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NO. COA03-147

NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2003

STANFORD M. WHITE,
Plaintiff,

v.

Dare County
No. 02 CVS 131

DOROTHY VIRGINIA LENNON,
INDIVIDUALLY, And DOROTHY
VIRGINIA LENNON, TRUSTEE
OF THE WILLIAM E. LENNON,
JR. TRUST,
Defendant.

Appeal by plaintiff from order filed 12 September 2002 by Judge Carl L. Tilghman in Dare County Superior Court. Heard in the Court of Appeals 29 October 2003.

Gray & Lloyd, L.L.P., by E. Crouse Gray, Jr., for plaintiff-appellant.

Manning, Fulton & Skinner, P.A., by Michael S. Harrell, for defendant-appellees.

BRYANT, Judge.

Stanford M. White (plaintiff) appeals an order filed 12 September 2002 dismissing his complaint for failure to state a claim upon which relief can be granted.

In September 2001, plaintiff executed a contract to buy from Dorothy Virginia Lennon (defendant) her one-third undivided interest in real property located in Dare County, North Carolina for \$200,000.00. Under the contract, defendant was to provide

plaintiff \$175,000.00 purchase money financing in accordance with an attached "Seller Financing Addendum." The addendum provided that the purchase money deed of trust "shall be a second lien on the property," but did not state any terms concerning the first lien.

In December 2001, plaintiff tendered performance to defendant, but defendant refused to close on the property. Plaintiff then sued for specific performance of the contract. In dismissing plaintiff's complaint, the trial court found that "the subordination provisions of the contract . . . are too indefinite under North Carolina law to permit the enforceability of that contract."

The issue is whether the trial court erred in dismissing plaintiff's complaint. Specifically, plaintiff argues the contract at issue did not contain a subordination clause, and even if such a clause existed, the contract would still be enforceable. We disagree.

A motion to dismiss pursuant to Rule 12(b)(6) tests the sufficiency of the complaint. A complaint will be found insufficient "if it is clearly without merit; such lack of merit may consist of an absence of law to support a claim of the sort made, absence of fact sufficient to make a good claim, or the disclosure of some fact which will necessarily defeat the claim."

MCB Limited v. McGowan, 86 N.C. App. 607, 608, 359 S.E.2d 50, 51 (1987) (citations omitted).

The second lien in the instant case is a subordinate lien.

Cornelius v. Helms, 120 N.C. App. 172, 174, 461 S.E.2d 338, 339 (1995); see also *Crocker v. Delta Group, Inc.*, 125 N.C. App. 583, 584, 481 S.E.2d 694, 695 (1997) (a deed of trust that is subordinate to a lien constitutes a second lien on the property). "[S]ubordination agreements and clauses which subordinate loan obligations secured by a deed of trust to future loans must, at a minimum, include terms which state the maximum amount of the future loan and the maximum rate of interest permitted on the loan." *Smith v. Martin*, 124 N.C. App. 592, 599, 478 S.E.2d 228, 232 (1996). The rationale for this requirement is that "these terms are necessary to 'define and minimize the risk that the subordinating liens will impair or destroy the seller's security.'" *Id.* (quoting *McGowan*, 86 N.C. App. at 610, 359 S.E.2d at 52 (holding that a deed of trust was void for indefiniteness because the subordination agreement in the deed required the parties to agree at a future time as to the reasonableness of a loan requested by the buyer)).

In the instant case, the subordination clause does not state the maximum amount nor the interest rate of the first lien. Plaintiff concedes the absence of these terms but argues that *McGowan* and its progeny do not control the instant case because those cases concerned "future liens," while the first lien contemplated in the contract at issue is a "present" lien. However, the terms of the parties' contract do not indicate whether the lien is a present or future lien. Furthermore, plaintiff fails to cite any authority in his brief to this Court to support his

proposition and explain the importance of the distinction. Based on the foregoing, we hold that the subordination clause in the contract at issue is void for indefiniteness.

We also reject plaintiff's argument that the contract is still enforceable because the subordination clause is severable from the contract. We first note that the contract does not contain a severability clause with respect to the subordination agreement. Furthermore, a contract is unenforceable if its material terms are indefinite. *Gray v. Hager*, 69 N.C. App. 331, 335, 317 S.E.2d 59, 62 (1984). In holding that the deed of trust was void, the *McGowan* Court recognized that a subordination agreement when present in a deed is a material aspect to a real estate transaction. See *McGowan*, 86 N.C. App. at 610-12, 359 S.E.2d at 52-53 (applying contract law requirement of specificity). Consistent with *McGowan* and contract law, the contract at issue is unenforceable due to the indefiniteness of the subordination clause. Accordingly, the trial court properly dismissed plaintiff's complaint.

Affirmed.

Judges McCULLOUGH and TYSON concur.

Report per Rule 30(e).