THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Daniel D. Hall, Circuit Court Judge

Appellate Case No. 2022-000290
Case No. 2020-CP-46-02006

Eastwood Construction Partners, LLC and
Eastwood Development Corporation,

Appellants,

v.

GHD Brooks Creek, a North Carolina Limited Liability Company; AF-Brooks Creek, LLC, a North Carolina Limited Liability Company; GHD Rivers Falls, LLC, a North Carolina Limited Liability Company; AF-River Falls, LLC, a North Carolina Limited Liability Company; GreenHawk Corporation, Inc.; and TRI Pointe Homes, Inc.

Respondents.

RESPONDENTS' FINAL JOINT BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES

Page(s)

Statutes and Court Rules

I. STATEMENT OF THE ISSUES ON APPEAL

1. **DID THE CIRCUIT COURT RIGHTLY CONCLUDE THAT THE LAND SALES CONTRACTS ALLEGED BY APPELLANTS DID NOT EXIST, WHEN THE UNDISPUTED EVIDENCE SHOWED THAT THE PARTIES HAD NEVER REACHED AGREEMENT ON THE MATERIAL TERMS OF THOSE ALLEGED CONTRACTS?**

2. **DID THE CIRCUIT COURT RIGHTLY CONCLUDE THAT THE STATUTE OF FRAUDS BARRED ENFORCEMENT OF THE LAND SALES CONTRACTS ALLEGED BY APPELLANTS, WHEN THE PRICE FOR SUCH SALES HAD NEVER BEEN COMMITTED TO A WRITING SIGNED BY THE SELLERS?**

3. **DID THE CIRCUIT COURT RIGHTLY CONCLUDE THAT APPELLANTS' ALLEGATIONS ABOUT A JOINT VENTURE BETWEEN THE PARTIES WERE INSUFFICIENT TO REMOVE THE CONTRACTS ALLEGED BY APPELLANTS FROM THE APPLICATION OF THE STATUTE OF FRAUDS?**

4. **DID THE CIRCUIT COURT PROPERLY EXERCISE ITS DISCRETION TO DENY APPELLANTS' REQUEST FOR ADDITIONAL, IRRELEVANT DISCOVERY AND PROCEED TO RULE ON RESPONDENTS' MOTIONS FOR PARTIAL SUMMARY JUDGMENT?**

II. STATEMENT OF THE CASE

Appellants Eastwood Construction Partners, LLC ("Eastwood Construction") and Eastwood Development Corporation ("Eastwood Development")[1] commenced this action in July 2020, almost six years after Eastwood Development had assigned away to GreenHawk[2] its contracts to purchase two separate tracts of land in York County, South Carolina known as "Brooks Creek" and "River Falls." (R. pp. 142-178). Claiming that GreenHawk had breached separate,

[1] Eastwood Construction and Eastwood Development are *separate* entities. Appellants' brief repeatedly fails to distinguish between the two entities, referring to them collectively as "Eastwood."

[2] The term "GreenHawk" is used in this brief to refer collectively to all of the Respondents except TRI Pointe Homes, Inc. ("TRI Pointe").

subsequent contracts to sell lots within Brooks Creek and River Falls to Eastwood *Construction*, Appellants sought from the Circuit Court an award of actual and exemplary damages and an order of specific performance. (*Id.*). Appellants attached to their initial Complaint a *lis pendens* that they had filed against each tract in June 2020. (*Id.*).

GreenHawk moved for partial dismissal of Appellants' Complaint and cancellation of the *lis pendens* on July 16, 2020, arguing that no written, enforceable agreements existed for the sale of lots in the Brooks Creek and River Falls subdivisions to Eastwood Construction. In response, Appellants filed their First Amended Complaint on July 31, 2020, claiming that a series of emails between the parties constituted an enforceable contract. (R. pp. 114-141). The Circuit Court denied GreenHawk's motion to dismiss and to cancel the *lis pendens* by Order entered on August 14, 2020.

TRI Pointe, which had signed a contract with GreenHawk in August 2019 to purchase the Brooks Creek subdivision, moved to intervene in this action on September 4, 2020. The Circuit Court granted TRI Pointe's motion. Thereafter, Appellants filed a Second Amended Complaint on October 20, 2020 to implead TRI Pointe as a defendant. (R. pp. 84-113). On January 7, 2021, Appellants amended their Complaint yet again, this time contending that a partnership or joint venture existed between Appellants and GreenHawk. (R. pp. 71-83). The Third Amended Complaint—now the operative pleading in this action—seeks actual and exemplary damages from GreenHawk and TRI Pointe on a variety of legal and equitable theories. The Third Amended Complaint also seeks an Order of specific performance for the sale of the Brooks Creek and River Falls tracts to Eastwood Construction (R. pp. 76-83).

In late 2021, following voluminous document exchanges between the parties and a series of depositions, GreenHawk and TRI Pointe each filed motions for partial summary judgment

seeking dismissal of Appellants' claims for specific performance and all other claims directly affecting title to Brooks Creek and River Falls. (R. pp. 892-894, 936-937). The Circuit Court held a hearing on the motions on December 10, 2021. On January 14, 2022, the Circuit Court granted TRI Pointe's motion in a written Order (R. pp. 32-39), holding that the contract alleged by Appellants for the sale of Brooks Creek to Eastwood Construction was unenforceable because the parties had left material terms open for further negotiation and, furthermore, that any such alleged contract was barred by the Statute of Frauds. (R. pp. 35-38). Further, because none of Appellants' remaining claims affected title to Brooks Creek, the Circuit Court concluded that the *lis pendens* against the Brooks Creek tract should be cancelled. (R. p. 38).

On February 15, 2022, the Circuit Court granted GreenHawk's motion for partial summary judgment, holding that no enforceable contract existed for Eastwood Construction's purchase of either Brooks Creek or River Falls and that Appellants and GreenHawk were not joint venturers. (R. pp. 22-31). Further, because none of Appellants' remaining claims affected the title to the tracts, the Circuit Court again concluded that the *lis pendens* on both properties should be cancelled. (R. pp. 29-30). Still pending before the Circuit Court are the claims that do not affect title to Brooks Creek or River Falls.

Appellants timely moved that the Circuit Court reconsider both of its summary judgment orders. On February 15, 2022, the Circuit Court denied Appellants' motion to reconsider the TRI Pointe order. (R. pp. 19-21). On March 8, 2022, the Circuit Court denied Appellants' motion to reconsider the GreenHawk Order. (R. pp. 16-18).

Appellants timely filed their notices of appeal of the Circuit Court's orders granting partial summary judgment, cancelling the *lis pendens,* and denying reconsideration on March 11, 2022. (R. pp. 179-191), and the appeals were subsequently consolidated. (R. pp. 1387-1388). After

Appellants filed their appeal, TRI Pointe and GreenHawk each moved that the Circuit Court lift the automatic stay imposed by the appeal and cancel the *lis pendens* on the properties (R. pp. 249-285), which Eastwood opposed. (R. pp. 192-248). On April 18, 2022, the Circuit Court granted each motion to lift the stay. The same day, Eastwood filed a petition pursuant to SCACR 241(d)(7), asking this Court to reverse the orders lifting the automatic stay. On April 25, 2022, Respondents filed a response in opposition to the 241(d)(7) petition. On May 12, 2022, this Court issued an order refusing to reverse and vacate the Circuit Court's orders to lift the stay. The same day, Appellants filed a petition with the Supreme Court of South Carolina, asking for a reversal of both the Circuit Court's and this Court's determinations on the stay. On June 28, 2022, the Supreme Court of South Carolina issued an order denying Appellants' petition.

III. STATEMENT OF FACTS

Notwithstanding Appellants' longwinded and misleading "Factual Background," the material facts of this case are both uncomplicated and undisputed. This action arises out of a failed negotiation over the sale of two parcels of land in York County, South Carolina. (*See* R. p. 23). As a land developer, GreenHawk purchases raw land and contracts for residential and commercial construction improvements. (*Id.*). Like GreenHawk, Eastwood Development develops land for construction improvements. (R. p. 1200, lines 1-6). Eastwood Construction is a home builder. (R. p. 1199, lines 1-7). Eastwood Development and Eastwood Construction are separate entities. (R. p. 1199, line 1-p. 1200, line 6).

In or about 2013, Eastwood Development identified two separate parcels of land in York County that would ultimately become the location for the Brooks Creek and River Falls planned subdivisions. (R. p. 23). Eastwood Development entered into contracts to purchase these parcels from third parties. (*Id.*). Prior to closing on the parcels, however, Eastwood Development assigned

its purchase contracts to GreenHawk, and GreenHawk entities purchased them. (*Id.*). The actual purchasers of the tracts were AF-Brooks Creek, LLC and AF-River Falls, LLC, which were GreenHawk affiliates formed for the specific purpose of purchasing the Brooks Creek and River Falls parcels. (R. p. 25).

It is undisputed that, when Eastwood Development assigned its purchase contracts for Brooks Creek and River Falls to GreenHawk, it was Appellants' "general understanding" that GreenHawk entities would incur the costs of developing the property, securing all necessary zoning and planning approvals for the subdivision, and preparing plats of residential lots within the subdivision. (*See, e.g.*, R. p. 1303, DT p. 27, lines 5-13;[3] p. 1103, lines 1-8; p. 1104, lines 10-13; p. 23). After such development, it was the parties' "general understanding" that the parties would attempt to negotiate the terms of lot sales contracts whereby the GreenHawk entities would sell the lots in the River Falls and Brooks Creek subdivisions to Eastwood Construction. (R. p. 23). In particular, with respect to Brooks Creek, Eastwood Construction's representative testified that GreenHawk and Eastwood would have to engage in further negotiations to "come up with a specific agreement on lot price," (R. p. 1304, DT p. 30, lines 10-16); a "specific agreement on a takedown schedule" for Eastwood Construction's purchase of lots, (*id.* at lines 17-24); and a determination of the deposit to be made by Eastwood Construction. (*Id.* at DT p. 31, lines 10-15).

As Appellants' representatives have admitted time and again, however, Eastwood Construction and GreenHawk were never able to agree on the material terms of a contract by which Eastwood Construction would purchase lots in Brooks Creek and River Falls. Appellants' fatal admissions on this score are exhaustively set forth in GreenHawk's and TRI Pointe's briefs in

[3] The transcript that was included in the Record for the 30(b)(6) Deposition of Joe Polite contains four deposition transcript pages on each individual Record page. In an effort to avoid confusion, citations to that transcript will include both the Record page number ("p.") as well as the deposition transcript page number ("DT p.").

support of their respective motions for partial summary judgment. (R. pp. 360-364; pp. 453-462). The Circuit Court relied on "this substantial amount of [undisputed] evidence" when granting GreenHawk's and TRI Pointe's motions. (*See* R. pp. 24-25). In particular:

- On October 18, 2016, Eastwood Construction's Vice-President for Land Joe Polite sent an email to Allen Nason, Eastwood Construction's in-house counsel, saying "[r]emember how just yesterday you were teaching me the importance of having a contract for lots when transferring or assigning property to a developer? It hit me last night VERY hard that that was not done with Greenhawk on 3 properties that I know: River Falls, Brooks Springs, and Kanata." (R. p. 1253) (emphasis in original).

- On October 26, 2016, Polite wrote another email to Clark Stewart, Eastwood Construction's owner, saying that "we are exposed on the pricing of [the River Falls and Brooks Creek] projects since there was never a contract put into place with Greenhawk when we assigned them these properties." (R. p. 1252).

- Just 23 days before Appellants filed their initial Complaint in this action, Polite admitted in an email to a GreenHawk representative that "there was never a ratified contract for the repurchase of the lots [in Brooks Creek] between [Eastwood Construction and a GreenHawk affiliate]." (R. p. 1265).[4]

- Polite confirmed in his May 2021 deposition that Eastwood Construction and GreenHawk would have had to agree on a lot price and takedown schedule for Brooks Creek and River Falls, which were "two essential terms of any lot purchase agreement." (R. p. 1224, lines 1-25; p. 1225, line 8-p. 1226, line 15).

- Polite confirmed in his October 2021 deposition as Eastwood Construction's 30(b)(6) representative that, as of the date of his deposition, there had been no agreement between Eastwood and GreenHawk with respect to the Brooks Creek lot price, takedown schedule, or deposit amount. (R. p. 1302, DT p. 23, line 14-p. 25, line 5). He admitted during the same deposition, that, if Eastwood Construction prevails in this action, "a lot price is still going to have to be determined." (R. p. 1306, DT p. 38, lines 2-14).

- Polite admitted in his 30(b)(6) deposition that there exists no agreement between Eastwood and GreenHawk to purchase River Falls in its semi-finished state. (R. p. 1320, DT p. 94, lines 7-17). (Unlike Brooks Creek, River Falls has not yet been

[4] Remarkably, Polite asks only for reimbursement of Eastwood Construction's pre-development expenses in this email and makes no mention of any alleged right to purchase the Brooks Creek tract from GreenHawk. Only after GreenHawk rejected Polite's reimbursement demand did Eastwood Construction claim—in this lawsuit—an entitlement to specific performance.

platted.) He further confirmed that Eastwood Construction has never made an offer for River Falls outside of settlement discussions associated with this lawsuit. (R. p. 1321, DT p. 98, line 25-p.99, line 8).

After an agreement with Eastwood Construction failed to materialize, GreenHawk eventually contracted to sell Brooks Creek to TRI Pointe and River Falls to non-party Taylor Morrison Homes. (R. p. 24, n.5).

After carefully considering the foregoing evidence and the other material, undisputed facts advanced by GreenHawk and TRI Pointe, the Circuit Court granted Respondents' respective motions for partial summary judgment, dismissed Appellants' specific performance claims other claims affecting title to Brooks Creek and River Falls, and cancelled the two *lis pendens* that Eastwood Construction had filed against those tracts. The following undisputed evidence was dispositive, according to the Circuit Court's February 15 Order:

1) GreenHawk and Eastwood Construction never executed a written contract for Brooks Creek or River Falls that would satisfy the Statute of Frauds (R. p. 24);

2) Appellants' representatives repeatedly acknowledged or admitted that no such contracts ever existed (R. p. 25);

3) In particular, Appellants' representatives repeatedly acknowledged or admitted that Eastwood Construction and GreenHawk never agreed on material terms (such as lot price, takedown schedule, or deposit amount) with respect to the alleged contracts concerning the purchase and sale of Brooks Creek and River Falls (*id.*); and

4) Appellants' allegations that Appellants and GreenHawk were partners or joint venturers was unsupported by the record[5] (*id.*).

Based upon what it called an "overwhelming amount of testimony and documents," the Circuit Court concluded there was no genuine issue of material fact as to whether Eastwood

[5] (*See* R. p. 29, n.10) (Circuit Court correctly recognizing that Appellants'' allegations in this regard were "repeatedly contradicted by the evidence"); (*see also* R. p. 25) (Joe Polite, while testifying as Appellants' 30(b)(6) designee, affirmatively testifying that Appellants were not anticipating sharing its profits with GreenHawk).

Construction and GreenHawk had entered into an enforceable contract for the purchase of lots in Brooks Creek or River Falls. (R. p. 29). "At most," the Circuit Court observed, "the parties had an unenforceable, oral agreement to agree on the material terms of a contract at some undetermined point in the future." (R. p. 27) (citation omitted). Accordingly, Respondents were entitled to partial summary judgment and cancellation of the *lis pendens* filed against Brooks Creek and River Falls.

Separately and independently, the Circuit Court correctly determined that Appellants' alleged agreements did not satisfy the Statute of Frauds. (*See* R. p. 68; *see also* p. 27). The only "writings" authored by GreenHawk that Eastwood offered in support of its contention that the Statute's requirements had been satisfied were two internal GreenHawk pro formas—one showing an internal rate of return of 20.2% and one showing an internal rate of return of 16.4%. (R. pp. 1018-1028; p. 1033). Appellants claimed that these pro formas proved that GreenHawk had agreed to sell lots to Eastwood Construction at a price that would guarantee GreenHawk a 20% profit. The Circuit Court disagreed:

> [Appellants] are correct in their contention that a contract need not set an exact price for a transfer of land if there is an agreed upon and definite method for ascertaining the price. [Appellants] claimed that the parties had agreed to a purchase price formula that would generate a 20% profit for Greenhawk and its affiliates. The only evidence that [Appellants] adduced in support of this claim, however, were two pro formas exchanged between [Appellants] and Greenhawk. *Neither of these pro formas actually project a twenty percent profit. Even if they did, neither pro forma shows that Greenhawk or its affiliates agreed to use such a pro forma projection as a binding contract lot price.*

(R. p. 68) (emphasis added). After the Circuit Court granted partial summary judgment on Appellants' specific performance claims, this appeal followed.

IV. STANDARD OF REVIEW

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). Summary judgment is appropriate 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." SCRCP 56(c). On appeal, the court reviews a grant of summary judgment under the same standard applied by the circuit court. *See Guinan v. Tenet Healthsystems of Hilton Head, Inc.*, 383 S.C. 48, 53, 677 S.E.2d 32, 35 (Ct. App. 2009); *Turner v. Milliman*, 392 S.C. 116, 121-22, 708 S.E.2d 766, 769 (2011).

"Where a motion for summary judgment is made and supported by proper affidavits, a plaintiff cannot rest on allegations in his pleadings that are controverted by affidavits and/or depositions submitted by defendants." *Montgomery v. CSX Transp., Inc.*, 362 S.C. 529, 542, 608 S.E.2d 440, 447 (Ct. App. 2004). Moreover, "[a] party may not create a genuine issue of material fact through speculation or guesswork." *In re Eleanor McCarthy Lenahan Tr. under agreement Dated July 12, 2001*, 428 S.C. 598, 605, 836 S.E.2d 793, 797 (Ct. App. 2019). "Mere bald assertions uncorroborated by any other evidence" are likewise insufficient to avoid summary judgment. *Noorai v. Sch. Dist. of Pickens Cty.*, No. 2014-001282, 2016 WL 1367066, at *2 (S.C. Ct. App. Apr. 6, 2016). Rather, "the nonmoving party must come forward with specific facts showing there is a genuine issue for trial." *Regions Bank v. Schmauch*, 354 S.C. 648, 660, 582 S.E.2d 432, 438 (Ct. App. 2003).

With respect to the Circuit Court's decision to refuse Appellants' request for further discovery prior to ruling on Respondents' summary judgment motion, however, an abuse of discretion standard applies. "The rulings of a trial judge in matters involving discovery will not

be disturbed on appeal absent a clear showing of an abuse of discretion." *Bayle v. S.C. Dept. of Transp.*, 344 S.C. 115, 128, 542 S.E.2d 736, 742 (Ct. App. 2001) (holding that trial court did not abuse its discretion before refusing plea for additional discovery before ruling on summary judgment motion); *see also* ***Black v. Lexington School Dist. No. 2***, 327 S.C. 55, 488 S.E.2d 327 (1997) (applying abuse of discretion standard to trial court's rulings pursuant to Rule 56, SCRCP). Accordingly, this Court should uphold the Circuit Court's decision not to grant additional discovery to Eastwood unless it concludes that the Circuit Court abused its discretion.

V. ARGUMENT

By Appellants' own, repeated admissions, no enforceable contracts for the sale of the Brooks Creek and River Falls tracts from any GreenHawk entity to Eastwood Construction ever existed. In particular, there is no evidence in the record indicating that the parties ever agreed to a price, deposit, or takedown schedule for the properties—all of which, Appellants have conceded, are material terms of a lot purchase agreement. The Statute of Frauds, invoked by Appellants in support of their position, cannot be used to supply material terms that do not exist. Even if the parties had orally settled on those terms, the Statute of Frauds would still be of no help to Respondents because (i) there exists no writing with an agreed-upon price and (ii) Appellants' alleged part performance does not refer solely to such contracts. The Statute of Frauds likewise bars Appellants' joint venture claim because there is no evidence that any joint venture ever existed between the parties.

Finally, the Circuit Court rightly concluded that Appellants' generalized plea for more discovery failed to identify "facts essential to [Appellants'] opposition" to Respondents' motions for summary judgment. In particular, because Appellants' own representatives conceded in discovery that the aforementioned material terms of Appellants' alleged contracts did not exist, no

amount of additional discovery could salvage Appellants' legal position. Therefore, no additional discovery was warranted, and the Circuit Court's grant of summary judgment was not premature.

A. Any alleged contract between Eastwood Construction and GreenHawk or any GreenHawk affiliate is unenforceable because the parties left material terms open for further negotiation.

An action for breach of contract is dependent upon the existence of a contract. *Tidewater Supply Co. v. Indus. Elec. Co.*, 253 S.C. 483, 485, 171 S.E.2d 607, 608 (1969). To have an enforceable contract, the parties must agree to all essential terms of the agreement, which include price, time, and place. *Vessell v. DPS Assoc. of Charleston, Inc.*, 148 F.3d 407, 410 (4th Cir. 1998); *see also McPeters v. Yeargin Const. Co.*, 290 S.C. 327, 330, 350 S.E.2d 208, 211 (Ct. App. 1986) ("Certain terms, such as price, time and place, are considered indispensable.") (citations omitted). When negotiating parties leave material terms open for future agreement, the contract is void for indefiniteness. *Ellis v. Taylor*, 316 S.C. 245, 249, 449 S.E.2d 487, 489 (1994).

As Mr. Polite repeatedly admitted, both when testifying in his individual capacity and as Eastwood Construction's corporate designee, Eastwood Construction and the appropriate GreenHawk entity never reached agreement on all material terms for the sale of lots in the Brooks Creek or River Falls. In particular, Polite conceded, "further negotiations and discussions" were required to determine (i) the specific price Eastwood Construction would pay for the lots, (ii) the takedown schedule by which it would acquire the lots, another essential term of any lot purchase contract, and (iii) the deposit that it would pay toward the lots. (R. p. 1304, DT p. 30, line 10-p.31, line 21; p. 1225, lines 8-13; p. 1237, lines 2-13). Indeed, Polite conceded that these and other material terms of the contract were to be agreed to *in the future*, once GreenHawk had a better idea of its development costs. (R. p. 1203, lines 6-11; p. 1204, lines 9-22). This sort of "agreement to agree"—which leaves material terms open for future agreement and determination—is precisely the sort of arrangement that South Carolina courts have time and again recognized as

unenforceable. *See, e.g. Anderson v. Hall*, 155 S.C. 320, 152 S.E. 521 (1930) (finding a contract unenforceable because it was too "indefinite and uncertain"); *Trident Const. Co. v. Austin Co.*, 272 F.Supp.2d 566, 575 (D.S.C. 2003) ("[a]greements to agree do not amount to a contract in South Carolina." (citations omitted); *N. Am. Rescue Prods., Inc. v. Richardson*, 411 S.C. 371, 379, 769 S.E.2d 237, 241 (2015) ("Provisions which are essentially agreements to agree in the future have no legal effect."). Like the agreements found unenforceable in these cases, the allegedly "clear" agreements for a GreenHawk affiliate to sell Brooks Creek and River Falls to Eastwood Construction is void for indefiniteness.

B. The Statute of Frauds bars enforcement of any alleged contracts for the sale of the properties because the available writings do not contain all material terms and Appellants' part performance allegations are insufficient to except this agreement from the Statute of Frauds' application.

1. The writings cited by Appellants do not contain every essential term to the alleged agreement and so the Statute of Frauds bars enforcement.

In South Carolina, a contract for the transfer of land is unenforceable unless it is written and signed by the party to be charged. S.C. Code § 32-3-10(4) (the "Statute of Frauds"). This rule requires that "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, 346, 642 S.E.2d 602, 604 (2007). The writings do not have to independently define a contract, but, "taken as a whole, the writings must set forth all the essential terms of the agreement." *Young v. Indep. Pub. Co.*, 273 S.C. 107, 111, 254 S.E.2d 681, 683 (1979); s*ee also Duvall v. Cox*, 215 Ga. 163, 164, 109 S.E.2d 593, 594 (1959) ("While the writing contains a description of two lots of land, it is totally lacking in the recitation of an agreement as to the price to be paid, or even of an agreement to buy and sell the described lots; and unquestionably is too vague, uncertain, indefinite and incomplete to be specifically enforced as a contract for the sale of land."). When a contract does not itself establish a definite price for real property, there must be a *definite method* for ascertaining it. *McPeters v. Yeargin Const. Co.*,

Inc., 290 S.C. 327, 331 (Ct. App. 1986) (citing *Edens v. Laurel Hill, Inc.*, 271 S.C. 369 (1978)) (emphasis added).

The meager writings cited by Appellants are insufficient to create a contract that can be salvaged by the Statute of Frauds. In an attempt to create a price term, Appellants cite only two "'pro formas' sent from GreenHawk to Eastwood that show a projected IRR *near 20%* for both Properties." (App. Br. 9) (emphasis added). Yet, Appellants' own words admit the absence of a writing with an enforceable price term. Pro formas with a projected IRR *near* 20% do not provide evidence of a *definite* method for ascertaining the price for the properties. Further, IRR depends upon the cost of the improvements to create the subdivision. There is a complete absence of negotiations, let alone agreement, on what costs of construction GreenHawk was to include in calculating its IRR. A "cost plus" agreement requires an agreement not only on what the "plus" is; i.e. the profit, but what are the costs. Finally, not only do the writings merely approximate, rather than define, an alleged price term, the two pro formas do not even reflect the same IRR figure. One document indicates an IRR of 20.2%, while the other indicates 16.4% (R. pp. 1018-1028; p. 1033). Without a writing that reflects a definite price or a definite method for ascertaining the price, the Statute of Frauds bars the enforcement of any alleged contract. It is also notable that Appellants also have not offered *any* writing by which GreenHawk proposed a takedown schedule for lots in Brooks Creek and River Falls, even though Mr. Polite, Appellants' Vice-President for land, admitted that such a takedown schedule was an "essential part of . . . any lot purchase contract for the sale of lots in a development." (R. p. 1237, lines 2-13).

2. Appellants' part performance allegations are insufficient to remove the alleged lot sales contracts from the Statute of Frauds because the material

terms of the alleged contracts were never agreed to and Appellants' actions did not refer "solely" to the alleged contracts.

In South Carolina, "sufficient part performance of a parol contract for the conveyance of land will remove the contract from the statute of frauds." *Scurry v. Edwards*, 232 S.C. 53, 100 S.E.2d 812 (1957). For the "part performance" exception from the Statute of Frauds to apply, however, all of the following elements must be present: (1) evidence of the contract's terms by proof that is clear, definite, and certain; (2) the party's partial execution clearly and unequivocally relates to the agreement; and (3) the party who requests performance had completed or was willing to complete its part of the oral contract. *Fesmire v. Digh*, 385 S.C. 296, 311, 683 S.E.2d 803, 811 (Ct. App. 2009).

As this list of requirements makes clear, the doctrine of part performance is intended to *illuminate* a contract to which the parties have already agreed, not to *create* a contract for which material terms are deficient. Accordingly, because Appellants' own admissions establish that the parties never reached an agreement as to all material terms of the alleged lot purchase contracts, the "part performance" doctrine is inapplicable here. Even if such material terms had been agreed upon, Appellants' alleged part performance did not clearly and unequivocally relate to the agreements. As such, the Statute of Frauds still applies and bars enforcement of the alleged contracts.

a. Appellants' evidence of contract terms is unclear, indefinite, and uncertain.

The first element of the part performance doctrine is clear evidence of the contract's terms by proof that is clear, definite, and certain. *Fesmire*, 385 S.C. at 311. As this part of the test indicates, part performance is one way (other than a writing) of revealing material contract terms *that already exist*. Yet as discussed above, the price, takedown schedule, and deposit for the properties were never agreed to in the first instance, much less clearly, definitely, or certainly. Mr.

Polite repeatedly conceded that "further negotiations and discussions" were required to determine (i) the specific price Eastwood Construction would pay for the lots, (ii) the takedown schedule by which it would acquire the lots, and (iii) the deposit that it would pay toward the lots. (R. p. 1304, DT p. 30, line 10-p. 31, line 21). Indeed, as late as the deposition of Eastwood Construction's corporate designee in October 2021, Appellants *still* could not say what the price for the Brooks Creek or River Falls lots would be if Appellants prevail on their specific performance claim. (R. p. 1306, DT p. 38, lines 6-11; p. 1325, DT p. 120, lines 6-19).

While South Carolina courts have apparently not yet addressed a part performance argument in the context of an alleged contract for which no price had been agreed upon, courts in nearby jurisdictions have declined to apply the doctrine under similar circumstances. *See Zappa v. Basden*, 188 Ga. App. 472, 475, 373 S.E.2d 246, 248-49 (1988) (declining to apply the part performance exception to a contract for the sale of land where the price was agreed to and part of it was paid, but the details for the payment of the remaining portion had not been agreed to); *Brenda Darlene, Inc. v. Bon Secour Fisheries, Inc.*, 101 So. 3d 1242, 1250 (Ala. Civ. App. 2012) ("Because the parties do not agree on the price term, the partial-performance exception cannot be fairly applied, because it would impose one party's price term over that proposed by the other party."). The reasoning in these cases is equally applicable and compelling here. Appellants and GreenHawk never agreed on a definite price for lots in the Brooks Creek and River Falls lots, so no enforceable contract exists. Through their request for specific performance, Appellants invite this Court to turn uncertain and indefinite pro forma "projections" into an enforceable contract with clear and definite price terms. Forcing such terms upon Respondents would put this Court in the position of a *negotiator* imposing one party's price on the other, rather than have this Court act as an *adjudicator* of a price to which both sides had already agreed. Because there is no dispute

that the parties left material terms (including price) open for future agreement, Appellants cannot provide evidence of contract terms that is clear, definite, and certain. Accordingly, the part performance doctrine is not applicable here, and the Statute of Frauds bars enforcement of the alleged agreements.

i. Appellants' alleged part performance neither clearly nor unequivocally relates to the purported agreements.

Even if this Court were to find that all material terms of the contracts for Eastwood Construction to buy lots in Brooks Creek and River Falls were clear, definite and certain, the Statute of Frauds would still bar Appellants' claims because the alleged acts of "part performance" do not relate solely to the alleged contracts. "In order for part performance of an oral agreement to remove the agreement from operation of the Statute of Frauds and permit specific performance, Appellants must establish acts which relate clearly and unequivocally to the agreement, *exclusive of any other relation between parties touching such agreement*." *Player v. Chandler*, 299 S.C. 101, 105–06, 382 S.E.2d 891, 894 (1989) (emphasis added) (citing *Aust v. Beard*, 230 S.C. 515, 96 S.E.2d 558 (1957)). Put another way, one party must do "some act *essential to the performance of the agreement* resulting in loss to himself and benefit to the other." *Graham v. Prince*, 293 S.C. 77, 81, 358 S.E.2d 714, 717 (Ct. App. 1987) (emphasis added). Appellants cannot satisfy these tests.

Appellants argue that three actions on their part establish part performance: (1) Eastwood Development's uncompensated relinquishment to GreenHawk of the right to buy the Brooks Creek and Rivers Falls tracts; (2) Eastwood Development's uncompensated transfer of property to GreenHawk; and (3) Appellants' uncompensated improvements to the properties. (App. Br. 22). The first two of these acts were carried out by Eastwood *Development*, not Eastwood *Construction*, however, and thus cannot be cited as part performance by Eastwood *Construction* of the alleged

lot purchase contracts. Notably, Appellants persistently and collectively refer to themselves as "Eastwood" throughout their brief, a reference that blurs the distinction that is fatal to their part performance argument.

Even if Eastwood *Development's* relinquishment of the right to purchase the Brooks Creek and River Falls properties to GreenHawk, and its subsequent conveyance of another sliver of land to GreenHawk, could be attributable to Eastwood Construction for part performance purposes, such acts do not solely relate to a contract for Eastwood *Construction* to purchase the properties from GreenHawk on clear, definite and unequivocal material terms. To the contrary, the relinquishment by Eastwood Development of its contracts to purchase the tracts is entirely consistent with what the parties have repeatedly said about their initial intentions: that everyone hoped for Eastwood Construction to buy lots in Brooks Creek and River Falls once GreenHawk had developed them, but that GreenHawk and Eastwood Construction could not agree on material terms. But the mere fact that Eastwood Development surrendered the properties initially does not "clearly and unequivocally indicate" that Eastwood Construction had agreed to buy the lots back at a definite price and on a definite schedule.

Likewise, Eastwood Development's transfer of a sliver of land to GreenHawk does not solely relate to a contract for Eastwood Construction to purchase Brooks Creek and River Falls lots from GreenHawk at a clear, definite and unequivocal price. Instead, such an action is consistent with what the undisputed evidence shows: that Eastwood Construction had written off both the River Falls and Brooks Creek projects and had not executed a lot sales contract for either tract. Accordingly, it had no reason to retain the sliver of land that it conveyed to GreenHawk.

Finally, the property improvements that Appellants cite in support of their part performance argument do not clearly or unequivocally relate to the purported lot sales contract. Evidence of

improvements made to the property, "while strong evidence of part performance, is neither conclusive of that issue nor indispensable proof of it." *Scurry*, 232 S.C. at 61, 100 S.E.2d at 816–17 (citing *Carson v. Coleman*, 208 S.C. 406, 38 S.E.2d 147; *Aust*, 230 S.C. 515, 96 S.E.2d 558). Here, Eastwood Construction has stated that it was "always our intention to receive that predevelopment money back." (R. p. 1323, DT p. 110, lines 22-23). Indeed, in the email that he sent to GreenHawk on June 8, 2020, Eastwood Construction's Joe Polite sought such reimbursement of development costs from GreenHawk but did not make any mention whatsoever of a contract (now alleged by Appellants) to purchase the property. (R. p. 1265). This is clear and undisputed evidence that Appellants' property improvements were intended to be *separately* compensable and did not relate solely to an alleged agreement for Eastwood Construction to purchase lots in Brooks Creek or River Falls. Accordingly, the improvements do not relate to the alleged lot sales contract alone, "exclusive of any other relation between parties touching such agreement." *Player, supra,* 299 S.C. at 105–06, 382 S.E.2d at 894. Appellants' part performance argument, therefore, must fail.

The principal legal authority that Appellants cite in support of the part performance exception is the South Carolina Supreme Court's holding in *Parr v. Parr*, 268 S.C. 58, 231 S.E.2d 695 (1977). In that case, a father conveyed 469 acres in fee simple to his son with the understanding that his son would take out a loan on the property, give those loan proceeds to his father, and reconvey a fee simple interest in 7.14 of those acres back to his father to live on. The father complied with the agreement by granting the 469 acres in fee simple to his son, and the son secured the loan proceeds and gave them to his father. Rather than convey 7.14 acres back to his father in fee simple, however, the son conveyed only a life estate by written deed. Almost 20 years later, when the father discovered that his son had given him only a life estate to the 7.14 acres

rather than the agreed-upon fee simple interest, he sued, claiming that part performance on his part caused his agreement to survive the statute of frauds.

In upholding the father's claim and ordering the son to reconvey the 7.14 acres to his father in fee simple, the Supreme Court took particular note that the father had honored the agreement by relinquishing the entire 469 acre tract to his son. "Additionally," the Court observed, "[the father] and his wife have been continuously in possession of the 7.14 acre tract. This fact is evidence of the agreement of the parties that [the son] was to reconvey the 7.14 acres." *Id.*, 268 S.C. at 66, 231 S.E.2d at 698. The Court concluded that these critical facts supported application of the part performance exception to the Statute of Frauds.

Neither of these critical facts is present here. As noted above, it was Eastwood *Development*, not Eastwood *Construction*, that assigned its rights to purchase the Brooks Creek and River Falls parcels to GreenHawk. Moreover, unlike the father in *Parr*, neither Eastwood Development nor Eastwood Construction remained in possession of any portion of the property to which Eastwood Development had assigned its rights. *Parr* is thus easily distinguishable and has no application here.

Perhaps in an effort to overcome this critical distinction between *Parr* and their case, Appellants argue that *Honorage Nursing Home*, 367 S.C. 108, 623 S.E.2d 853 (Ct. App. 2005) demonstrates that actual possession of real property "is not necessary" "to establish [an] unwritten contract." (App. Br. 32). While Appellants are correct that actual possession is not *necessary*, *Honorage Nursing Home* offers no support to their position because of two critical factual distinctions between that case and this one. First, in *Honorage Nursing Home*, there existed a written contract between the parties that satisfied the Statute of Frauds. 367 S.C. at 115, 623 S.E.2d at 856. Thus, this Court's observations in that case concerning the part performance

doctrine were mere *dicta*. Second, the acts of part performance alleged by the defendant in *Honorage Nursing Home*—defendant's vacating leased premises early and surrendering the furniture and fixtures to its landlord—were directly relatable and referable to the early lease termination contract alleged by defendant. Here, by contrast, the principal acts of part performance alleged by Eastwood Construction were undertaken not by Eastwood Construction itself, but by Eastwood Development, an admitted stranger to the alleged lot purchase contracts between Eastwood Construction and GreenHawk. Again, for the part performance doctrine to apply at all, it is the performance of Eastwood *Construction*—the party to the alleged oral contract—that matters.

In short, none of the acts cited by Appellants demonstrate that GreenHawk agreed to sell Brooks Creek and River Falls to Eastwood Construction for an agreed upon price, at any agreed upon time, and upon receiving an agreed upon deposit. The authority cited by Appellants is inapposite and does not support a finding of part performance here. Indeed, the heavy burden borne by Appellants to make out a part performance exception to the Statute of Frauds is made even clearer in decisions from some of South Carolina's sister jurisdictions. Courts in Nebraska and Georgia, which follow a similar rule as South Carolina, have explained how acts relate "clearly and unequivocally' to an unwritten agreement so that the part performance doctrine applies. The Nebraska Supreme Court has described the "onerous burden of proof" on the party asserting the part performance exception as requiring the plaintiff to "prove not only that the alleged performance is referable to the oral contract, but also that the performance 'cannot be accounted for on any other reasonable hypothesis.'" *Ficke v. Wolken*, 291 Neb. 482, 490, 868 N.W.2d 305, 311 (2015). Similarly, in Georgia, the actions that are held out to establish sufficient part performance must be "required by the terms of the contract" and must refer "to performance of the

provisions of the contract and not to acts done by one because of his belief in and reliance on the agreement." *Zappa*, 188 Ga. App. at 476, 373 S.E.2d at 250. In other words, these courts, require that the actions serving as the basis for part performance must themselves be contractual terms. These requirements are fully consistent with the law of South Carolina and are persuasive here.

Because part performance cannot illuminate terms that never existed and because none of Appellants' acts unequivocally related to a contract for the purchase of either property, the Statute of Frauds bars enforcement of the alleged contracts.

C. There is No Genuine Issue of Material Fact that the Parties Were Neither Partners Nor Joint Venturers.

In their Third Amended Complaint, Appellants presented for the first time the argument that the Eastwood entities and GreenHawk were partners or joint venturers in the Brooks Creek and River Falls projects. (*See, e.g.*, R. p. 81, ¶ 69 ("As joint venturers, Eastwood and GreenHawk had fiduciary duties to one another."), ¶ 74 ("Eastwood and Greenhawk were partners carrying on as co-owners of a business for profit.")). Despite the Circuit Court's holding that the parties were not joint venturers and that there was no genuine issue of material fact on this issue, Appellants revisit the argument on appeal. The dispute over whether Appellants and GreenHawk were joint venturers is moot, as the transfer of land between the parties would still be subject to the Statute of Frauds. In any event, there is no genuine dispute of material fact about whether the parties were joint venturers, as it is undisputed that the parties had no control over one another and did not share in profits and losses.

South Carolina's Statute of Frauds explicitly states that "*any* contract for sale of lands, tenements or hereditaments or *any* interest in or concerning them" must be written and signed by the party to be charged to be enforceable. S.C. Code Ann. § 32-3-10(4) (emphasis added). The Statute's command is all-embracing, making no distinction between an agreement to transfer real

property pursuant to a conventional land sales agreement and an agreement to transfer real property made pursuant to a joint venture. *All* such agreements, in whatever form, are subject to the Statute of Frauds.

Courts in some jurisdictions—though not, apparently, in South Carolina—have considered whether an agreement to transfer an interest in land, made in the context of a joint venture, is subject to the Statute of Frauds. The overwhelming majority of jurisdictions that have been presented with this issue have found that such a transfer is subject to the statute. *See, e.g.*, *Palmer v. Fuqua*, 641 F.2d 1146, 1159 (5th Cir. 1981) ("A contract between two persons to go into the business of buying and selling real estate as partners or as joint adventurers, sharing the profits and losses thereof, is not within section 4 (of the Statute of Frauds) unless there is a provision for the transfer of specific land from one party to the other."); *Elias v. Serota*, 103 A.D.2d 410, 413, 480 N.Y.S.2d 344 (1984) ("There is no merit, therefore, in the contention that all agreements between partners involving the disposition of real property fall outside the ambit of the Statute of Frauds.") (citations omitted); *Quimby v. Myers*, 179 Vt. 611, 614, 895 A.2d 128, 131 (2005) ("[W]hile partnership or joint venture agreements need not be in writing as a general matter, the fact that agreements covered by the Statute of Frauds—such as those relating to interests in real property—are made in the context of a partnership or joint venture agreement does not render the statute inapplicable."). This is the only result that is faithful to South Carolina's own Statute of Frauds, and the reasoning behind the foregoing authorities is compelling here. As such, even if the parties were joint venturers, Appellants' claim for specific performance fails.

Even if this Court were to disagree and find that a writing is not needed for the transfer of land between joint venturers, the parties were not engaged in a joint venture. A joint venture exists when there is a community of interest in the performance of a common purpose, a joint proprietary

interest in the subject matter, a mutual right of the parties to control one another, a right to share in the profits, and a duty to share in any losses which may be sustained. *Altman v. Young Lumber Co.*, 376 F. Supp. 1290, 1296 (D.S.C. 1974); *Peoples Fed. Savings & Loan Ass'n v. Myrtle Beach Golf & Yacht Club*, 310 S.C. 132, 147 425 S.E.2d 764, 774 (S.C. Ct. App. 1992). Appellants and GreenHawk had no right to control one another and had no duty to share in the profits and losses related to Brooks Creek and River Falls.

First, neither Appellants nor GreenHawk had a right of control over the other. This lack of control is evidenced by Appellants' continual efforts to get GreenHawk to agree to a written contract for the transfer of the properties. (*See* R. p. 1253 ("Do you have any record of these transfers and is there any way we can *regain control of these properties*?") (emphasis added); R. p. 1252 ("Guys, we are exposed on the pricing of these projects since there was never a contract put into place with GreenHawk when we assigned them these properties.")). If the parties had a mutual right to control one another, Appellants would not have needed to "regain control" of the properties.

Moreover, testimony from Appellants' own representatives proves that there was no joint profit or loss agreement between the Eastwood entities and GreenHawk. (*See, e.g.*, R. p. 1242, lines 5-12 (admitting that there is no joint profit or loss agreement between Eastwood and GreenHawk); R. p. 1308, DT p. 48, lines 3-8 ("Q: Was there an agreement in principle that Eastwood is going to share a profit and loss on both River Falls and Brooks Creek? A: *We were not anticipating sharing the profit with Greenhawk.*") (emphasis added); R. p. 1312, DT p. 65, lines 2-7 ("Q: Was there any prior deal, to your knowledge, in which there was an agreement to share the net profit or loss on the project? A: Not to my knowledge.")). Without a duty to share in the profits and losses, the parties cannot be considered joint venturers.

D. The Circuit Court properly exercised its discretion to reject Appellants' request for additional, irrelevant discovery and to proceed to rule on Respondents' motions for partial summary judgment.

Appellants' primary argument on appeal—to which half of the argument section of their brief is devoted—is that the Circuit Court should have given them "more discovery" before ruling on Respondent's motions for partial summary judgment. (Appellants' Br. at 16-22). What Appellants refuse to acknowledge, however, is that no amount of additional discovery could have created a genuine issue of material fact because Eastwood's own admissions are fatal to its specific performance claims. Nothing in the 20,000 pages of documents and multiple witnesses that GreenHawk has already produced can neutralize Eastwood's repeated concessions that no enforceable contract existed between the parties, and as the Circuit Court correctly held, nothing will. The Circuit Court properly exercised its discretion by refusing to permit Appellants to engage in a fishing expedition.

S.C. R. Civ. P. 56 allows a party to move for summary judgment at any time. To be sure, Appellants correctly observe that Rule 56(f) allows the court to deny or defer ruling on such a motion an application for judgment if the nonmoving party if "it appear[s] from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition." *See also Guinan, supra,* 383 S.C. 48, 53–54. However, the circuit court operates within the exercise of its sound *discretion* when making this determination. *See Black,* 327 S.C. 55, 488 S.E.2d 327 (applying abuse of discretion standard to trial court's rulings pursuant to Rule 56, SCRCP).

Here, the Circuit Court properly exercised its discretion when it determined that no amount of additional discovery could cure Appellants' "crippling evidentiary defects." (*See* R. p. 36). Based upon nothing more than rank speculation, Appellants now attempt to convince this Court that more discovery will refute what has already been conclusively established by the testimony

of its own representatives. Despite the fact that these representatives, including Appellants' own 30(b)(6) witness, repeatedly made admissions that were fatal to the formation of any alleged contract, Appellants now ask this Court to allow them to contradict themselves by securing additional discovery *from GreenHawk*. Their plea for additional discovery, however, should be called what it is—an impermissible "fishing expedition." *See Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 544 (1991) (requiring a party seeking a Rule 56(f) delay to demonstrate a likelihood that further discovery would uncover additional, relevant evidence to avoid summary judgment); *see also Guinan*, 383 S.C. at 54 (holding that "the nonmoving party must demonstrate the likelihood that further discovery will uncover additional relevant evidence and that the party is not merely engaged in a 'fishing expedition'").

Appellants' "fishing expedition" is broken into three categories: (1) Eastwood wants to depose two additional GreenHawk witnesses; (2) Eastwood wants additional GreenHawk documents; and (3) Eastwood complains that GreenHawk overly redacted certain documents before the summary judgment hearing. (Appellants' Br. at 17-21). However, these arguments all fall flat because, as the Circuit Court correctly recognized, no amount of additional discovery from GreenHawk can cure the repeated fatal admissions that run rampant through the documents and testimony from Appellants' own representatives. Simply put, Eastwood's failure to provide "specific arguments regarding incomplete discovery," *Guinan*, 383 S.C. at 54, n.4, and its plea for this Court to make "inferential leaps" while failing to articulate those facts "essential to its opposition" that additional discovery would disclose, are not enough to defeat summary judgment. *In re Eleanor McCarthy Lenahan Tr.*, 428 S.C. at 605. Accordingly, the Circuit Court acted well within its discretion when it determined that Appellants were not entitled to additional discovery prior to granting partial summary judgment.

VI. CONCLUSION

Because (i) the parties never agreed to the material terms of the land sales contracts alleged by Appellants; (ii) such material terms, even if they had been agreed upon, were never reduced to writing; (iii) the parties are not joint venturers; and (iv) there has been sufficient discovery, this Court should affirm the Circuit Court's decision granting Respondents' partial motions for summary judgment and rejecting Appellants' claims for specific performance.

Respectfully Submitted this 18th day of October, 2022.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Daniel D. Hall, Circuit Court Judge

Appellate Case No. 2022-000290
Case No. 2020-CP-46-02006

Eastwood Construction Partners, LLC and
Eastwood Development Corporation,

Appellants,

v.

GHD Brooks Creek, a North Carolina Limited Liability Company; AF-Brooks Creek, LLC, a North Carolina Limited Liability Company; GHD Rivers Falls, LLC, a North Carolina Limited Liability Company; AF-River Falls, LLC, a North Carolina Limited Liability Company; GreenHawk Corporation, Inc.; and TRI Pointe Homes, Inc.

Respondents

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Joint Brief of Respondents, GHD Brooks Creek; AF-Brooks Creek, LLC; GHD Rivers Falls, LLC; AF-River Falls, LLC; GreenHawk Corporation, Inc.; and TRI Pointe Homes, Inc., in this matter comply with Rule 211(b) of the South Carolina Appellate Court Rules.

This 18th day of October, 2022.

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