

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

) IN THE COURT OF COMMON PLEAS
)
) CASE NO.: 2021-CP-07-00482_

MFM PROPERTIES, LLC and.,
MFM RESIDENTIAL PROPERTIES,
LLC,

Plaintiffs,

v.

ROTUNDA LAND &
DEVELOPMENT GROUP, LLC, and
CALLOWAY TITLE & ESCROW,
LLC,

Defendants.

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Jun 23 2022

SC Court of Appeals

**ORDER GRANTING
PLAINTIFFS' MOTION
FOR SUMMARY JUDGMENT**

This matter came before the Court on motion by the Plaintiffs, MFM Properties, LLC and MFM Residential Properties, LLC (MFM), for summary judgment against the Defendant, Rotunda Land & Development Group, LLC (“Rotunda”) on the basis that there is no genuine issue of material fact. Plaintiffs by their Complaint seek the payment of forfeited earnest money to them by Rotunda. This matter was argued before the Court on April 5, 2022 at the Beaufort County Courthouse with counsel for Plaintiffs and counsel for Rotunda present. Counsel for both sides waived a court reporter and therefore this Motion is decided on the filed pleadings, memoranda, and other documents filed in connection with this matter. After considering all the information provided, the Court hereby GRANTS the Plaintiffs’ Motion for Summary Judgment.

Factual Background

MFM Properties, LLC and MFM Residential Properties, LLC (collectively, “MFM” or “Plaintiffs”) entered into a Purchase and Sale Agreement with Rotunda effective August 19, 2019

(“Agreement”) for the sale of undeveloped real property located in Hardeeville, Jasper County, South Carolina (“Property”) for \$16,000,000.

Per Section 1(b) of the Agreement, in partial consideration of MFM’s execution of the Agreement, Rotunda agreed to deposit One Hundred Thousand (\$100,000.00) Dollars and no/cents in escrow with escrow agent, Defendant Calloway Title and Escrow, Inc. (“Escrow Agent.”)¹ This sum is the “Initial Earnest Money.” Per Section 12(b) of the Agreement, should Rotunda default under the Agreement, one of MFM’s remedies was that the Initial Earnest Money would be forfeited to MFM.

Rotunda by letter dated February 12, 2020 exercised an option to extend an Initial Inspection Period pursuant to the Agreement and tendered an extension fee to the Escrow Agent on February 13, 2020 as provided for in the Agreement. By letter of April 17, 2020, Rotunda terminated the Agreement in accordance with Section 3(c) of the Agreement which entitled MFM to recover the Initial Earnest Money.

Rather than require the forfeiture of the Initial Earnest Money, an amendment to the Purchase and Sale agreement was made. By a Reinstatement of and First Amendment to the Agreement dated July 8, 2020 (“First Amendment”), Plaintiffs and Rotunda agreed to reinstate, amend and modify the Agreement. Among the terms of the First Amendment was that Rotunda per Section 4(b) tender a second One Hundred Thousand (\$100,000.00) Dollars and no/cents in escrow with Escrow Agent by November 30, 2020. This sum is called the “Additional Earnest

¹ Calloway Title & Escrow, LLC is a defendant in this lawsuit only by virtue of the fact that it holds the Initial Earnest Money in trust. Calloway has been served but has not answered or appeared as all parties agree that Calloway is a nominal party with the sole purpose of paying the Initial Earnest Money to the prevailing party in this litigation. MFM seeks in its Third and Fourth Causes of Action an order that Calloway pay the Initial Earnest Money to MFM, which is granted as noted *infra*.

Money” in the First Amendment and herein. The First Amendment also confirmed at Section 4(a) that the Initial Earnest Money was non-refundable.

Rotunda failed to deposit either the Additional Earnest Money or the additional extension fee with the Escrow Agent by November 30, 2020 as required by the First Amendment. Rotunda failed to close on the property as required by the Agreement and First Extension. MFM demanded that Rotunda direct the Escrow Agent to pay the Initial Earnest Money of \$100,000 to MFM and Rotunda has failed to do so. Further, MFM has demanded that Rotunda pay the Additional Earnest Money to MFM and Rotunda has failed to do so.

While admitting that it had not performed these steps required by the Agreement and First Amendment, Rotunda repeatedly asserts in its Answer that it is “ready and willing and able to do so.” Additionally, at some point in late November and early December 2020, Paul Lange, owner of Rotunda, had conversations with Harry Morgan, a principal of MFM. In these conversation, Lange discussed a need for additional time to execute the Purchase and Sale agreement due to Covid-19 affecting the planning process with the Town of Hardeeville.

Notwithstanding Rotunda’s position that it was still negotiating, MFM through legal counsel told Rotunda four times in December 2020 that Rotunda must either close by December 31, 2020 or send the Initial Escrow Money and the Additional Escrow Money to MFM. MFM declared the Agreement and First Amendment irrevocably in default by letter of January 12, 2021. This lawsuit followed.

Law

Summary judgment is proper when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c),

SCRCP. “In determining whether a genuine issue of material fact exists, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party.” Bass, 395 S.C. at 133–34, 716 S.E.2d at 912 (citing Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P., 385 S.C. 452, 456, 684 S.E.2d 756, 758 (2009)). The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder. Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 433, 438 (2003). Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent’s case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. Regions Bank v. Schmauch, 354 S.C. 648, 582 S.E.2d 432, 438 (Ct. App. 2003).

Discussion

There is no genuine issue of material fact at issue in this case. Rotunda breached the Agreement and its First Amendment by its failure to perform as required by the agreements. These agreements are subject to the Statute of Frauds and contain unambiguous information.

Rotunda defaulted under the First Amendment. There is no dispute that Rotunda failed to perform as the First Amendment required. To recover for a breach of contract, the plaintiff must prove:

- (1) A binding contract entered into by the parties;
- (2) A breach or unjustifiable failure to perform the contract; and
- (3) Damage suffered by the plaintiff as a direct and proximate result of the breach.

Fuller v. E. Fire & Cas. Ins. Co., 240 S.C. 75, 124 S.E.2d 602 (1962).

The the parties, entered into the Agreement and First Amendment, which are binding contracts between MFM and Rotunda. These written contracts were clearly signed by the sophisticated parties and witnesses and contain unambiguous language. The damages are the

\$100,000 in Initial Earnest Money and \$100,000 in Additional Earnest Money, plus prejudgment interest, and the prevailing party's reasonable costs and attorney's fees per Section 15(g) of the Agreement.

Rotunda claims that there is an issue of material fact and there is no actual breach or unjustified failure to perform as it is still "ready, willing and able" to perform and that at one time, it claims one of the owners of MFM, Harry Morgan, discussed with the principle owner of Rotunda, Paul Lange, a possible new deal regarding the Property. However, these allegations, as noted *infra*, do not create a question of fact, rather this issue is a question of law.

Rotunda is owned primarily by Paul Lange, Rotunda's SCRCP 30(b)(6) deposition designee, and his wife. Mr. Lange is a highly sophisticated real estate investor with a career in commercial development. Lange in no way disputed any of the terms of the Agreement or First Amendment in the Rotunda deposition. He admitted these were the only written agreements with MFM but made references to discussions with Harry Morgan of MFM. (Lange Dep. 23: 13 – 25).

When asked repeatedly for the terms of any other agreement with MFM regarding the Property, Lange never could identify one with any specificity. However, he finally admitted that MFM Properties never granted an extension to the First Amendment, at least not one that was written or with any terms like time, place or consideration. (Lange Dep. 29: 8-12).

Lange testified during his deposition that MFM asked Rotunda, through an alleged intermediary of MFM, to present a contract for an extension to MFM. Rotunda subsequently by a proposed letter of intent dated March 11, 2021² with an increase in purchase price to \$16,500,000

² This was well after the Agreement and First Amendment had been declared irrevocably terminated by MFM on January 12, 2021 as noted *supra*.

sought *reinstatement* of the Agreement and First Amendment, but that MFM never accepted those terms. Plaintiffs' response was this lawsuit. (Lange Dep. 82:14-25; 83:14-25).

Lange also admitted that notwithstanding Rotunda's assertion that it was ready, willing and able to perform the Agreement and First Amendment, Rotunda never paid the Additional Earnest Money, and has not to this date. (Lange Dep. 38:14-22). Lange admitted that no one at MFM told him not to pay the Additional Earnest money; rather, Lange just *inferred* it from a conversation he alleged he had with Harry Morgan. (Lange Dep. 38: 24-25; 40:3-6; 84:15-25; 85: 1-12).

Lange never could say that he was expressly told that Rotunda would be granted another extension. For several legal reasons as delineated below, Rotunda's characterization of any discussions held with MFM do not rescue it from summary judgement.

First, the Agreement's merger clause at Section 14 bars an oral change to the Agreement³ on these facts. Section 14 states that the Agreement is the only agreement and no modification may be made except in writing signed by both parties. The Agreement also has a non-wavier provision at Section 15(b) that states:

No failure by either party to exercise any power given either party hereunder or to insist upon strict compliance by either party with its obligations hereunder, and no custom or practice of the parties at variance with the terms hereof shall constitute a waiver of either party's right to demand exact compliance with the terms hereof.

(Rotunda Dep., Ex 2.)

Beyond the merger clause, the parole evidence rule bars any attempt by Rotunda to change the terms of these written agreements. "When an agreement is reduced to writing, there is a strong implication the whole intention of the parties has been expressed and there is no agreement or

³ The First Amendment did not change these terms; per Section 2 it was simply a reinstatement of the Agreement with a few changed terms. Further, the First Amendment at Section 7 also expressly ratified the Agreement's terms, including those listed above.

intention contrary to that expressed.” Lingefelt v. Forest Hills Homes, Inc., 305 S.C. 197, 201, 406 S.E.2d 394, 396 (Ct. App. 1991) (quoting Palmetto State Sav. Bank of S.C. v. Barr, 293 S.C. 252, 254, 359 S.E.2d 531, 532 (Ct. App. 1987). “The parole evidence rule is particularly applicable where the writing in question has an integration clause.” U.S. Leasing Corp. v. Janicare, Inc., 294 S.C. 312, 318, 364 S.E.2d 202, 205 (Ct. App. 1988).

The parole evidence rule does not prohibit evidence of a subsequent and independent agreement. Lingefelt, 406 S.E.2d at 396. However, any modification of written contract must satisfy all requisites of valid contract. Bishop Realty & Rentals, Inc. v. Perk, Inc., 292 S.C. 182, 355 S.E.2d 298 (Ct. App. 1987). As noted *infra*, Rotunda fails to demonstrate such elements.

For an alleged modification of the Agreement, Rotunda provides no evidence of the essential terms of a contract extension, such as price, time for performance, and Rotunda does not even claim that such essential terms of a contract were agreed to. “It is well settled in South Carolina that in order for there to be a binding contract between parties, there must be a mutual manifestation of assent to the terms.” Potomac Leasing Co. v. Otts Mkt., Inc., 292 S.C. 603, 606, 358 S.E.2d 154 (Ct. App. 1987). “Furthermore, the assent must be as to all the terms of the contract.” Id. (Emphasis added.)

The formation of a contract requires offer, acceptance and consideration for all of which there must be mutual assent, or a "meeting of the minds" as to the essential terms. Player v. Chandler, 299 S.C. 101, 382 S.E.2d 891, 895 (1989). “Certain terms, such as price, time and place, are considered indispensable and must be set out with reasonable certainty.” McPeters v. Yeargin Const. Co., 290 S.C. 327, 350 S.E.2d 208, 211 (Ct. App. 1986); Player, 382 S.E.2d at 895 (contract “must reasonably identify the subject matter of the contract, sufficiently indicate a contract has

been made between the parties, and state with reasonable certainty the essential terms of the agreement.”)

Thus, there can be no contract where the parties never completed their negotiations or where essential terms are lacking. As stated by the Supreme Court:

Frequently, agreements are arrived at piecemeal with different terms and items being discussed and agreed upon separately. However, as long as the parties know there is an essential term not yet agreed on, there is no contract. The preliminary agreements on specific items are mere preliminary negotiation building up the terms of the final offer that may or may not be made.

Stevens & Wilkinson of S.C., Inc. v. City of Columbia, 409 S.C. 568, 582, 762 S.E.2d 696, 703 (2014), quoting 1 Corbin on Contracts § 2.8. See W.E. Gilbert & Assocs. v. S.C. Nat. Bank, 285 S.C. 421, 330 S.E.2d 307, 309 (Ct. App. 1985). Also see, Oeland v. Kimbrell's Furniture Co., 210 S.C. 223, 42 S.E.2d 228, 230 (1947)(“[M]aterial terms of the contract cannot be left for future settlement.”) Craven v. Williams, 302 F. Supp. 885, 890 (D.S.C. 1969) (“[A] contract is not made so long as both parties anticipate that something remains to be done to establish contractual relations.”); and Savannah Guano Co. v. Fogle, 112 S.C. 234, 100 S.E. 59 (1919)(party cannot be held liable for only promising to make a contract and refusing later to fulfill that promise where all terms are not agreed upon.)

Even interpreting all evidence favorably for Rotunda, Rotunda offers no evidence of any price (consideration), or time for performance for an oral modification of the Agreement or First Amendment., Thus, there is no genuine issue of material fact that a subsequent modification agreement formed; at best these were only negotiations.

Finally, even if Rotunda had produced sufficient evidence to show all the terms of an agreement that somehow modified the Agreement, there is no evidence of a *written* amendment to the Agreement and First Amendment. This is fatal to Rotunda’s defense. These agreements are

for the sale of land. The South Carolina Statute of Frauds requires that any contract for an interest in land must be in writing and signed by the party against whom it is seeking to be enforced. S.C. Code Ann. § 32-3-10(4)⁴. Failure to put such a contract in writing renders it void. *Id.* Moreover, a contract required to be in writing by the South Carolina Statute of Frauds cannot be orally modified. Windham v. Honeycutt, 279 S.C. 109, 302 S.E.2d 856 (1983) (Court held evidence of oral modification of the real estate contract violated the Statute of Frauds); see Player, 382 S.E.2d at 895.

“To satisfy the Statute of Frauds, every essential element of the contract must be expressed in a writing signed by the party to be compelled.” Fici v. Koon, 372 S.C. 341, 642 S.E.2d 602, 604 (2007). “The burden of proof is on the party seeking to enforce the contract.” *Id.* “The writing must reasonably identify the subject matter of the contract, sufficiently indicate a contract has been made between the parties, and state with reasonable certainty the essential terms of the agreement.” Honorage Nursing Home of Florence, S.C., Inc. v. Florence Convalescent Ctr., Inc., 367 S.C. 108, 623 S.E.2d 853, 856 (Ct. App. 2005). The writing must “be thereafter executed with such clarity and certainty as to show that the minds of the parties had met on all material terms and with no material term left for future agreement or negotiation.” Robert Harmon & Bore, Inc. v. Jenkins, 282 S.C. 189, 318 S.E.2d 371, 374 (Ct. App. 1984) *quoting in part* 73 Am. Jur. 2d Statute of Frauds § 341.

Rotunda purports to change the Agreement and First Amendment by changing the terms for their performance, that is, the payment of the Initial Earnest Money and Additional Earnest

⁴ S.C. Code Ann. § 32-3-10(4) provides: “No action shall be brought whereby: ... (4) To charge any person upon any contract or sale of lands, tenements or hereditaments or any interest in or concerning them; ... Unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some person thereunto by him lawfully authorized.”

Money. However, Rotunda has presented no writing signed by MFM evidencing this alleged agreement. Thus, any such oral contract is void pursuant to the Statute of Frauds.

Therefore, there is no genuine issue of material fact but that Plaintiffs are entitled to summary judgment against Rotunda on Plaintiffs' First Cause of Action for Breach of Contract for Rotunda's breach of the Agreement by its failure to pay Plaintiffs the \$100,000 Initial Earnest Money and for Rotunda's breach of the First Amendment by its failure to pay the Plaintiffs the \$100,000 Additional Earnest Money.

Further, as part of this judgment, and as requested by Plaintiffs in the Third and Fourth Causes of Action, the Court orders and authorizes the Escrow Agent release the Initial Earnest Money to Plaintiffs upon their written demand with a copy of this filed Order, which would reduce the judgment by \$100,000 upon receipt by Plaintiffs.⁵ Plaintiffs are also entitled to prejudgment interest on the \$200,000 is recoverable from January 12, 2021 (the final date of default by Rotunda), at the statutory rate set at S.C. Code Ann. § 34-31-20(A) of 8.75% . until the date of final judgment in this matter.

Finally, Plaintiffs as the prevailing parties in this matter are entitled to their reasonable attorney's fees and costs as provided in Section 15(g) of the Agreement, and therefore are entitled to an award their reasonable attorney's fees and costs. Plaintiffs shall within ten days of this Order file an affidavit of attorney's fees and costs and a calculation of prejudgment interest through the date of this Order, and Plaintiffs shall also file a proposed order regarding the same.

⁵ Plaintiffs in their brief abandoned their remaining claims in the Complaint, the Fifth and Sixth Causes of Action, based on this grant of summary judgment.

IT IS SO ORDERED!

The Honorable Robert J. Bonds
Presiding Judge



Beaufort Common Pleas

Case Caption: Mfm Properties Llc , plaintiff, et al VS Rotunda Land & Development Group Llc , defendant, et al

Case Number: 2021CP0700482

Type: Order/Summary Judgment

So Ordered

s/ Robert Bonds, 2770