, . . . a tender of performance by the vendee would be a useless act . . . , his failure to make such tender will not preclude in his behalf the equitable relief of specific performance, at least where he tenders performance in his bill or petition." *McMillan v. Smith*, 363 S.W.2d 437, 442–43 (Tex. 1962) (quoting 79 A.L.R. 1240).

Although the Court claims *Burford* holds that a non-breaching plaintiff is required to prove he was ready, willing, and able to perform, and somehow distinguishes between tender and proof of ability to pay, the Court misrepresents the rule in that case. In *Burford*, the Court held that when a seller repudiates the contract, tender is excused and "all that is required" is that the plaintiff offer to do equity, which can be done in the pleadings. 199 S.W.2d at 143. *Burford* does not support the Court's new rule, and neither do the other cases relied on by the Court.

The Court cites *Corzelius v. Oliver*, another case involving the buyer's ability to pay within a contractual time limit for exercising an option. 220 S.W.2d 632, 633 (Tex. 1949). In *Corzelius*, the plaintiff had a one-year option to reacquire lands conveyed to his ex-wife as part of a divorce settlement. *Id.* Although the plaintiff attempted to exercise the option, his ex-wife (the defendant) refused because she objected to his source of financing, and eventually a jury found for the plaintiff. *Id.* at 633–34. At trial, one of the issues before the jury was whether the plaintiff could have made payment within the one-year time limit contemplated by the contract. *Id.* at 634. The jury found that, but for the defendant's actions, such a payment could have been timely made. *Id.* On appeal, the only issue was the defendant's contention that "there was no evidence to show that Corzelius was ready and able to perform within the time limit of the option." *Id.* In addressing that point, the Court noted that "it would appear but reasonable" for Corzelius to show that he could have performed

under the agreement, *id.* at 635, and then detailed the evidence to conclude that there was at least some evidence to support the jury's finding in that regard. *Id.* Certainly, taken alone, this part of *Corzelius* could arguably support an interpretation that proof of the ability to pay is an appropriate subject for a fact-finder's consideration in a specific performance case. But such a reading is not accurate and has given rise to confusion in the lower courts. Contrary to the Court's conclusion, *see* ___ S.W.3d at ___, nowhere does *Corzelius* indicate that a non-breaching buyer, under a non-option contract, must prove ability to perform at the time specified in the contract when tender of payment is excused. *Corzelius* is distinct from the non-option contract case because the timing of the buyer's ability to pay was relevant to whether the buyer had exercised his option to purchase and therefore the seller had an obligation to convey the property. Even when a buyer must show ability to pay, a buyer need not show a firm financing commitment to be entitled to specific performance, but need only put on evidence of his financial capacity and creditworthiness. *Corzelius*, 220 S.W.2d at 635 (recognizing that financing sources would probably be reluctant to execute a commitment for financing to complete a sale of lands the owner had decided not to convey). Notwithstanding the evidence offered at trial and the jury's finding, "Corzelius [was not] bound to do more here than make the tender which was contained in his pleadings." *Id.*

It appears that misreading of the brief statements in *Burford* and *Corzelius* led courts of appeals to rule erroneously that a plaintiff seeking specific performance must always prove to a fact-finder that he is ready, willing, and able to perform under the contract. *See 17090 Parkway, Ltd. v. McDavid*, 80 S.W.3d 252, 256 (Tex. App.—Dallas 2002, pet. denied); *Chessher v. McNabb*, 619 S.W.2d 420, 421 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ); *Hendershot v. Amarillo*

Nat'l Bank, 476 S.W.2d 919, 920 (Tex. Civ. App.—Amarillo 1972, no writ). Those cases did not offer any reasoning as to why proof before a fact-finder is necessary even though actual tender is excused when a seller has breached. On this point, *17090 Parkway* simply cites *Chessher* and *Hendershot*. 80 S.W.3d at 256. *Chessher* cites only *Hendershot*. 619 S.W.2d at 421. *Hendershot* cites only this Court's decisions in *Burford* and *Corzelius* without any analysis and without recognizing that those cases involved option contracts containing conditions precedent to the seller's obligation to convey the property. *See* 476 S.W.2d at 920. *Hendershot*'s misreading of *Burford* and *Corzelius* therefore resulted in repeated error in the courts of appeals, which now repeats itself in this Court, eclipsing the long-standing rule that a party seeking specific performance need only offer to perform in its pleadings.

Lawler cites a number of cases in support of his position that ability to pay must be proven at trial, but I am not persuaded that such a rule exists in Texas.[2] As already discussed, the cases requiring proof of ability to pay at trial are perpetuating *Hendershot*'s erroneous reading of our opinions in *Burford* and *Corzelius*, which did not distinguish, as the Court does, between an excused tender requirement and an unexcused requirement to prove ability to pay. The Court contends that such a distinction is "entirely reasonable," noting that a party could well offer performance but not be capable of performing. ___ S.W.3d at ___. But when the seller's breach relieved the buyer of

[2] See *Kress*, 261 S.W.2d at 704 (recognizing that specific performance is an equitable remedy); *17090 Parkway*, 80 S.W.3d at 256 (relying on erroneous and distinguishable courts of appeals' cases, as explained above); *Lazy M. Ranch, Ltd. v. TXI Operations, LP*, 978 S.W.2d 678, 683 (Tex. App.—Austin 1998, pet. denied) (rejecting specific performance because the buyer breached the contract and had unclean hands); *Am. Apparel Prods.*, 880 S.W.2d at 269–70 (rejecting specific performance because the buyer unilaterally rescinded the contract); *Gordin v. Shuler*, 704 S.W.2d 403, 408 (Tex. App.—Dallas 1985, writ ref'd n.r.e.) (rejecting specific performance because the buyer failed to comply with the contract terms and failed to disclose material information); *Chessher*, 619 S.W.2d at 421 (same); *Hendershot*, 476 S.W.2d at 920 (erroneously interpreting *Burford* and *Corzelius*, as explained above).

his obligation to appear at closing and perform as required under the contract, it may be impossible for anyone to know whether the buyer could have performed. Continued efforts to perform such as arranging financing or appearing at the scheduled closing would be useless, just as the Court recognizes that tendering payment would be. The Court erroneously concludes that ordering specific performance without requiring the non-breaching buyer to prove ability to pay at the time required by the contract "grants the plaintiff more than he is entitled to under the contract." *Id.* at ___. In fact, the opposite is true. When a contract provides for simultaneous performance by both seller and buyer, the seller must give the buyer the full opportunity to perform as provided by the contract, or face remedies for breach in cutting off that opportunity. Requiring a buyer to prove that it could have performed at a time when the seller's breach eliminated that obligation and when the subject property was under contract for sale to a third party imposes a much higher burden on the buyer than the contract requires. The seller's own breach cannot impose an extra-contractual obligation on the buyer to prove useless financing commitments. The Court contends that my view would "essentially rewrite the parties' contract" and "eliminate the plaintiff's contractual obligation to be capable of performance at the time the contract required." ___ S.W.3d at ___. In fact, it is actually the breaching seller who altered those contractual obligations when he breached the contract by agreeing to sell the property to a third party.

The Court relies on contracts treatises as support for its claim that requiring a non-breaching buyer to prove ability to pay is an entrenched rule in Texas jurisprudence. ___ S.W.3d at ___. The author of the primary treatise relied on by the Court cites law from various jurisdictions, seemingly favoring Montana and Connecticut, but the only citation to Texas law is to a case that does not

mention or discuss the showing a plaintiff must make to obtain specific performance. 25 RICHARD A. LORD, WILLISTON ON CONTRACTS § 67:15, at 236–38) (4th ed. 2002); *see Shuler v. Gordin*, 644 S.W.2d 446, 447–49 (Tex. 1982). Edward Yorio's treatise, which states the general rule that a plaintiff must show readiness, willingness, and ability to perform, is silent on whether or how a non-breaching buyer must make that showing. EDWARD YORIO, CONTRACT ENFORCEMENT: SPECIFIC PERFORMANCE AND INJUNCTIONS § 6.4, at 145 (1989 & supp. 2004). Yorio acknowledges the Texas rule in a footnote, however, by quoting a Seventh Court of Appeals case holding that "when the seller has conspicuously breached the contract, it is only necessary that the purchaser be ready and willing, and offers to perform within his pleadings." *Id.* at n.10 (quoting *Abraham Inv. Co. v. Payne Ranch, Inc.*, 968 S.W.2d 518, 527 (Tex. App.—Amarillo 1998, pet. denied), which relied on *Burford*, and also citing *17090 Parkway*). Comment b to section 363 of the Restatement (Second) of Contracts, which addresses securing performance for an agreed exchange and states that specific performance may be refused if "performance is not secured to the satisfaction of the court," supports the long-standing Texas rule:

> The desired security can often be afforded by the terms of the order itself. If performance by the injured party is already due or will be due simultaneously with the performance of the party in breach, the order may be made conditional on the injured party's rendition of his performance. . . .
>
> The question of security does not arise until the time for issuance of an order. At the pleading stage, a mere allegation by the plaintiff that he is ready and willing to perform is usually sufficient in a suit for specific performance or an injunction. Actual performance or tender is generally not required.

Restatement (Second) of Contracts § 363 cmt. b (1981). Because DiGiuseppe need only offer to perform in his pleadings to establish his entitlement to specific performance, the only disputed fact

issue to be resolved by the jury was whether Lawler breached the contract. *See White v. Sw. Bell Tel. Co.*, 651 S.W.2d 260, 262 (Tex. 1983) (holding that only disputed factual issues are presented to the jury).

Aside from the doctrinal reasons for this rule, there are important policy considerations at stake here. Requiring advance proof of an ability to pay puts the breaching seller in a better position than he would have been if the deal had gone through as contemplated in the contract by allowing him greater security in the solvency of the transaction. Unless the contract provides otherwise, sellers must wait until closing to find out whether the buyer can and will actually go through with the deal. If a seller suspects that a buyer cannot perform, the seller faces a choice: (1) wait until closing to see if the buyer tenders the required payment, or (2) breach the contract and face remedies for breach. The Court introduces the concept of harmless breach, concluding that a seller's breach "does no harm" when the seller, in advance of closing, believes a buyer will not be capable of performing under the contract and prematurely eliminates the buyer's opportunity to complete the transaction. ___ S.W.3d at ___. But such a breach, which cuts off a buyer's opportunity to show that he is in fact capable of performing at the time performance is due, is inherently harmful.

Requiring a non-breaching buyer to demonstrate ability to pay imposes a burden on buyers to secure firm funding commitments well in advance of closing and disclose funding sources, a burden that typically would not exist in transactions performed under a property sales contract. Until today, we have never required a non-breaching purchaser to put on such proof. *Cf. Corzelius*, 220 S.W.2d at 635 (explaining that it would not be necessary for a purchaser "to produce a firm commitment for an adequate loan" and recognizing that "[b]anks, insurance companies, and others

loaning money would probably be reluctant to execute a commitment for a loan to complete a sale of lands which the owner had declared she would not convey"). The sale of property often becomes a complex transaction that may involve developers with many properties, numerous lenders, investors who may wish to remain confidential until closing, and other sources of cash flow that may not come together until the last minute. Sellers find out at closing whether a buyer can pay, and buyers need not choose a source of financing or secure a financing commitment until shortly before closing. *See Shuler*, 644 S.W.2d at 448 (indicating that the time for buyer and seller to show their ability to perform is at closing). I see no reason to change this state of affairs simply because a seller has, for whatever reason, breached his agreement and forced a non-breaching plaintiff to seek judicial enforcement. And, in a case such as this, in which the buyer testified that he was ready and able to close when acceptable zoning was approved and continued to be ready and able to close, equity demands no more of a non-breaching buyer.

Finally, it is entirely possible that a buyer who is ready, willing, and able to perform at the time of trial may find his fortunes diminished by the time the closing date arrives such that he is no longer able to make payment. Just as we do not require tender of payment when it would be a "useless and idle ceremony," we cannot require a showing of ability to perform at the time of trial when it, in many cases, would be equally meaningless. *See Burford*, 199 S.W.2d at 145. The most efficient way to ensure DiGiuseppe's payment is not to burden the fact-finder with a speculative inquiry into the buyer's finances and potential financing prospects, but rather for the trial court to set a prompt closing date, supervised by the court, during which DiGiuseppe may tender

performance. Only then must DiGiuseppe prove ability to pay, by tendering the payment due. If DiGiuseppe is unable to close, Lawler will then be entitled to remedies the contract provides.

In my view, once a party has pled the remedy of specific performance with sufficient specificity, nothing else is required with regard to ability to pay. It is understood that by bringing the action (and undertaking the costs and risk involved in such litigation), the party is ready and willing to consummate the transaction should the court render judgment in its favor. Here, DiGiuseppe has done all that is required.[3] His first pleading in the trial court and his cross-petition requested the remedy of specific performance and stated that, as soon as acceptable zoning was approved, he was ready, willing, and able to satisfy his funding obligations under the contract. DiGiuseppe's pleadings indicated that he "possessed the necessary capital to move forward with the acquisition of the Property." Moreover, during trial, he testified that he was ready and able to close after March 7, 2000, the date the city council approved acceptable zoning.[4] DiGiuseppe stated that

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[3] Strictly speaking, the pleadings filed by DiGiuseppe did not request the remedy of specific performance. Frisco Master Plan, the limited partnership to which DiGiuseppe transferred his interest under the contract, requested specific performance as a third-party plaintiff to the suit between DiGiuseppe and Lawler. Accordingly, the trial court's judgment granted specific performance in favor of Frisco Master Plan, not DiGiuseppe. Because DiGiuseppe was acting on behalf of Frisco Master Plan and Southbrook Development Company, I have not distinguished between these three parties for the purposes of this opinion.

[4] DiGiuseppe testified as follows:

Q. Could you close after March 7th [the date DiGiuseppe accepted the zoning changes]?

A. Absolutely.

Q. Could Mr. Lawler close after March 7th?

A. No.

Q. Were you ready and able to close after March 7th?

A. We were.

he had three homebuilders who would have funded the purchase and that "if there hadn't been another contract in place, [they] would have closed the deal." Though the Court finds DiGiuseppe's testimony "equivocal and conflicting" because DiGiuseppe did not demonstrate that would not have been able to close the transaction on his own, ___ S.W.3d at ___, I am satisfied that DiGiuseppe presented at least some evidence of his ability, with the help of investors he had secured, to tender the money required under the contract.[5] *See Corzelius*, 220 S.W.2d at 635 (holding that a buyer is

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Q. Are you ready and able to close today?

A. We are.

* * *

Q. You want to close this contract in accordance with its terms, don't you?

A. Yes, I do.

[5] Though, as the Court points out, DiGiuseppe did not have cash in hand to personally tender payment under the contract, DiGiuseppe testified that he had secured financing sources.

Q. Now, you had no ability to close this transaction yourself, did you?

A. I, personally, was not going to close the deal myself, no.

Q. You were going to get some investors to do it, weren't you?

A. I had them.

* * *

Q. . . . Is there any question – I want you to tell the jury – is there any question that you have the commitments and have the money to close this deal?

A. Not at all –

* * *

Q. And can you close this deal now?

A. Yes.

obligated to do no more than offer to perform in his pleadings, but a buyer who put on some evidence of creditworthiness and willing funding sources sufficiently established ability to pay). Contrary to the Court's suggestion, DiGiuseppe was not required to prove that he had cash in hand or that a written financing agreement was in place. DiGiuseppe offered to do equity in his pleadings, and he presented some evidence of his willingness and ability to perform under the contract. When a seller's repudiation of a contract makes the buyer's tender of payment useless and excuses that requirement, there is no principled reason to impose on the innocent buyer an obligation to establish pre-closing funding arrangements, which is not required by the contract and has never been required by this Court. DiGiuseppe did all that is required to show that he is entitled to the remedy of specific performance. I believe that, upon the jury's finding that Lawler breached the contract and DiGiuseppe did not, the trial judge had authority to order specific performance. Because the Court holds otherwise, I respectfully dissent.

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PAUL W. GREEN
JUSTICE

OPINION DELIVERED: October 17, 2008