

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

James O. Spence, Master-in-Equity

Case Number: 2010-CP-32-2038

Oliver Grady Query, and the Estate of Grady W. Query by its Personal Representative,
Oliver Grady Query, Respondents/Appellants,

vs.

Ladislao Castrejon, Alberto Lozano and Jesus Brito, Defendants,
Of whom Ladislao Castejon is the Appellant/Respondent, and Jesus Brito is the Respondent.

RESPONDENTS' INITIAL BRIEF OF RESPONDENTS/APPELLANTS

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ARGUMENT

I. There are sufficient writings memorializing modifications to the written contract between the parties to buy and sell real estate so that the Statute of Frauds is not implicated.

The trial court found there was a binding contract between the parties to buy and sell real estate. In his Order at page 6, he reviewed the terms of the written contract between the parties, Plaintiffs' Trial Exhibit 4. The trial Judge further found that neither of the parties ever sought to enforce the "time is of the essence" clause or the original closing deadline date of April 25, 2008.

"The determination of whether [a party's] actions constituted waiver is a question of fact." Madren v. Bradford, 378 S.C. 187, 661 S.E. 2d 390, 394 (Ct. App. 2008). The trial judge, sitting as a jury, found abundant evidence of continuing negotiations between the parties to consummate the sale on owner financing terms. In his Order at page 7, he found that the parties agreed "upon a new financing arrangement involving owner financing and a closing date in September 2008." Appellant – Respondent Castrejon did not dispute this and, in fact, testified the only reason the closing did not occur was that on the day of the scheduled closing his business partner, Respondent Brito, decided he did not want to provide the down payment of \$75,000.00.

Regarding the Statute of Frauds argument as to the modifications to the contract, there are sufficient writings memorializing said modifications.

Pursuant to the South Carolina Statute of Frauds, any contract for an interest in land must be in writing and signed by the party against whom enforcement is sought. S.C Code Ann. § 32-3-10(4) (2007). A writing sufficient to remove an oral agreement from the Statute of Frauds "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."

Smith v. McClam, 289 S.C. 425, 456, 346 S.E.. 2d 720, 723 (1986).

As to the closing date, the trial judge noted during trial that extensions of closing dates are routine matters. Here, the closing date was initially extended to complete negotiations over owner financing terms. It was extended again, from August to September 2008, because the closing attorney determined that he needed a current survey of the property. See Plaintiff's Trial Exhibit 8 (Survey).

As to the terms of owners financing, Respondents – Appellants would submit that these did not constitute a modification of the written contract since paragraph six of the contract states the “contract is contingent upon above financing”, but it does not specify a particular type of financing. Therefore, either “conventional” or “seller” financing satisfies the condition precedent to the contract and neither would constitute a modification to the terms.

In any event, South Carolina courts have found various writings sufficient to satisfy the Statute of Frauds, including a memorandum in a letter and an email. See, Smith v. McClam, *supra* at 456; Mathis v. Brown & Brown of South Carolina, Inc., 389 S.C. 299, 698, S.E. 2d 773 (2010). On August 12, 2008, Seller's realtor sent a fax (Plaintiff's Trial Exhibit 10) to the closing attorney with the agreed-upon owner financing terms. Later that day, the closing attorney confirmed via e-mail to the seller that the closing was scheduled to go forward with owner financing. Plaintiffs' Trial Exhibit 6. The seller testified that the amortization schedule Plaintiffs' Trial Exhibit 7, was sent to the closing attorney. A copy of the schedule was located in the closing attorney's file for the scheduled closing. (Plaintiffs' Trial Exhibit 5).

The trial judge found there was a written contract between the parties –“a standard form of the Greater Columbia Association of Realtors captioned ‘Land, Lots, and Acreage Offer to Purchase.’” Order at page 11. The owner financing terms were forwarded to the closing attorney in writing and he confirmed in writing that the closing was scheduled to proceed on owner

financing. The condition precedent to the contract was thus met and the ruling of the trial judge should be reversed.

CONCLUSION

Although various legal arguments have been asserted on behalf of Appellant-Respondent purchaser, he testified and the trial judge found that the only reason this closing did not occur was that purchaser's partner did not like the property and Appellant-Respondent purchaser claimed he was relying on his partner for the down payment funds. Whether or not this constitutes a condition precedent to the contract should be dispositive here.

Respectfully submitted



Mark Evans, S.C Bar #6490
Attorney for Respondents/Appellants

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Oliver Grady Query, and the Estate of Grady W. Query by its Personal Representative,
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vs.

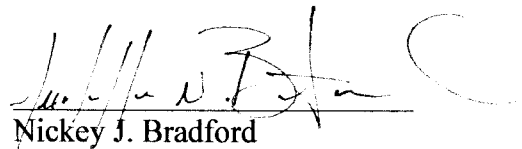
Ladislao Castrejon, Alberto Lozano and Jesus Brito, Defendants,
Of whom Ladislao Castejon is the Appellant/Respondent, and Jesus Brito is the Respondent.

PROOF OF SERVICE

I hereby certify that on this 26th day of November 2014, a true and correct copy of the foregoing document Respondents' Initial Brief of Respondents/Appellants was mailed, postage fully prepaid, via the United States Mail, addressed as follows:

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November 26, 2014

The South Carolina Court of Appeals
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RE: Oliver Grady Query v. Ladislao Castrejon, Alberto Lozano, & Jesus Brito
Case Number: 2010-CP-32-2038

Dear Madam:

Enclosed herewith for filing, please find an original of the Respondents' Initial Brief of Respondents/ Appellants in the above mentioned case. Please file the originals and return the clocked copy to me in the enclosed envelope.

Thank You.

With kind regards,

Mark V. Evans

Mark V. Evans

MVE/njb
Enclosures (as stated)

cc: Allen Bullard, Esquire
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