

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-657

CLAUDIO R. DAMASCENO

vs.

SAULO R. SAMPAIO & another.<sup>1</sup>

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Claudio Damasceno entered into an oral agreement to sell his house to Saulo and Mariangela Sampaio in exchange for (1) a \$24,000 cash payment, (2) the Sampaios' assumption of the property's mortgages, and (3) payment of all property-related expenses. When the Sampaios failed to complete the assumption of the first mortgage, Damasceno brought this action seeking to rescind the transaction, and to cancel the deed to the Sampaios. Damasceno appeals from a judgment dismissing his claims, entered after a bench trial before a judge of the Superior Court. For the reasons that follow we affirm, because rescission was not an available remedy under the facts as found.

Background. In late 2010, facing possible foreclosure on his house in Saugus, Damasceno entered into an oral agreement

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<sup>1</sup> Mariangela V. Sampaio.

with Saulo Sampaio to sell his house to the Sampaio's. Pursuant to the agreement, Damasceno would execute a deed with Mariangela<sup>2</sup> named as grantee, and in exchange the Sampaio's would pay Damasceno \$24,000, pay all property expenses, including payments on two mortgages,<sup>3</sup> and assume the mortgages (or refinance the property in their name).

Damasceno testified that the parties agreed that the Sampaio's would assume the mortgages within one year of the Sampaio's taking possession of the property. Saulo testified that while there was never a set date, it was anticipated that it would take one year to eighteen months to complete the assumption. Based on this testimony, the trial judge determined that while Damasceno and Saulo "did not set a deadline," they had "discussed the matter and initially believed that it would take a year to eighteen months for Saulo to accomplish the mortgage assumption."

In April 2013, over two years after the Sampaio's took possession of the house, the Sampaio's still had not assumed the first mortgage,<sup>4</sup> and Damasceno filed this action. After a bench

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<sup>2</sup> From this point we refer to the individual Sampaio's by their first names for convenience.

<sup>3</sup> The other expenses included taxes, insurance, utilities, and maintenance.

<sup>4</sup> The second mortgage was discharged in January 2013, and is not at issue.

trial of the parties' equitable claims in April 2017, the trial judge found that the Sampaios had performed substantially all of their obligations under the agreement. As to the obligation to assume the mortgage, the judge determined that the Sampaios had made a good faith effort either to assume the mortgage or to obtain substitute financing so that the mortgage could be discharged, and that the Sampaios' good faith efforts satisfied their contractual obligations. The judge accordingly ruled that the Sampaios were not in breach, and dismissed Damasceno's claims for rescission (count I) and cancellation of the deed (count II).<sup>5</sup> Thereafter, the judge entered an order requiring Damasceno to cooperate with the Sampaios to facilitate their assumption of the mortgage on the property. Final judgment entered on January 19, 2018, and on the same day, Damasceno filed a notice of appeal.

Discussion. We review the trial judge's findings of fact for clear error. Aggregate Indus.-Northeast Region, Inc. v. Hugo Key & Sons, 90 Mass. App. Ct. 146, 149 (2016), citing Twin Fires Inv., LLC v. Morgan Stanley Dean Witter & Co., 445 Mass. 411, 420 (2005), and Mass. R. Civ. P. 52 (a), as amended, 423 Mass. 1402 (1996). The judge's conclusions of law are reviewed

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<sup>5</sup> The Sampaios' counterclaims seeking specific performance and alleging unjust enrichment, not on appeal here, were also dismissed; a third counterclaim -- for intentional infliction of emotional distress -- was dismissed voluntarily by the Sampaios.

de novo. Aggregate Indus.-Northeast Region, Inc., supra, citing Martin v. Simmons Props., LLC, 467 Mass. 1, 8 (2014).

1. Claim for rescission. Rescission is a potential remedy for breach of contract, but rescission is not an available remedy for any and all breaches. Rather, a plaintiff seeking rescission must show a breach that has deprived him or her of the essence of the agreement. "In the absence of fraud, nothing less than conduct that amounts to an abrogation of the contract, or that goes to the essence of it, or takes away its foundation, can be made a ground for rescission of it by the other party." Worcester Heritage Soc'y, Inc. v. Trussell, 31 Mass. App. Ct. 343, 345 (1991), quoting Rankle v. Burrage, 202 Mass. 89, 99 (1909).

The facts here do not justify the rescission remedy. The first issue, of course, is whether there was even a breach of contract. The trial judge ruled that there was not, reasoning that it was sufficient that the Sampaios had made "good faith efforts" to assume the mortgage. As to that question we are inclined to agree with Damasceno that the contract required more than "good faith efforts." Rather, the parties' agreement requires that Damasceno be relieved of his obligation to pay on the mortgage. That the parties did not specify a time for performance is not critical, because where time for performance is an omitted material term, the law generally will impose a

reasonable time. See Warren v. Ball, 341 Mass. 350, 352-354 (1960). See also Barber v. Fox, 36 Mass. App. Ct. 525, 528 (1994); Charles River Park, Inc. v. Boston Redev. Auth., 28 Mass. App. Ct. 795, 814 (1990). When the underlying facts are undisputed, what constitutes a reasonable time is a question of law. Id. Here the Sampaios were required to relieve Damasceno of his mortgage obligation within a reasonable time of taking possession of the home. "Good faith efforts" are not enough.<sup>6</sup>

Nevertheless, we need not decide precisely when the Sampaios were obligated to assume the mortgage, or whether the Sampaios were in breach at the time of trial, because in any event rescission was not an appropriate remedy on these facts. The Sampaios' failure to assume the mortgage did not "go[] to the essence" of the contract, or "take[] away its foundation." Worcester Heritage Soc'y, Inc., 31 Mass. App. Ct. at 345. Quite the contrary, Damasceno was not even harmed by the failure to assume; the Sampaios were paying the mortgage, and it was current, as were all the other expenses of the home such as taxes, insurance, and maintenance. The fundamental essence of

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<sup>6</sup> We need not define the time for performance, as it is not critical to our decision. The ability of the Sampaios to assume the existing mortgage is dependent on the agreement of the lender, which may not be forthcoming. In those circumstances the Sampaios will need to find another means to relieve the plaintiff of his mortgage obligation. The trial judge recognized this in his decision.

the agreement was that Damasceno would recover his equity in the home (\$24,000) and be relieved of the obligation to pay the mortgage and expenses, which he could not afford. That fundamental essence had been met, as of the time of trial. We have said that equitable considerations disfavor rescission as a remedy for a "mere failure to perform a promise." DiBella v. Fiumara, 63 Mass. App. Ct. 640, 646 (2005), quoting Restatement (Second) of Property (Landlord & Tenant) § 13.1 comment j (1977). Under the circumstances, there was not, as Damasceno contends, an "utter failure of consideration." Worcester Heritage Soc'y, Inc., supra.<sup>7,8</sup>

2. Claim for cancellation of the deed conveying the property. Damasceno also argues that the judge erred in ruling that Damasceno was not entitled to a cancellation of the deed. Relying on cases where a conveyance of a deed was made upon an express condition stated either in the deed or by separate

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<sup>7</sup> Our resolution would not bar Damasceno from seeking contract damages if, at some point in the future, circumstances changed and he was damaged because the Sampaios had failed to relieve him of his mortgage obligation.

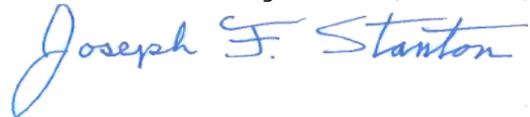
<sup>8</sup> We note that there apparently was another flaw in Damasceno's rescission theory, which we need not reach. The rescission remedy requires the parties to be returned to their respective positions before the contract's inception. May v. SunTrust Mtge., Inc., 467 Mass. 756, 763-764 (2014). Damasceno accordingly would have needed to tender to the Sampaios at least (1) the \$24,000, and (2) any reduction in the mortgage principal as a result of the Sampaios' payments of the mortgage. See Lincoln Inv. Co. v. James, 260 Mass. 541, 543 (1927). There is no evidence of such a tender in the record before us.

agreement, he contends that a deed will be cancelled where the grantee fails to fulfill the condition. See Collins v. Keefe, 332 Mass. 375, 377 (1955) (condition in deed). See also Rayner v. McCabe, 319 Mass. 311, 313 (1946) (condition made by separate agreement); Vincent v. Torrey, 11 Mass. App. Ct. 463, 467 (1981) (condition made by oral promise). In these cases, however, the reconveyance was supported by evidence indicating that there was a substantial failure to perform by the defendants. See, e.g., Vincent, 11 Mass. App. Ct. at 465 (master found that, aside from some limited performance of agreement to take care of original elderly homeowners and their property, defendants engaged in "unkind and unreasonable" caretaking and failed to timely pay taxes and other expenses). For the same reasons that Damasceno has failed to establish his entitlement to rescission, he has similarly failed to establish an entitlement to have the deed cancelled -- the Sampaios' failure to complete the assumption of the mortgage did not constitute an essential breach of their agreement or cause Damasceno harm.

For these reasons, we affirm.

Judgment affirmed.

By the Court (Hanlon,  
Kinder & Englander, JJ.<sup>9</sup>),



Clerk

Entered: July 3, 2019.

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<sup>9</sup> The panelists are listed in order of seniority.