

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON)	CASE NO.: 2022-CP-10-01958
)	2022-LP-10-00201
Marc K. Knapp,)	2022-LP-10-00255
)	
Plaintiff,)	
)	
Versus)	ORDER GRANTING SUMMARY
)	JUDGMENT AS TO PLAINTIFF'S
James Douglas Jenkins, IV, Peter Barnwell)	CLAIMS AND CANCELLING
Jenkins, and Alicia J. Roy,)	LIS PENDENS
)	
Defendants.)	
)	

THIS MATTER was before the Court for a hearing on December 12, 2022, on Defendants James Jenkins, Peter Jenkins, and Alicia Roy's (hereinafter "the Jenkins") Motion to Dismiss and/or for Summary Judgment¹ on the plaintiff's claims and Motion to Cancel Lis Pendens. Present were Miles Adler, Esq., attorney for the plaintiff, Marc Knapp, and David K. Haller, Esq., counsel for the defendants, with defendant James Jenkins. After reviewing the record before the court and hearing the arguments of counsel, I grant the motions.

FINDINGS OF FACT

On January 5, 2022, Marc Knapp (hereinafter "Knapp") agreed to buy from the Jenkins real property located at 5896 Maybank Highway, Wadmalaw Island, Charleston County (hereinafter "the Property"). The Property consists of approximately 6.69 acres of raw, undeveloped land. Knapp agreed to pay \$285,000.00 in exchange for the Jenkins providing marketable title to the Property. The property was sold, "As-Is." The contract called for closing

¹ Defendants initially filed a Motion to Dismiss pursuant to SCRCF Rule 12(b)(6), but subsequently timely amended their motion to alternatively seek Summary Judgment. Plaintiff filed a formal opposition to the Motion for Summary Judgment and it is this motion that is properly before and decided by the Court.

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on or before February 10, 2022. Shortly before the original closing date, the parties agreed to extend closing to February 24, 2022.

Knapp did not close on February 24, 2022, and the Jenkins declined to extend the closing date. The Jenkins were not satisfied that Knapp had financing to purchase the Property. Knapp filed a *lis pendens* on the property on March 24, 2022, and a second *lis pendens* April 14, 2022. He filed suit for declaratory judgment, specific performance, and breach of contract against the Jenkins on April 28, 2022. The Jenkins have answered and asserted counterclaims.

Knapp asserts that the Jenkins breached the contract by not extending the closing date when contingencies in it were not met by the date of closing. Knapp claims title to the property was not marketable. Further, he claims the contract is contingent on a septic permit from the South Carolina Department of Health and Environmental Control for the Property and that he did not have to close until that contingency was completed.

The matter was referred to me with finality by consent order dated September 21, 2022.

STANDARD OF REVIEW

Pursuant to SCRCP Rule 56, the standard for summary judgment for cases with a preponderance of the evidence standard is:

[S]ummary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. If triable issues exist, those issues must go to the jury. Summary judgment is appropriate where 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 judgment as a matter of law. All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts. However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot

differ, summary judgment should be granted. The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. Because it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues.

BPS, Inc. v. Worthy, 362 S.C. 319, 608 S.E.2d 155 (Ct. App. 2005). This is generally referred to as the “scintilla of evidence” standard.

LAW/ANALYSIS

Knapp seeks in his complaint a declaration that, “the Contract has not expired and that the “As-Is” provision in the Contract only applies to improvements on the Jenkins Tract and that “As-Is” does not relate to questions of marketable title generally and specifically the need for a properly set pin, establishment of the graveyard boundary, and the existence and location of an easement across the Jenkins Tract.” He further asks the Court to order specific performance of the contract and/or for judgment on the Jenkins’s breach of contract.

To succeed on any of these claims, however, Knapp must show that he was ready, willing, and able to perform on his own notwithstanding any alleged breach of the contract by the Jenkins. *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 106, 531 S.E.2d 287, 291 (2000) (holding that for a party to enforce a contract he must show he was and remains ready, willing, and able to perform his part of the contract.). The Jenkins contend that Knapp was not able to close because he did not, and still does not, have adequate financing as required by the contract terms. “Where a contract is not performed, the party who is guilty of the first breach is generally the one upon whom all liability for the nonperformance rests.” *Silver v. Abstract Pools & Spas, Inc.*, 376 S.C. 585, 594, 658 S.E.2d 539, 543 (Ct. App. 2008). The Jenkins contend Knapp breached the contract’s Financing Contingency and cannot now complain of any alleged subsequent nonperformance by them. I find Knapp breached the Financing Contingency and was not ready, willing, and able to purchase the

Property on the date of closing. Accordingly, the Court finds that Knapp was the first to breach and his claims are moot.

1. Financing Contingency

The contract's Financing Contingency provides:

FINANCE: Buyer's obligation under this Contract [X] is [] is not contingent upon obtaining financing of a [] 30 year or [] 15 year or [X] other _____ purchase money loan at reasonable prevailing market terms with loan(s) equal in amounts to a maximum 80 % of the Purchase Price or Appraisal Value whichever is lower. ("Financing Contingency"). Financing Contingency expires at Closing ("Financing Period"). Buyer must make timely good faith efforts to apply for and obtain financing while refraining from contrary actions ("Financing Effort"). In a timely manner, Buyer shall inform Seller and Brokers of pertinent financing issues and authorize Buyer's Lender to disclose pertinent loan information to Seller and Brokers ("Financing Disclosure"). Buyer shall apply for financing by January 10, 2022 (date) shall Deliver Notice to Seller of reasonable pre-final loan approval (e.g. pre-approval letter, initial approval letter) that contains no unreasonable credit, income, or asset conditions by January 17, 2022 (date) (no repairs required prior to this Notice). Final loan approval occurred when Lender funds loan(s). If the Buyer changes their Lender during the Financing Period they must notify the seller in writing within 7 calendar days. Absent written approval by the Seller Buyer cannot change lender if the closing date agreed up in Paragraph 4 will change as a direct result. If a Lender subsequently declines or fails to approve financing, the Buyer shall notify the Seller and Brokers as soon as possible. If the Seller and Brokers are notified of inability to obtain financing during the Financing Period, either Party may terminate this Contract by Notice.

Contract, ¶7(emphasis added).

The Jenkins contend Knapp breached the Financing Contingency by:

1. Failing to apply for financing for raw land by January 10, 2022;
2. Failing to provide a pre-approval letter by January 17, 2022;
3. Failing to obtain a loan for 80% of the purchase price by the closing date;
4. Failing to notify the Jenkins that Knapp was changing Lenders;
5. Failing to inform the Jenkins that he had been denied financing by a Lender so they could terminate the contract.

Based on the record before me, including Knapp's deposition testimony, I agree with the Jenkins.

Knapp testified that he applied for financing from four different lenders. The first was a VA lender, who neither approved nor denied Knapp financing. Instead, it stated it would not finance the purchase of raw land, such as the Property. His second application was not actually by him. Knapp testified he asked his daughter to apply for financing and, if she was approved, he would assign the contract to her. The record before me contained an email from a lender with AgSouth Bank dated February 2, 2022, (after the contractual deadline) stating Lauren Knapp was approved for \$145,000.00 in financing, less than the 80% the contract required. The third application was with First Citizens Bank. Knapp was denied financing by it. The last application was with a private lender named Ken Koos. Mr. Koos provided an affidavit stating he was willing to lend Knapp's business \$225,000 and that he had agreed to do so sometime undefined in January. However, in an email from Koos to Knapp dated March 22, 2022—almost a month after the extended closing date—Koos wrote, “Marc, my partner has been out west out backing it with limited reception and internet. I will discuss the proposed deal with him tomorrow, Thursday the latest. However, the deal has my vote.” This contemporaneous email indicates, at best, a contingent offer after the contractual deadline.

Knapp further admitted that he changed lenders without informing the Jenkins,² that he did not have a pre-approval of a loan from a lender by January 17, 2022,³ that he was denied financing by a lender (First Citizens) and did not inform the Jenkins,⁴ and that he did not have approved financing for 80% of the purchase price. By these admissions, Knapp acknowledged violating several provisions of the Financing Contingency. The clear intent of the contingency is to allow the buyer an opportunity to obtain financing, while allowing the seller the right to end the contract

² Depo. of Knapp, p. 33, ln. 22- p. 34, ln. 3.

³ Depo. of Knapp, p. 40, ln. 13-18.

⁴ Depo. of Knapp, p. 42, ln. 10-20.

if it became clear that the buyer could not afford to buy the property. The record here is clear based on Knapp's admissions that he was unable to obtain a loan for the 80% value and that his opportunity to obtain financing was, at best, limited. Knapp hid this information from the Jenkins and kept from them the ability to move on from the contract.⁵

The record shows that Knapp had not obtained the financing by the date required in the contract. The record further illustrates that Knapp failed to comply with the time and notice deadlines in it and that he hid this information from the Jenkins. Knapp breached the contract as a result. Being first to breach the contract, Knapp cannot complain of any other nonperformance. *Silver v. Abstract Pools & Spas, Inc.*, 376 S.C. 585, 594, 658 S.E.2d 539, 543 (Ct. App. 2008). Further, he was not ready, willing, and able to perform on the date of closing. Accordingly, he cannot succeed on his specific performance claim. *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 106, 531 S.E.2d 287, 291 (2000). Because of the breaches of the Financing Contingency, the Jenkins would be entitled to terminate the contract, so the declaratory judgment claims are moot. As a result, summary judgment is appropriate and I grant the Defendants' motion.

2. Knapp's Assertions of Breaches

Even if I did not find Knapp breached the Finance Contingency, I would still grant summary judgment because I find that no merit to his primary claims. Knapp asserts that 1) title to the property was not marketable and that closing should be delayed until it is; and 2) that the

⁵ After the missed closing date, Knapp through his counsel continued to act disingenuously as to Knapp's ability to pay for the property. "I have a call in to Mr. Knapp to get authorization for you to speak with his loan broker to confirm the loan application. As soon as I hear back from him I will forward you the loan broker's contacts so you can do your diligence." Email of Adler, March 9, 2022. This contemporaneous email was either untrue or some of Knapp's assertions regarding his financing are questionable.

contract was contingent on his obtaining a septic permit and he did not have to close until the permit was obtained. I reject both arguments.

Knapp contends there is a question about the marketability of the title.⁶ “A purchaser of realty cannot be required to take doubtful title and if there is a reasonable probability of litigation with respect to the title, it is unmarketable. To be marketable, a title need not be flawless. Rather, a marketable title is one free from encumbrances and any reasonable doubt as to its validity. It is a title which a reasonable purchaser, well-informed as to the facts and their legal significance, is ready and willing to accept.” *Scalise Dev., Inc. v. Tideland Invs., LLC*, 392 S.C. 27, 33, 707 S.E.2d 440, 443 (Ct. App. 2011) (internal citations omitted).

First, all parties acknowledge that the title search on the property showed no encroachments or other impediments. In fact, when Knapp claimed title was not marketable, the Jenkins obtained a commitment from a title insurance company to insure the property. Knapp still refused to close.

Knapp asserts that, although there was no formal encroachment found on the Property, a survey from 1969 showed a graveyard on a neighboring property. Knapp claimed there was a question of the boundaries of the graveyard. Knapp’s theory is that if the graveyard is on the Property, S.C. Code Ann. §27-43-310 would require him to give access to it. The statute provides, “**An owner** of private property on which a cemetery, burial ground, or grave is located must allow ingress or egress to the cemetery, burial ground, or graves...”. S.C. Code Ann. §27-43-310(A) (emphasis added). Since the graveyard is not on the Property, the owner of it cannot be compelled to provide access. Knapp claimed a picture from Google maps (from the internet) showed a path across the Property onto the neighboring property to access the graveyard. Knapp did not obtain

⁶ Knapp frames this issue as the Jenkins contending that because there is an “as-is” clause in the contract, Knapp must take the title to the property as it is. He provides nothing to bolster this assertion. The Jenkins contention is that the title is marketable and they were prepared to close in compliance with the contract.

a survey of his own. Knapp has shown no law that states a map printed from the internet is an encroachment.

However, Knapp acknowledged in his deposition that when he went to the Property, there was no noticeable path across it. In fact, Knapp testified that he had to cut his own path across the Property to stake out his proposed septic plan. After cutting the path, Knapp emailed his real estate agent on February 2, 2022, and said, "We verified today that the graves are not on the property." No showing has been made that a graveyard exists on the Property or that there is any path or other encroachment on it.

There is no genuine issue of material fact as to the marketability of the title and I hold that title to the Property is marketable. That said, if Knapp was concerned about the title, his remedy was to terminate the contract, not hold it hostage.

Second, Knapp asserts the contract was contingent on his obtaining a septic tank permit from SCDHEC which was not issued by closing. Knapp's theory is that the Jenkins must extend the closing date until the permit was issued. However, Knapp did not apply for the permit until February 7, 2022, three days before the initial closing date. The contract states "Time is of the Essence" and, even with an extended time to close, he did not obtain a permit by February 24, 2022. Knapp attributes his failure to close on a missing survey pin on the property which he contends the Jenkins were obligated to fix. However, the contract states that the seller agrees to take the Property as-is.

"As-is means the Buyer buys the Property for the Purchase Price while Seller maintains the Property from the Effective date through Closing subject to normal wear and tear without repair or replacement and sells the Property for the Purchase Price unless otherwise agreed upon...". Contract, ¶8. Knapp asserts this provision does not apply because he is buying raw land; however,

nothing in the contract supports this contention. The Property is defined as 5895 Maybank Highway, which all parties acknowledge as raw land. I interpret the contract as not requiring the Jenkins to make any repairs or do any work to the Property prior to closing. Again, if Knapp could not obtain a permit by closing, his remedy was to either terminate the contract, because the contingency was not met or negotiate an extension of the closing amenable to the Jenkins. For this reason, Knapp's contention also fails.

Having determined that Knapp no longer has a contract interest in the Property, the *lis pendens* is hereby cancelled.

THEREFORE, IT IS ORDERED that Defendants' Motion to Dismiss and/or for Summary Judgment is GRANTED; and

IT IS FURTHER ORDERED that judgment be entered in favor of the Jenkins on all of plaintiff Marc Knapp's claims; and

IT IS FURTHER ORDERED that plaintiff's *lis pendens* (2022-LP-10-00201 and 2022-LP-10-00255) are CANCELLED; and

IT IS FURTHER ORDERED that the court retains jurisdiction to award attorney's fees and costs pursuant to the contract between the parties. Defendants shall submit a request for fees and costs within ten (10) days of the date of this order; and

IT IS FURTHER ORDERED that this case may continue for the Defendants to pursue their counterclaims.

AND IT IS SO ORDERED!



Charleston Common Pleas

Case Caption: Marc K Knapp VS James Douglas Jenkins IV , defendant, et al
Case Number: 2022CP1001958
Type: Master/Order/Other

So Ordered

s/Mikell R. Scarborough 3062

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