

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

Civil Action No. 2015-CP-10-3389

PETER MILLER, MARY ALICE MILLER,)
MARY ALICE MILLER, AS TRUSTEE)
OF MARY ALICE MILLER LIVING)
TRUST, MILLER GROUP PROPERTIES,)
LLC, AND C-MILLER PROPERTIES,)
LLC,)

Plaintiffs,)

vs.)

MARILYN L. DILLON AND JLI, LLC,)

Defendants)

and)

MARILYN L. DILLON)

Third-Party Plaintiff)

vs.)

PMC, LLC)

**ORDER DENYING PLAINTIFFS MOTION
TO ENFORCE SETTLEMENT ORDER**

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JULIE J. VANCE, CLERK OF COURT

This matter comes before the Court on a Motion to Enforce Settlement Order filed by Plaintiffs on April 28, 2017. A hearing was held before the undersigned on June 14, 2017. Based on my review of the file, the submissions of the parties, the arguments of counsel for the parties and the applicable substantive and procedural law, the Court **DENIES** Plaintiffs' Motion to Enforce Settlement Order for the reasons set forth below.

FACTUAL AND PROCEDURAL BACKGROUND

On June 1, 2006, Peter Miller, Mary Alice Miller (collectively, the "Millers"), Mary Alice Miller as Trustee of the Mary Alice Miller Living Trust ("Trust") and Miller Group

Properties, LLC ("Miller Group") made, executed and delivered to Defendant Marilyn J. Dillon ("Dillon") a Promissory Note ("Note") in the original principal sum of Three Hundred Sixty Thousand and 00/100s (\$360,000.00) dollars. Said Note provided for payment of all sums due thereunder to be paid on May 31, 2009. To better secure the sums extended as evidenced by the Note, a Mortgage ("Mortgage") dated February 5, 2008 was executed and recorded on February 7, 2008 in Book S650 at page 250. Said Mortgage is a valid lien on certain real property located in Charleston, South Carolina ("Property").

On March 23, 2012, Miller Group made, executed and delivered to Dillon a Modified Promissory Note ("Modified Note") in the principal sum of Four Hundred Thirty-Four Thousand Fifty-Nine and 00/100s (\$434,059.00) dollars. Said Modified Note provided for interest at a rate of seven percent (7%) per annum and for monthly payments to be in the amount of Two Thousand Five Hundred Thirty-Two and 01/100s (\$2,532.01) dollars. The Modified Note had a term of one (1) year with a balloon of the unpaid balance being due on May 1, 2013. Concurrent with the execution of the Modified Note, a Modification of Mortgage Agreement ("Mortgage Modification") was recorded on July 11, 2012 in Book O263 at page 507. This Mortgage Modification memorialized the terms of the Modified Note and re-affirmed the Mortgage as security for same.

Thereafter, the Loan went unpaid for a long period of time. No payment was made at maturity. Prior to Defendants commencing a foreclosure action, the Plaintiffs instituted this matter by the filing of a Lis Pendens, Summons and Complaint by the Plaintiffs on June 15, 2015. The Complaint alleges *inter alia* a cause of action for Declaratory Judgment. Defendants Dillon and JLJ Associates, LLC ("JLJ") (collectively "Defendants") filed an Answer, Counterclaim, Cross-Claim and Third-Party Complaint ("Answer") on September 17, 2015.



Defendants' Answer generally denies the allegations of the Complaint, asserts various affirmative defenses and further asserts claims against Plaintiffs and PMC for foreclosure of that certain Mortgage held by Dillon.

Mediation was held, resulting in a Consent Settlement Order ("Settlement Order") being entered on September 12, 2016. Under the terms of the Settlement Order, each of the parties had certain obligations, most of which were the responsibility of the Plaintiffs and PMC. Plaintiffs' filed the instant Motion to Enforce Settlement Order on April 28, 2017.

ANALYSIS

Plaintiffs seek to compel performance of the Settlement Order to require Defendants to execute a Real Estate Purchase Agreement submitted by CRM Agency, LLC, a Georgia limited liability company of which Plaintiff Cynthia Miller is the managing member. Defendants argue performance should not be compelled because (1) the Real Estate Purchase Agreement violates the terms of the Settlement Order; and (2) Plaintiffs own breaches of the Settlement Order preclude such enforcement. The Court agrees with Defendants and, for the following reasons, finds that the denial of the Motion to Enforce Settlement Order is merited.

1. The Real Estate Purchase Agreement does not comply with the Settlement Order.

The parties disagree as to whether the Real Estate Purchase Agreement complies with the Settlement Order. Based on a consideration of the language of the Settlement Order, the Court finds the Real Estate Purchase Agreement does not comply with several provisions of the Settlement Order.

First, Plaintiffs did not provide a loan commitment or a ratified contract as stipulated by the Settlement Order.¹ Mutual assent is a longstanding principle of contract law. See Prestwick

¹ Under the terms of the Settlement Order, Plaintiffs were required to present (a) "a ratified contract to sell the property....for Eight Hundred Fifty Thousand and 00/100s (\$850,000.00) dollars or higher..." within One Hundred

Golf Club, Inc. v. Prestwick Limited Partnership, 331 S.C. 385, 503 S.E.2d 184 (Ct. App. 1998)

(“In order for a contract to be binding, there must be mutual manifestation of assent between the parties”); see also, Rose Electric, Inc. v. Cooler Erectors of Atlanta, Inc., 418 S.C. 424, 794 S.E.2d 382 (Ct. App. 2016) (“A contract is an obligation which arises from actual agreement of the parties manifested by words, oral or written, or by conduct”). The Real Estate Purchase Agreement is signed only by C-Miller Properties, LLC and the proposed Buyer, CRM Agency, LLC. Neither JJJ nor PMC, the other two (2) owners of the Property, signed the Agreement. As such, the Court finds that it is not a ratified contract, and that the Real Estate Purchase Agreement does not comply with the terms of the Settlement Order.

The Court also finds the Real Estate Purchase Agreement is not supported by valuable consideration which is a necessary element of contract formation. See Plantation A.D., LLC v. Gerald Builders of Conway, Inc., 386 S.C. 198, 687 S.E.2d 714 (Ct. App. 2009) (“The necessary elements of a contract are an offer, acceptance and valuable consideration.”). Section 3 thereof provides as follows: “The total purchase price for the Property is \$850,000.00. Buyer will pay no money down, \$0.00 (“Earnest Money”) upon the execution of this Agreement and will pay the entire \$850,000.00 of the purchase price at closing.” As a result, the Real Estate Purchase Agreement lacks consideration and does not comply with the terms of the Settlement Order.

Additionally, the Court finds the Real Estate Purchase Agreement violates the terms of the Settlement Order in that Section 4 thereof provides that “either Party may unilaterally delay closing for any reason, but in no event will closing occur more than 30 day after the Closing date specified herein....” Any extension of the Closing Date pursuant to Section 4 of the Real Estate

Eighty (180) days of the date of the filing of the Settlement Order or (b) an unqualified commitment letter from a reputable lender...in an amount sufficient to pay the debt owed Defendants/Third Party Plaintiffs...



Purchase Agreement would violate the terms of the Settlement Order as it would set closing more than two hundred seventy (270) days from the filing of said Settlement Order.

Therefore, the Real Estate Purchase Agreement does not comply with the terms of the Settlement Order. As a result, the Court find that Plaintiffs have failed to comply with said Settlement Agreement, Defendants were entitled to reject and refuse to sign the Real Estate Purchase Agreement, and Dillon was entitled to record the Deed-in-Lieu of Foreclosure as she has now done.

At the hearing, Cynthia Miller offered an affidavit in response to Defendants' response. In that affidavit, Ms. Miller offered multiple facts that are not before the Court on this Motion. As such, the Court discounts any matter not-relevant to the Motion to Enforce. That said, Ms. Miller's affidavit argues that the deadline to present a ratified contract was March 11, 2017 and, because the 11th was a Saturday, that the deadline was extended to March 13, 2017. The Settlement Agreement does not make a provision for business days versus weekend days. As such, the deadline to obtain a ratified contract was March 11, 2017.

2. Plaintiffs cannot compel Settlement Agreement due to their own non-performance.

While the Motion to Enforce Settlement Order fails on the basis of the Real Estate Purchase Agreement not complying with certain provisions of the Settlement Order, Defendants also argue Plaintiffs cannot seek specific performance under the Settlement Agreement because their own breaches preclude such enforcement.

In South Carolina jurisprudence, settlement agreements are viewed as contracts. Pee Dee Stores, Inc. v. Doyle, et al., 381 S.C. 234, 672 S.E.2d 799 (Ct. App. 2009). When "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) (quoting Willms Trucking Co. v. JW Constr. Co., 314 S.C. 170, 178, 442 S.E.2d 197, 201 (Ct. App. 1994)). Further, in order to compel specific performance, a court of equity must find that: (1) there is clear evidence of a valid agreement (2) the agreement has been partly carried into execution on one side with the approbation of the other; and (3) the party who comes to compel performance has performed his or her part, or has been and remains able and willing to perform his or her part of the contract. Ingram v. Kasey's Associates, 340 S.C. 98, 531 S.E.2d 287 (2000). The doctrine of unclean hands precludes a party from recovering in equity if he or she acted unfairly in a matter that is the subject of the litigation to the prejudice of the other party. Id.

Defendants put forth sufficient evidence illustrating that they have fulfilled their obligations thereunder while the Plaintiffs have consistently failed to honor theirs. First, the Settlement Order provided that the Property would be listed for sale with Reid Davis of Lee & Associates which never happened. As the evidence shows, the Plaintiffs, in particular Cynthia Miller, failed to cooperate with Mr. Davis throughout the process making a listing impracticable. In fact, the only person to cooperate fully with Mr. Davis was Joseph Dillon, the spouse of Dillon. As indicated in Mr. Davis' affidavit, multiple attempts were made by him to contact Cynthia Miller, the person with the most knowledge of the Property, to no avail. Even when a listing agreement was presented, Cynthia Miller, who managed the Property for many years refused to execute it.

Second, the Plaintiffs failed to pay the 2016 property taxes for the Property as required under the Settlement Order. Third, the Plaintiffs did not provide the Deed-in-Lieu documents to Defendants' counsel until after the time to produce a ratified contract or *bona fide* loan commitment had passed. When provided, the documents were altered [by C-Miller] and did not

contain sufficient documentation to make it possible for Dillon to obtain title insurance despite numerous requests. Fourth, Dillon complied with the terms of the Settlement Order by advancing funds pursuant to Section 9 of same.

Therefore, the Court finds that Plaintiffs cannot seek specific performance of the Settlement Order when they themselves have not complied with the Settlement Order. First, they breached the Settlement Order first making them unable to demand performance now. Second, Plaintiffs', in particular C-Miller Properties, LLC and its sole member, failure to cooperate with the listing of the Property as required in the Settlement Order constitutes unclean hands barring specific performance. Third, while Defendants fulfilled their obligations under the Settlement Order, Plaintiffs have failed to honor theirs making specific performance inappropriate.

3. Prejudice to the Parties.

The Court further finds that enforcing the Settlement Order would work a prejudice on Defendants. "Under South Carolina law, the equitable power of a court is not bound by cast-iron rules, but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hand of another." Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr., 386 S.C. 108, 116–17, 687 S.E.2d 29, 33 (2009). Courts will not hear one who engages in open defiance of orders and then complains that others who have made a good faith effort to comply are guilty of some technical default. Whetstone v. Whetstone, 309 S.C. 227, 420 S.E.2d 877 (Ct. App. 1992). This is especially true when the disobedient party's own conduct has prevented the one acting in good faith from fulfilling his duties. Id.

A motion to compel a settlement agreement is one for specific performance. See Carlson v. S.C. State Plastering, LLC, 404 S.C. 250, 743 S.E.2d 868 (Ct. App. 2013) (filing a motion to

compel to enforce an agreement); King v. Oxford, 282 S.C. 307, 318 S.E.2d 125 (Ct. App. 1984) (requesting specific performance to compel transfer of stock as required by contract). Specific performance is an equitable remedy that requires the Court to weigh the equities of the parties involved. Time Warner Cable v. Condo Services, Inc., 381 S.C. 275, 282, 672 S.E.2d 816, 819 (Ct. App. 2009) (“[A] court granting [specific performance] must...carefully consider all the circumstances of the particular case.”).

In this matter, the equities favor the Defendants. As has been established, the loan which was the subject of this matter matured in May 1, 2013, over four (4) years from the date of this Order. It originated in June of 2006. Therefore, Dillon has been without payment of her funds since at least May 1, 2013 and, according to the arguments at the hearing, long before that time. Dillon bargained for foreclosure of the property if no payment was made. She then agreed to accept a Deed-in-Lieu of Foreclosure after giving the Plaintiffs adequate time to sell the property to a third party under the Settlement Order. No sale materialized despite her efforts and, she is entitled to the remedy provided: the recordation of the Deed-in-Lieu and title to the Property.

Additionally, Dillon has continued to be prejudiced while this motion has been pending. There are various costs associated with the property including the 2016 taxes which were not paid by the Plaintiffs as required under the Settlement Order that continue to accrue penalties along with other costs. Dillon is hesitant to expend further amounts for which it will be unreimbursed if the Court were to order the property sold to CRM Agency, LLC.

Further, the Deed-in-Lieu of Foreclosure was recorded prior to the Motion to Enforce Settlement along with certain corrective deeds to clear up title issues. Thereafter, Dillon conveyed the property ~~conveyed~~ into an LLC. Any order compelling enforcement of the Settlement Agreement would require this Court to either set aside those transfers or to re-write

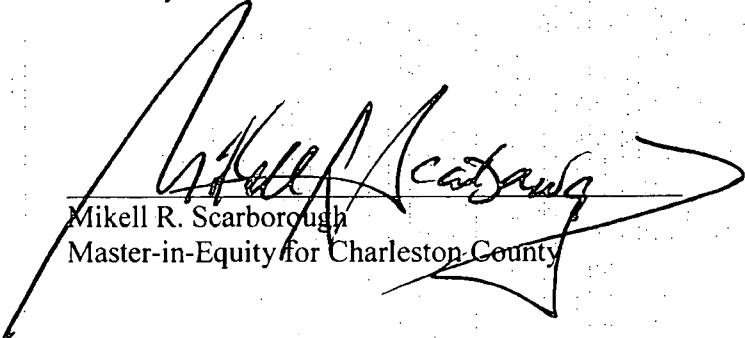


the parties Settlement Agreement. Courts are not in the business of re-writing contracts for the parties and this Court cannot do so at this stage. Abel v. S.C. Dept. of Health and Environmental Control, 419 S.C. 434, 441, 798 S.E.2d 445, 448 (Ct. App. 2017) (“Courts are without authority to alter a contract by construction or to make new contracts for the parties.”); York v. Dodgeland of Columbia, Inc., 406 S.C. 67, 90, 749 S.E.2d 139, 151 (Ct. App. 2013) (“South Carolina’s general principle...is that it is not a function of the court to rewrite contracts for the parties.”). Further, the Court is hesitant to set aside valid conveyances in the context of a Motion to Enforce Settlement.

CONCLUSION

Based on the foregoing, the Court hereby **DENIES** Plaintiffs Motion to Enforce Settlement Order.

IT IS SO ORDERED.


Mikell R. Scarborough
Master-in-Equity for Charleston County

Charleston, South Carolina
September 27, 2017