STATE OF SOUTH CAROLINA

COUNTY OF YORK

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

Eastwood Construction Partners, LLC, and Eastwood Development Corporation,

Plaintiffs,

v.

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

Defendants.

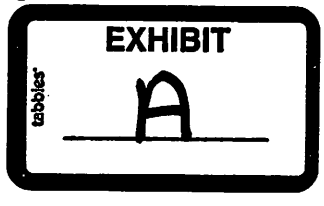
C/A No. 2020-CP-46-02006

ORDER

This matter came before the Court on December 10, 2021, upon Defendants GHD-Brooks Creek, LLC, AF-Brooks Creek, LLC, GHD-River Falls, LLC, AF-River Falls, LLC, and GreenHawk Corporation, Inc.'s ("GreenHawk") (collectively, "Defendants") Motion for Partial Summary Judgment and Cancellation of Lis Pendens[1] ("Motion"). Present at the hearing were John I. Mabe, Andrew A. Mathias, and Konstantine P. Diamaduros for Defendants, Stephen M. Cox, Amanda P. Nitto, and Tim Misner for Co-Defendant TRI-Pointe Homes, Inc. ("TRI-Pointe"),[2] and James C. Adams, II, William O. Walker, IV, and James Edward Bradley for

[1] Unless otherwise specified, "Lis Pendens" as used herein is a collective reference to Lis Pendens Nos. 2020-LP-46-00228 and 2020-LP-46-00229.

[2] TRI-Pointe also filed a Motion for Partial Summary Judgment, which is addressed in a separate Order.



Plaintiffs Eastwood Construction Partners, LLC and Eastwood Development Corporation (collectively "Eastwood").

UNDISPUTED FACTS

Based upon Defendants' Motion and the memorandum in support thereof ("Memorandum"), including supporting exhibits, as well as the arguments of counsel, I find that the following facts are not in dispute:

I. Background

This dispute arises out of a failed negotiation to purchase land in York County. As a land developer, GreenHawk purchases raw land and contracts for construction of improvements for residential or commercial purposes. In this instance, Eastwood identified two separate parcels of land that would ultimately become Brooks Creek[3] and River Falls. Prior to closing on these assembled parcels, Eastwood assigned the contracts for purchase to GreenHawk, and GreenHawk entities purchased them.[4] The parties do not dispute that the initial intention was for GreenHawk to develop the land; then, after GreenHawk completed development, the parties would enter into contracts whereby GreenHawk would sell the lots in the River Falls and Brooks Creek subdivisions to Eastwood. Despite negotiations that spanned several years, this initial intention never came to fruition.

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[3] GreenHawk formed two LLC's, AF-Brooks Creek, LLC and GHD-Brooks Creek, LLC, to purchase and to develop the Brooks Creek subdivision. Eastwood sometimes referred to Brooks Creek as "Brooks Springs," and TRI-Pointe later changed the name to Ashburn. However, Brooks Creek, Brooks Springs, and Ashburn all refer to the same property.

[4] The contracting parties were AF-Brooks Creek, LLC and AF-River Falls, LLC, which were GreenHawk affiliates formed for the specific purpose of purchasing these tracts of land.

Prior to this litigation, GreenHawk sold part of Brooks Creek to TRI-Pointe.[5] Shortly thereafter, Eastwood filed the Lis Pendens on June 11, 2020. On July 1, 2020, Eastwood filed its initial Complaint, which has since been amended three times, on July 31, 2020, October 30, 2020, and February 25, 2021. At issue in this Motion are Eastwood's claims for specific performance.

II. No Enforceable Contract Existed Between the Parties Whereby Eastwood Would Purchase River Falls or Brooks Creek From GreenHawk

In their Memorandum and at the hearing on this Motion, Defendants submitted a substantial amount of evidence, including documents and deposition testimony primarily from Eastwood's own representatives, which conclusively established that no enforceable contract, written or otherwise, has ever existed between the parties whereby Eastwood would purchase River Falls or Brooks Creek from GreenHawk. This undisputed evidence included, but was not limited to, the following:[6]

- The parties never executed a written contract for Brooks Creek or River Falls that would satisfy the statute of frauds.
- Joe Dority and Joe Polite, Eastwood's former and current Vice President of Land,[7] each testified at deposition that Eastwood's standard practice was to have a written contract in place for land sale agreements. *See* Defs.' Mem. at 6, 8.
- Regarding the parties' course of dealing, Mr. Polite testified that all prior lot purchase agreements between Eastwood and GreenHawk involved the use of a signed, written contract. *Id.* at 12. Moreover, all prior dealings between the parties – as identified and

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[5] Although the remainder of Brooks Creek is still under contract for sale to TRI-Pointe, GreenHawk's efforts to consummate that sale have been stymied by Eastwood's filing of the Brooks Creek Lis Pendens. In addition, River Falls is currently under contract for sale to non-party Taylor Morrison Homes, but this sale similarly cannot go forward as long as the River Falls Lis Pendens remains in effect.

[6] For a full overview of the documents and deposition testimony submitted by Defendants, *see* Defs.' Mem. at 4-13.

[7] Mr. Polite succeeded Mr. Dority as Eastwood's Vice President of Land. Mr. Polite was also designated as Eastwood's 30(b)(6) witness.

submitted by GreenHawk – regarding the purchase and sale of land involved the use of a written contract. *Id.* at 17 n.10. Eastwood never disputed this fact.

- Various Eastwood representatives repeatedly acknowledged or admitted that there was no contract, or that Eastwood needed a contract, with respect to purchase and sale of Brooks Creek. *See generally id.* at 4-13.

- Various Eastwood representatives repeatedly acknowledged or admitted that there was no contract, or that Eastwood needed a contract, with respect to purchase and sale of River Falls. *Id.*

- Various Eastwood representatives repeatedly acknowledged or admitted that Eastwood and GreenHawk never agreed on material terms (i.e., lot price, takedown schedule, or deposit amount) with respect to the alleged contract concerning the purchase and sale of Brooks Creek. *Id.*

- Various Eastwood representatives repeatedly acknowledged or admitted that Eastwood and GreenHawk never agreed on material terms (i.e., lot price, takedown schedule, or deposit amount) with respect to the alleged contract concerning the purchase and sale of River Falls. *Id.*

III. The Evidence Does Not Support Eastwood's Allegations that Eastwood and GreenHawk Were Partners or Joint Venturers.

Deposition testimony from Eastwood witnesses directly contradicts Eastwood's partnership and joint venture allegations.[8] First, Mr. Polite admitted that no joint profit or loss agreement existed between the parties. *See* Defs.' Mem. at 18. Second, Mr. Dority admitted that the parties never discussed becoming partners or joint venturers. *Id.* Third, and perhaps most importantly, Mr. Polite, while testifying as Eastwood's 30(b)(6) designee, stated the following after being asked whether there was an agreement to share the net profit or loss with GreenHawk: "We [Eastwood] were not anticipating sharing the net profit with GreenHawk." *Id.*

CONCLUSIONS OF LAW

Based upon Defendants' Motion and Memorandum, including supporting exhibits, as well as the arguments of counsel, I make the following conclusions of law:

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[8] These allegations appeared, for the first time, in Eastwood's Third Amended Complaint.

I. Standard of Review

Summary Judgment is appropriate "if 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). "[O]nce the moving party carries its initial burden, the opposing party must come forward with specific facts that show there is a genuine issue of fact remaining for trial." *Sides v. Greenville Hosp. Sys.*, 362 S.C. 250, 255 (S.C. Ct. App. 2004).

"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). Furthermore, "[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) (recognizing that one may not create a genuine issue of material fact by speculation or an "inferential leap"). And, "mere bald assertions uncorroborated by any other evidence" are likewise insufficient. *See Noorai v. Sch. Dist. of Pickens Cty.*, No. 2014-001282, 2016 WL 1367066, at *2 (S.C. Ct. App. Apr. 6, 2016); *see also Jackson v. Bermuda Sands, Inc.*, 383 S.C. 11, 17, 677 S.E.2d 612, 616 (Ct. App. 2009) (holding that "assertions as to liability must be more than mere bald allegations made by the non-moving party in order to create a genuine issue of material fact").

II. Analysis

A. Specific Performance

"Specific performance should be granted only if there is no adequate remedy at law and specific enforcement of the contract is equitable between the parties." *Ingram v. Kasey's Assocs.*,

340 S.C. 98, 105, 531 S.E.2d 287, 291 (2000) (citations omitted). In order to compel specific performance, a court must find:

> (1) ***there is clear evidence of a valid agreement***; (2) the agreement had 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.

Id. at 106, 531 S.E.2d at 291 (emphasis added).

Here, the documentary evidence produced in discovery ***by Eastwood***, together with the testimony of Eastwood's own representatives, indisputably established that the parties never had a valid agreement for the purchase and sale of River Falls or Brooks Creek. It is undisputed that the parties never executed a written contract for either property that would satisfy the statute of frauds. *See Fici v. Koon*, 372 S.C. 341, 346, 642 S.E.2d 602, 604 (2007) ("To satisfy the Statute of Frauds, every essential element of the contract must be expressed in a writing signed by the party to be compelled."). At most, the parties had an unenforceable, oral agreement to agree on the material terms of a contract at some undetermined point in the future. *See id.* at 347, 642 S.E.2d at 605 (holding that an agreement to agree is not enforceable under the statute of frauds); *see also Stevens & Wilkinson of S.C., Inc.*, 409 S.C. at 579, 762 S.E.2d at 701-02 (holding that an agreement to execute further agreements is unenforceable when there is no meeting of the minds on material terms).

At deposition, Eastwood's own executives who were in charge of land acquisition, one of whom was Eastwood's 30(b)(6) designee, testified to as much and repeatedly confirmed that the parties never agreed to material terms of the contract, such as lot price, takedown schedule, and a deposit amount for River Falls or Brooks Creek. *See* Defs.' Mem. at 15 (Mr. Polite, as Eastwood's 30(b)(6) designee, testifying that the parties had an "***agreement in principle***" with respect to how they would arrive at an agreed-upon lot price) (emphasis added); *see also id.* (Mr. Polite, as

Eastwood's 30(b)(6) designee, confirming that as of October 20, 2021, there was no agreement between Eastwood and GreenHawk with respect to the Brooks Creek lot price, takedown schedule, or deposit amount); *id.* (Mr. Polite, as Eastwood's 30(b)(6) designee, confirming that "there was no acceptance or rejection of" the draft contract Eastwood received for Brooks Creek on October 31, 2018, and further noting that there was no need for Eastwood's land acquisition committee to meet about Brooks Creek at that point "[b]ecause ***there was no agreed upon terms by both [Eastwood's] Charlotte division or GreenHawk at the time***") (emphasis added); *Id.* (Mr. Polite, as Eastwood's 30(b)(6) designee, Q: "Just for clarity, I'm asking for the company's knowledge. I'm asking if there is a term of any agreement by which the company has the right to buy the River Falls project undeveloped?" A: "***Not to my knowledge.***") (emphasis added); *Id.* (Mr. Dority testifying that the parties had a "***verbal understanding***" and that the "***exact terms [of the contracts] would have had to be nailed down***") (emphasis added); *Id.* at 15-16 (Mr. Dority testifying, "***I don't remember any specific terms for Brooks Springs, Brooks Creek, River Falls. . . . I remember I talked to the GreenHawk folks about terms. Okay, we need to get the terms . . .***") (emphasis added).

To the extent Eastwood attempts to sidestep these glaring contractual deficiencies through an alleged course of dealing between the parties, *see, e.g.,* Third Am. Compl. at ¶¶ 10-11, those allegations were directly contradicted by the evidence. While testifying as Eastwood's 30(b)(6) designee, Mr. Polite confirmed that Eastwood has ***never*** closed on a property sale with GreenHawk without a signed, written contract, and further confirmed that if this Court were to order specific performance with respect to River Falls or Brooks Creek, that "***[i]t would be the first time that . . . Eastwood would buy a lot from a GreenHawk entity without a signed written contract.***" *See* Defs.' Mem. at 16 (quoting Mr. Polite's deposition testimony) (emphasis added). This testimony,

as well as the prior written contracts between the parties,[9] run entirely contrary to Eastwood's course of dealing allegations.

The overwhelming amount of testimony and documents reviewed and considered by the Court only lead to one conclusion. There is no genuine issue of material fact that no "valid agreement" existed between Eastwood and GreenHawk with respect to the purchase and sale of River Falls or Brooks Creek. Accordingly, Defendants are entitled to summary judgment on Eastwood's specific performance claims. *Ingram*, 340 S.C. at 106, 531 S.E.2d at 291. To the extent Eastwood argued that enforceable contracts existed under the part performance exception to the statute of frauds, that argument likewise fails without the presence of a valid agreement. *See Gibson v. Hrysikos*, 293 S.C. 8, 15, 358 S.E.2d 173, 176 (Ct. App. 1987).[10]

B. Lis Pendens

Eastwood's specific performance claims are the only causes of action that affect the title to River Falls and Brooks Creek. Accordingly, because GreenHawk is entitled to summary judgment on those claims, the Lis Pendens must be cancelled. *See Carolina Park Assocs., LLC v. Marino*, 400 S.C. 1, 9, 732 S.E.2d 876, 880 (2012) (affirming the cancellation of a lis pendens

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[9] *See* Defs.' Mem. at 17 n.10.

[10] Eastwood's partnership and joint venture allegations fare no better. Even if this Court were to assume that the Supreme Court of South Carolina would recognize a partnership or joint venture exception to the statute of frauds, Eastwood's partnership and joint venture allegations were also repeatedly contradicted by the evidence. *See Trexler v. McIntrye*, 216 S.C. 469, 473-474, 58 S.E.2d 887, 889 (1950) ("[T]he true test of a copartnership is that there must be a communion of profits and losses."); *Halbersberg v. Berry*, 302 S.C. 97, 101, 394 S.E.2d 7, 10 (Ct. App. 1990) ("To establish a partnership there must be an association of two or more persons to carry on as co-owners of a business for profit.").

after the plaintiffs no longer had a claim affecting the title to real property because the lis pendens was no longer authorized by S.C. Code Ann. § 15-11-10).

CONCLUSION

Without a valid agreement, a claim for specific performance cannot lie under South Carolina law. *Ingram*, 340 S.C. at 106, 531 S.E.2d at 291. Defendants are entitled to summary judgment on Eastwood's specific performance claims because there is no genuine issue of material fact that no valid agreement existed between Eastwood and GreenHawk with respect to the purchase and sale of River Falls or Brooks Creek. Accordingly, Defendants' Motion is **GRANTED**. Eastwood's specific performance claims are hereby dismissed with prejudice, and the Lis Pendens are hereby cancelled.

IT IS SO ORDERED.

Daniel D. Hall
Presiding Judge, York County

February ___, 2022

York Common Pleas

Case Caption: Eastwood Construction Partners, Llc , plaintiff, et al VS Ghd Brooks Creek , defendant, et al

Case Number: 2020CP4602006

Type: Order/Summary Judgment

So Ordered

s/Daniel D. Hall 2753