

# THE STATE OF NEW HAMPSHIRE

## SUPREME COURT

**In Case No. 2017-0487, In re Simone Garczynski Irrevocable Trust, the court on July 26, 2018, issued the following order:**

The appellant, Michael Garczynski (Michael), appeals an order of the Circuit Court (Quigley, J.) denying a motion in which he sought to invalidate a conveyance of real property by the Simone Garczynski Irrevocable Trust (trust) to its trustee, James Garczynski (James), and to compel its conveyance to him. Michael argues that the trial court erred by finding that he had forfeited his right to purchase the property pursuant to a prior mediation agreement and a court order implementing that agreement. We vacate and remand.

Michael and James are brothers and beneficiaries of the trust. Their now-deceased mother, Simone Garczynski, previously owned the property at issue. According to the trial court, both Michael and James have “frequently expressed interest in purchasing the property from the Trust.”

In November 2015, the trial court accepted a mediation agreement that granted Michael the right to purchase the property at a price to be determined by appraisals, and required him to communicate whether he intended to exercise his right no later than March 15, 2016. The agreement was silent, however, as to the mechanics of how a sale to Michael would proceed.

In accordance with the agreement, Michael notified the trustee of his intent to purchase the property. Thereafter, counsel for the trust inquired of Michael whether he could afford the purchase price and whether the property was appropriate for him in light of certain disabilities that he has. Michael did not respond to counsel’s letter, and James subsequently moved to set the mediation agreement aside and allow him to purchase the property, arguing that Michael had done nothing to complete a purchase. Following a hearing, the trial court denied the motion, finding “that there was miscommunication between [Michael and James] and insufficient specificity in the mediation agreement to determine whether Michael . . . had appropriately responded.” To allow Michael “an appropriate opportunity to effectuate the transfer of the property from the trust to him,” the trial court articulated several terms governing any conveyance of the property to Michael. Among the terms, the order provided Michael with “60 days from the date of this order to close on the property, unless otherwise agreed by the parties in writing prior to the expiration of 60 days,” and required that he “provide a bank check made payable to the Simone Garczynski Irrevocable Trust for the full amount owed” at the closing. If Michael did not complete the

purchase within sixty days, James was allowed to purchase it on the same terms and conditions. The order was signed by the court on October 18, 2016, and issued by notice of decision dated October 24, 2016.

The parties subsequently agreed to conduct a closing at 1:00 p.m. on Thursday, December 15, 2016. Counsel for the trust had initially proposed a 1:00 p.m. closing on Friday, December 16. In requesting that the closing instead occur during the afternoon of December 15, counsel for Michael explained that he had limited availability during the afternoon of December 16, that he was going to be in Florida on a family vacation the following week, that the week after that was Christmas vacation, and that he was concerned that, should a problem arise during a December 16 afternoon closing, the parties might not have sufficient time to address it.

Prior to the scheduled closing time on December 15, Michael and his attorney went to a branch of his bank in order to obtain a bank check for the closing funds. Because Michael's driver's license had expired nine years earlier, however, the branch supervisor refused to issue a check. At 11:14 a.m., Michael's attorney sent counsel for the trust an e-mail stating that Michael would be unable to close that day or the next, and that he would send a more detailed letter of explanation. At 4:59 p.m., Michael's attorney sent counsel for the trust a letter explaining what had occurred when Michael had attempted to obtain the bank check, and reminding counsel that he would be out of state from Saturday, December 17, through Christmas. Michael's attorney stated that Michael was going to attempt to obtain a bank check from a different branch, that he hoped to send the necessary closing documents to counsel for the trust on the following day, that Michael had provided him with a power of attorney so that Michael's presence would not be necessary to complete any transaction, and that he hoped the parties would be able to resolve any outstanding issues upon his return from vacation. Counsel for the trust responded by letter at 4:59 p.m. on Friday, December 16, asserting that under the October order, the sixty-day deadline to close would expire at midnight on Saturday, December 17, and that unless she had received a bank check and accurate, updated closing documents by that time, Michael's right to purchase the property would become "moot."

On December 17, Michael obtained a bank check in the amount of \$179,786.35 from a different branch of his bank, and mailed it to his attorney's office. The check was made payable to the order of the Simone Garczynski Revocable Trust, rather than the Simone Garczynski Irrevocable Trust; there is no Simone Garczynski Revocable Trust. Michael's attorney received the check on December 22, and later that day, sent a copy of it to counsel for the trust and requested that the parties conduct a closing on December 26 or 27, 2016, when he would be back from vacation. At the hearing on the motion at issue in this appeal, Michael's counsel represented that although he was still in Florida on December 22, "if push came to shove, [he had] somebody in [his] office [who]

could have taken care of [a closing] on [December] 23rd.” Counsel for the trust, however, responded by letter on December 22, stating, in its entirety, as follows:

I have read your letter of this date. You must also have received my letter of December 16, 2016. I stand by my interpretation of the Court’s Order. Your client had until midnight of December 17, 2016, to close. At your insistence, we agreed to close on the 15th. Your client failed to close. He has lost his right to purchase. Hence, there will be no closing on the 26th or 27th.

The trust subsequently conveyed the property to James, and Michael filed the present motion seeking to invalidate the conveyance and to compel a conveyance of the property to him. Michael argued, in part, that under the October order, “60 days from the date of this order” meant sixty days from the October 24, 2016 notice of decision, not sixty days from October 18, 2016, when the trial judge signed the order. Because he had secured the necessary funds to complete the transaction, and because he was ready, willing, and able to complete it by December 23, 2016, Michael argued that he was entitled to purchase the property, but that the trustee’s refusal to close after December 17 foreclosed “any right that [he] had to purchase the property” after December 17. The error in the manner in which the trust was named as payee on the bank check, according to Michael, was an error that the bank had made, and that could readily have been rectified. The trustee countered that, under the plain language of the October order, the trial court intended “60 days from the date of this order” to mean sixty days from when it was signed, or December 17, 2016. The trustee observed that Michael never, in fact, offered to close on December 23. The trustee further took the position that Michael’s attempt to obtain a bank check with an expired driver’s license on the date of the closing, and the error in the bank check that he obtained, established that his failure to timely close was attributable to his own dilatory conduct.

The trial court agreed with Michael’s interpretation of the October order, ruling that the sixty-day closing period ran from the notice of decision, and that, therefore, Michael had until December 23 to complete the closing. Nevertheless, the court concluded that the trustee’s error in requiring a December 17 closing did not “excuse Michael[’s] . . . neglect to act.” Specifically, the trial court faulted Michael for not attempting to secure a bank check until shortly before the scheduled closing, for obtaining a bank check containing an error in the payee’s name, for not securing another closing agent during his counsel’s vacation, for not attempting to reschedule the closing to a date and time within the sixty-day closing period, and, despite the December 22 written request of Michael’s attorney to conduct a closing on December 26 or 27, for not seeking the trustee’s agreement or a court order to extend the deadline beyond December 23.

The trial court ruled that the closing did not occur as a result of Michael’s dilatory and neglectful actions and, thus, that Michael forfeited his right to

purchase the property. We will not disturb the trial court's ruling unless it is unsupported by the evidence or plainly erroneous as a matter of law. Hodges v. Johnson, 170 N.H. 470, 480 (2017); see also RSA 567-A:4 (2007). On appeal, Michael argues, in part, that the trustee's outright refusal to close after December 17 prevented a timely closing from occurring, thereby excusing his failure to close within the deadline as a matter of law. We agree.

At the outset, we reject the trustee's argument that, because a judgment is "effective" from the time it is "rendered," and is "rendered" when it is announced by memorandum filed with the clerk, Gray v. Kelly, 161 N.H. 160, 167 (2010), the trial court necessarily erred as a matter of law by ruling that the sixty-day closing period ran from the October 24, 2016 notice of decision. We note that this is an argument that the trustee did not make in the trial court. See Bean v. Red Oak Prop. Mgmt., 151 N.H. 248, 250 (2004). Nor did the trustee file a cross-appeal from the trial court's adverse ruling that the closing period ran from the notice of decision. See Mass. Bay Ins. Co. v. Am. Healthcare Servs. Assn., 170 N.H. 342, 353-54 (2017). Even if we assume, without deciding, that this issue is properly before us, in concluding that the sixty-day closing period ran from the October 24, 2016 notice of decision, the trial court did not determine the "effective" date of its judgment or when it had "rendered" the judgment. Rather, it simply interpreted its prior order to determine what it had meant when it provided Michael with sixty days "from the date of this order" in which to close. Upon this record, we cannot say that the trial court erred in interpreting its prior order. Cf. In the Matter of Salesky & Salesky, 157 N.H. 698, 702 (2008) (the interpretation of a court order is a question of law subject to de novo review).

"While the performance of the terms of a contract can ordinarily be fully required, still if it can be shown that the performance of the contract was prevented directly or indirectly by the act of the promisee, its non-performance will be excused." Cheshire Oil Co. v. Springfield Realty Corp., 118 N.H. 232, 240 (1978) (quotation omitted); see also Pierce v. Morse, 65 N.H. 196, 200 (1889) (holding that, where purchaser's strict compliance with the conditions of a contract for the sale of property was prevented by sellers' honest but mistaken interpretation of the contract, purchaser was entitled to specific performance). Likewise, when a party unequivocally repudiates that party's contractual obligations prior to when that party's performance is due, that party is deemed to be in breach of the contract, excusing the other party's further performance. McNeal v. Lebel, 157 N.H. 458, 462 (2008).

Under the terms of the October 2016 order, Michael had until December 23, 2016, or until a later date if the parties "otherwise agreed . . . in writing prior to" December 23, in which to complete the purchase. Nevertheless, when Michael's counsel disclosed the issue concerning the bank check on December 15, explained that Michael would attempt to obtain the bank check from a different branch, and expressed a desire to resolve any outstanding issues upon his return from vacation, counsel for the trustee replied that she would not

convey the property to Michael at all unless he presented “updated, accurate closing documents and a bank check . . . prior to 11:59 p.m. on December 17, 2016.” Although the trial court may be correct that Michael acted neglectfully by waiting until just prior to the December 15 scheduled closing to request a bank check with an expired driver’s license, under the court’s order, he still had more than a week in which to complete the transaction at that point, and the record establishes that his attorney had prepared a deed and settlement documents incorporating edits requested by the trustee, and had obtained Michael’s power of attorney to complete the transaction.

Michael was, in fact, able to obtain the bank check on December 17, some six days prior to the December 23 deadline. Although the check contained an error in the name of the payee, the fact that Michael obtained it shows that the bank was willing to issue him the necessary funds to complete the purchase. When Michael’s attorney forwarded a copy of the bank check to the trustee’s attorney on December 22 and requested a closing on December 26 or 27, he effectively sought an agreement in writing to extend the deadline by three or four days. Although Michael’s attorney did not ask to close on December 23, the closing deadline had not yet passed, and Michael was entitled to seek the trustee’s agreement for the brief extension under the terms of the October order. The trustee’s response — that there would be no closing because Michael had failed to close by December 17 — constitutes the trustee’s unequivocal refusal to convey the property to Michael after December 17.

We conclude that, by refusing to convey the property at any time after December 17, the trustee repudiated his obligations under the October order as a matter of law, thereby preventing Michael from closing in accordance with the terms of the October 2016 order. Under these circumstances, Michael’s failure to close by December 23, 2016 was excused, and the trial court’s ruling to the contrary was plainly erroneous as a matter of law.

Because the trial court erred by ruling that Michael forfeited his right to purchase the property under the October 2016 order, we vacate and remand for further proceedings consistent with this order. We leave it to the trial court, with input from the parties, to determine an appropriate remedy upon remand.

Vacated and remanded.

BASSETT, HANTZ MARCONI, and DONOVAN, JJ., concurred.

**Eileen Fox,  
Clerk**