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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-638

No. COA21-795

Filed 20 September 2022

New Hanover County, No. 18CVS906

HD HOSPITALITY, LLC, Plaintiff,

v.

LIVE OAK BANKING COMPANY, Defendant.

Appeal by plaintiff from order entered 20 May 2021 by Judge R. Kent Harrell in New Hanover County Superior Court. Heard in the Court of Appeals 9 August 2022.

Nelson Mullins Riley & Scarborough, by Lorin J. Lapidus and G. Gray Wilson, for plaintiff-appellant.

McGuireWoods LLP, by Henry L. Kitchin, Jr. and Abigail A. Golden, for defendant-appellee.

GORE, Judge.

¶ 1 Plaintiff HD Hospitality, LLC, ("HD"), appeals from the trial court's order granting summary judgment on all claims in favor of defendant Live Oak Banking Company ("Live Oak"). The trial court's summary judgment order constitutes a final judgment and is immediately appealable pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2021). On appeal, HD argues it offered competent record evidence to establish

genuine issues of material fact on its claims for (i) fraudulent concealment and derivative punitive damages and (ii) breach of the duty to negotiate in good faith. We affirm.

I.

¶ 2 HD is a limited liability company owned by Hitenkumar "Harry" Vaidya and his wife, Dimple Vaidya. The Vaidyas formed HD in 2011 to purchase an existing Quality Inn. In 2016, HD sought to enter a new market by building one of the first new concept design Comfort Inn Hotels from the ground up in White House, Tennessee.

¶ 3 To finance construction, the Vaidyas planned to execute a complicated series of time-sensitive transactions to leverage HD's equity in its existing properties. Specifically, they hoped to (1) sell two of their properties; (2) buy a new piece of vacant land; (3) obtain a multi-million-dollar construction loan; and (4) utilize a sophisticated tax strategy called a Section 1031 "like-kind" exchange. A Section 1031 exchange is a replacement of one investment property for another. When properly executed, a Section 1031 exchange allows deferral of capital gains taxes to some later date. Completing a Section 1031 exchange involving construction requires the taxpayer to hire a knowledgeable attorney, establish a qualified intermediary to own the new property during the construction period, and reinvest all gains on a sale into construction within 180 days after the sale. Given the complexity of the contemplated

transaction, HD's attorney advised Vaidya to "not . . . close on the sales [of their existing properties] until [they] are ready to close the purchase of the [new property] and the financing."

¶ 4 Live Oak is a commercial lender specializing in loans to small businesses that are guaranteed by government agencies, including the U.S. Small Business Administration ("SBA") under its Section 7(a) Loan program. Typically, when a potential borrower approaches Live Oak to obtain a loan, Live Oak first issues a non-binding proposal letter setting out the general terms of the proposed loan so that the potential borrower can determine if the proposed loan is one for which it would like to apply. The potential borrower must sign the proposal letter and pay a small fee. The potential borrower must then submit documents showing its financial position, eligibility for an SBA loan, and credit history. Additionally, for construction loans, Live Oak requires the potential borrower to submit a construction bid and feasibility study.

¶ 5 Once Live Oak receives all required documentation from the potential borrower, the bank's underwriting department performs a "formal workup." During this workup, Live Oak assesses the financial condition of the borrower and any proposed guarantors. If the loan exceeds $1,000,000.00, the loan will be submitted to the bank's Credit Committee for consideration and a vote. If the Credit Committee approves the loan, Live Oak issues a conditional approval letter, which outlines the

general terms and conditions of the proposed loan. Live Oak's loan approvals are conditioned on various assumptions, including the applicant's disclosed financial position, the project's cost, the borrower's projected capital contribution (referred to as an "equity injection"), and the principal amount of the loan. Live Oak requires any borrower seeking a loan for new hotel construction to provide, at minimum, a 20% equity injection relative to the total amount of the loan. However, Live Oak may require a larger equity injection in certain circumstances based on other aspects and risks of the proposed loan.

¶ 6 Under Live Oak's internal credit policy ("Credit Policy"), loan approvals expire after 90 days. Under the terms of the proposal letter, any loan not closed within the specified time must "have the approval letter reaffirmed" by the Credit Committee.

¶ 7 In March 2016, Harry Vaidya applied for an SBA loan from Live Oak. After Vaidya submitted all necessary documentation and signed a loan proposal letter, Live Oak's underwriting group performed a formal workup of the proposed loan. Based upon the amount of the loan request, HD's loan application was then submitted to Live Oak's Credit Committee for approval.

¶ 8 Live Oak's Credit Committee conditionally approved HD for a pair of loans in a loan commitment letter (the "Commitment Letter"), dated 14 June 2015. The Commitment Letter outlined in detail: (1) a larger term loan backed by an SBA guarantee, and (2) a smaller conventional (non-SBA-backed) loan, together totaling

a principal amount of $5,105,000 (together, the "Approved 2016 Loan"). The Commitment Letter stated the required borrower equity injection was "currently" $1,276,500 and based on HD's estimated costs for construction of a 33,000 square foot hotel.

¶ 9 HD had submitted a construction estimate with its application materials, which the Live Oak Credit Committee relied upon when it approved the Approved 2016 Loan. However, the construction estimate was not specific to HD's project and property—HD's general contractor based it on a "similar project in Georgia." The Commitment Letter further specified that the loan closing must occur within 90 days or else the financing would require re-approval by the Credit Committee and that "[s]hould the proposed square footage or cost of construction increase, loan is subject to re-approval by Live Oak Bank and borrower may be required to inject funds for any project cost overruns." The Vaidyas signed and returned the Commitment Letter on 16 June 2016.

¶ 10 When Live Oak's loan approval expired on 9 September 2016, HD did not have a contract to purchase the land on which it intended to build the Comfort Inn, a construction contract, nor a firm construction quote from a general contractor. HD had not closed on its two existing properties either. Despite the expiration of the approval for the Approved 2016 Loan, Live Oak continued to communicate with HD about potential financing of its anticipated project.

¶ 11 Harry Vaidya testified he spent the summer of 2016 working with an architect to design the Comfort Inn and obtain necessary permits for the project. In August 2016, Vaidya told Live Oak he planned to alter the design of the hotel to add an indoor pool. As a result, the square footage of the hotel increased, and the proposed budget for construction increased by approximately $540,000. Additionally, HD was forced to find a new general contractor in October 2016, after its original general contractor, RCO Construction, withdrew from the project for personal reasons. HD was forced to immediately hire and work with a replacement contractor, JVK Constructors, at increased cost.

¶ 12 Despite not knowing what its new hotel would cost to construct, and not having any construction financing in place, HD sold its existing properties on 1 February 2017. Only after HD started the clock on its 180-day deadline to complete its Section 1031 exchange did Harry Vaidya contact Live Oak to try to finalize HD's construction financing.

¶ 13 Harry Vaidya waited until 10 March 2017 to present Live Oak with a new written construction bid from JVK. The March 2017 JVK bid, which included all site work, totaled $5,361,728.09, roughly $1,000,000 higher than the original estimate HD had provided to Live Oak in 2016. At this point, to achieve its desired deferral of capital gains taxes via a Section 1031 exchange, HD had less than 150 days to obtain a new loan approval, close that loan, mobilize a contractor, and fully invest the gains

from the sales of the other two properties into construction work.

¶ 14 After HD provided Live Oak with the JVK bid on 10 March 2017, Live Oak told HD that it needed to apply for approval of a different, larger loan. Harry Vaidya testified he understood that this meant Live Oak's Credit Committee would have to decide whether to approve the new, larger loan. Vaidya communicated with Kirsten Mathews, a loan officer in Live Oak's Hotel Lending Department, and Casey Pleasants, an underwriter in the Hotel Lending Department, who assisted him with putting together his new loan application. Matthew Goers, a senior credit officer in Live Oak's Credit Department, was responsible for presenting HD's new loan package to Live Oak's Credit Committee for approval.

¶ 15 During the week of 14 March 2017, Mathews informed Vaidya that due to the increased loan amount, he needed to provide a larger equity injection. Mathews also suggested Vaidya obtain a comparison bid from another contractor and provided contact information for a contractor that constructed another hotel project that Live Oak financed. Vaidya never did so. Vaidya responded by asserting it's "not easy to come up with another $300,000, when you have not expected it" and asked Live Oak to lower the equity injection required. In an email dated 24 April 2017, Mathews and Pleasants informed Vaidya that "[Live Oak] will need to have an investor bring [$200,000] to the table in order to get the deal approved by credit."

¶ 16 Mathews and Pleasants worked with Vaidya over the next several weeks to

restructure the loan so that Vaidya could afford to cover the borrower equity injection himself. However, by late April 2017, it was apparent that HD would need another partner to provide the additional equity required for the larger loan. Pleasants previously warned Vaidya that an equity partner may be necessary due to loan size increase.

¶ 17 On 25 April 2017, Vaidya emailed Pleasants and Mathews stating, "I seriously still believe that I am able to pull this off by myself. That was the original plan. I need you guys to help me. Please ask your Credit Department one more time if, it[']s possible." In response, on 26 April 2017, Pleasants reiterated to Vaidya that he needed to bring in a partner with additional equity. However, Goers later stated he believed Vaidya had "potential character" issues and "did not have [his] sh-t together." Also on 26 April 2017, Goers wrote in an email to the Live Oak Credit Committee that "[t]here has been very mixed feedback on this deal from the team, and the [equity injection] increase may be our way out; however, we're very far along in the process and Harry's 1031 timeline is about to expire. The cash flow looks ok."

¶ 18 Goers was later asked at deposition whether there was a number available regarding the additional equity injection required for loan approval, or whether anyone at Live Oak raised character concerns with Vaidya. That colloquy is as follows:

> Q: So if Mr. Vaidya offered a . . . $500,000 equity injection,

that would have received at least your approval, wouldn't it have?

. . .

A: It's an arbitrary number, but it would have . . . helped, certainly helped.

. . .

Q: But there was ultimately a number that would have secured loan approval at some point, correct?

A: With the exception of the . . . potential character issue.

Q: Did you ever explain to Mr. Vaidya that you had a problem with his character?

A: I never did, no. We never had the conversation.

Q: Did anyone ever have a conversation with Mr. Vaidya that they had a problem with his character?

A: I cannot speak to that.

Q: Was this loan ever denied with the justification that there was a problem with Mr. Vaidya's character?

A: Hard to say. Would you give six million dollars to a person who lied to you?

. . .

Q: So as of April 28, 2017, in your view, was this deal dead?

A: Yes.

Q: Did you communicate that information to Mr. Vaidya on April 28, 2017, that you viewed that . . . this deal was dead?

A: It was not my responsibility to.

> . . .
>
> Q: To your knowledge, did . . . anyone at Live Oak communicate . . . to Mr. Vaidya that the deal was dead as of April 28, 2017?
>
> A: I believe that I recall having a conversation with the loan team after, but I – I can't – no idea.

¶ 19 On 28 April 2017, Imesh Vaidya (a cousin of Harry Vaidya), sent a one-page letter to Live Oak stating that his company would invest $200,000 into the deal to meet the need for additional equity. Mathews and Pleasants modified the loan package to reflect this third-party injection and submitted the package to the Credit Committee for consideration. However, even with this additional equity from the third-party investor, the Credit Committee declined to approve the new loan.

¶ 20 On 1 May 2017, Mathews informed Vaidya that the Credit Committee would be willing to review the loan one more time, but that Live Oak "need[ed] to know how much more you are willing/able to bring from your equity partner so [Live Oak] can rework the numbers and see if it's a substantial enough change to resubmit." Mathews also told him that the deal would be more attractive to the Credit Committee if Imesh Vaidya was willing to provide an equity injection that would equate to 20% or more of an ownership share in HD, because under both Live Oak's and the SBA's lending standards, a personal guarantee would be required from any individual who owned 20% or more of the borrowing entity. In response to Vaidya's request that Mathews tell him how much additional equity from Imesh Vaidya was

required by the Credit Committee, Mathews informed Vaidya that she was unable to tell him the precise amount that would secure approval.

¶ 21 On 2 May 2017, Vaidya told Live Oak that Imesh Vaidya would invest an additional $100,000 to bring his ownership share to 18.75%, and that "he will not have to sign the personal guarantee of the loan." This proposal was sent to the Credit Committee on 3 May 2017.

¶ 22 On 4 May 2017, Goers informed Mathews and Pleasants that the Credit Committee would not approve making the loan even with the increased equity injection. Pleasants and Mathews called Vaidya on 5 May 2017 and notified him that the loan was declined, and that Live Oak would be unable to proceed. After Live Oak's denial, HD subsequently procured a loan commitment from two other banks, and by paying additional fees, was able to proceed with the Comfort Inn project. However, the Section 1031 exchange deadline had passed.

¶ 23 On 15 March 2018, HD filed a complaint in New Hanover County superior court alleging fraudulent concealment, breach of the duty to negotiate in good faith, breach of contract in the alternative, and a derivative claim for punitive damages based on fraudulent concealment. On 18 May 2018, Live Oak filed a motion to dismiss the complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. The trial court denied the motion on 27 August 2018. HD filed a partial voluntary dismissal without prejudice with respect to a lost profits damage claim on

28 August 2019. This matter proceeded through substantial discovery, and Live Oak filed a motion for summary judgment on all remaining claims, amended with particular grounds on 10 May 2021. HD filed an additional partial voluntary dismissal without prejudice with respect to its alternative breach of contract claim on 18 May 2021. Live Oak's amended motion for summary judgment was heard on the same day, and the trial court entered an order granting the motion on 20 May 2021. HD filed timely notice of appeal from the trial court's summary judgment order on 27 May 2021.

II.

¶ 24 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 any party is entitled to a judgment as a matter of law." N.C. R. Civ. P. 56(c). The standard of review for summary judgment orders is *de novo*. *Builders Mut. Ins. Co. v. N. Main Constr., Ltd.*, 361 N.C. 85, 88, 637 S.E.2d 528, 530 (2006).

¶ 25 "To constitute fraud, there must be false representation, known to be false, or made with reckless indifference as to its truth, and it must be made with intent to deceive." *Myrtle Apartments, Inc. v. Lumbermen's Mut. Cas. Co.*, 258 N.C. 49, 52, 127 S.E.2d 759, 761 (1962) (citations omitted). "[T]he following essential elements of actionable fraud are well established: (1) False representation or concealment of a

material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive[,] (4) which does in fact deceive, (5) resulting in damage to the injured party." *Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 569, 374 S.E.2d 385, 391 (1988) (citation and emphasis omitted). Additionally, a plaintiff's reliance must be reasonable. *Forbis v. Neal*, 361 N.C. 519, 527, 649 S.E.2d 382, 387 (2007). "A claim for fraud may be based on an affirmative misrepresentation of a material fact, or a failure to disclose a material fact relating to a transaction which the parties had a duty to disclose." *Hardin v. KCS Int'l, Inc.*, 199 N.C. App. 687, 696, 682 S.E.2d 726, 733 (2009) (quotation marks and citation omitted).

¶ 26 HD asserts the record establishes triable issues regarding whether Live Oak intentionally concealed the material fact of the amount of additional equity injection needed to complete the loan, which HD reasonably relied upon to its detriment, thus missing the section 1031 deadline. HD further contends the trial court impermissibly deprived the fact-finder of its prerogative to decide whether Live Oak intentionally concealed that the loan was actually dead at the end of April 2017 because the bank had issues with Vaidya's character despite Live Oak's contemporaneous representation that $200,000 of non-borrowed funds would secure loan approval at that time. Thus, HD contends, the trial court reversibly erred by granting summary judgment in favor of Live Oak on HD's claim for fraudulent concealment. We disagree.

¶ 27 Here, HD has not shown that Live Oak concealed an existing material fact, possessed fraudulent intent to deceive, or their own reasonable reliance upon Live Oak's alleged concealment.

¶ 28 As a preliminary matter, it is unclear whether Live Oak had a duty to disclose the amount of additional equity injection needed to complete the loan at issue. HD has not put forth specific evidence that Live Oak was under any obligation to disclose its internal equity target in the context of an arm's length negotiation with a prospective borrower. When the 2016 Commitment Letter became unenforceable by its express terms, there was no subsequent commitment letter or written loan approval in which Live Oak entered into a binding agreement that comports with the requirements for commercial loan commitments set out in N.C. Gen. Stat. § 22-5 (2021) ("No commercial loan commitment by a bank, savings and loan association, or credit union for a loan in excess of fifty thousand dollars ($50,000) shall be binding unless the commitment is in writing and signed by the party to be bound.").

¶ 29 In his testimony, Vaidya could not identify all material terms for the contemplated $6.1 million loan, could not specify the loan's interest rate, "believed the loan was going to be amortized for about 25 years," and that he was told this "verbally" or that "it might be in the commitment letter" that expired in September 2016. There is no enforceable loan agreement appearing in the record, and HD has not shown that Live Oak breached a duty to disclose a material fact relating to a

future transaction. *See Boyce v. McMahan*, 285 N.C. 730, 734, 208 S.E.2d 692, 695 (1974) ("[A] contract to enter into a future contract must specify all its material and essential terms, and leave none to be agreed upon as a result of future negotiations.").

¶ 30 Presuming, without deciding, that Live Oak had an obligation to disclose their required amount of equity injection, HD has not forecast sufficient evidence to refute the testimony of Mathews, Goers, and Pleasants, that Live Oak never determined a specific amount of equity injection that would have resulted in the loan being approved by Live Oak's Credit Committee. *See Brickell v. Collins*, 44 N.C. App. 707, 711, 262 S.E.2d 387, 390 (1980) ("[T]he general rule is that '[s]ilence, in order to be an actionable fraud, must relate to a material matter *known to the party* and which it is his legal duty to communicate to the other contracting party . . . .'") (emphasis and alteration in original). Goers testified he did not know the specific equity injection amount needed to secure loan approval. Goer's testimony that a $500,000 equity injection from Imesh Vaidya "would have helped" is consistent with Mathews's statement to Vaidya that the deal would be "stronger" in the eyes of the Credit Committee if Imesh Vaidya offered to invest an amount equivalent to an ownership share in HD of 20% and signed a personal guarantee. HD further cites to unspecified portions of Live Oak's Credit Policy Manual in asserting that Live Oak had a duty to determine the precise amount of equity injection required, but the Policy provides only that the amount of equity for a given project should be, *inter alia*, at a level that

"results in a prudent leverage position."

¶ 31 The record shows that Live Oak was never under any obligation to lend HD money in April 2017, and Live Oak could have declined to approve HD's loan at any time. HD has not identified any evidence establishing why Live Oak would want to mislead Vaidya into believing that Live Oak was working to get his loan approved, given that Live Oak was not bound to a written loan agreement and retained the right to walk away from the bargaining table at any time. Live Oak maintains that it never determined the minimally acceptable amount of investor equity that would have been required to close. An additional equity injection of $200,000 and $300,000 were deemed insufficient, yet HD claims Live Oak knew this number but concealed it for some ulterior motive. However, fraudulent intent remains to be seen where no record evidence identifies what Live Oak had to gain from the alleged concealment of a material fact in the subject litigation.

¶ 32 HD cannot show it reasonably relied on any assurance that it would receive a loan from Live Oak. As previously stated, the parties had not reached a final written agreement on all material terms of the prospective loan. HD argues it reasonably relied on Live Oak's alleged concealment when it "continued in good faith to try and pursue closing the loan," and "upon first approaching Live Oak, HD informed the bank that HD planned to reinvest the funds from the Quality Inn sale into the new Comfort Inn project through a section 1031 exchange." However, no record evidence

suggests Live Oak induced HD's decision to start the clock on its Section 1031 exchange by selling its existing properties without having first obtained a construction quote or having secured its financing.

¶ 33 This Court recently addressed a similar fraud and reliance issue in *Roberson v. TruPoint Bank*, 281 N.C. App. 45, 2021-NCCOA-692. In *Roberson*, the defendant allegedly made assurances that the "loan would go through" before the plaintiff withdrew his IRA funds, but

> key and essential loan terms remained unresolved, including the length, the interest rate, applicable fees, the repayment schedule, and the other material conditions of the loan. No final agreement or binding commitment had been reached. As an experienced property owner, [the] Plaintiff knew or should have known, the essential material terms of the loan had not been agreed to and no final agreement had been reached. [The] Plaintiff's complaint fail[ed] to show any justifiable reliance as a matter of law.

Id. at 51-52, 2021-NCCOA-692, ¶ 27.

¶ 34 Accordingly, HD has not met its burden on motion for summary judgment. Because Live Oak is entitled to judgment in its favor on HD's claim for fraudulent concealment, the trial court did not err in granting judgment in Live Oak's favor for damages as well.

III.

¶ 35 HD further argues the record illustrates genuine issues of material fact as to

whether Live Oak is liable for breach of the duty to negotiate in good faith, and thus, the trial court reversibly erred by granting summary judgment on that claim as well. This argument is without merit.

¶ 36 A claim for breach of duty to negotiate in good faith has not been recognized by any appellate court in North Carolina. HD argues this claim has been recognized and addressed by the North Carolina business court in *RREF BB Acquisitions, LLC v. MAS Props., LLC.*, 2015 NCBC LEXIS 61, 2015 NCBC 58, 2015 WL 3646992 (N.C. Bus. Ct. June 9, 2015), *on reconsideration*, No. 13 CVS 193, 2015 NCBC LEXIS 110, 2015 WL 7910510 (N.C. Bus. Ct. Dec. 3, 2015). Business court opinions represent merely persuasive authority, but "we are mindful that the Business Court exists solely to hear complex business cases, and as such are respectful of its opinions." *Goldstein v. Am. Steel Span, Inc.*, 181 N.C. App. 534, 536 n.2, 640 S.E.2d 740, 742 n.2 (2007).

¶ 37 In *RREF*, the business court determined that there was "no reason that an agreement to continue negotiating in good faith would not be enforceable, provided that it met all of the requirements for contract formation under North Carolina law." *Id.* at *57. However, as Live Oak notes in their brief, a recent United States District Court for the Eastern District of North Carolina ("E.D.N.C.") decision, also persuasive authority, discussed *RREF* and subsequent business court decisions that recognize "a claim for breach of an express agreement to negotiate in good faith exists under

North Carolina law." *MLU Servs., Inc. v. Lawrence Mobile Home Serv., Inc.*, 2021 U.S. Dist. LEXIS 204895, at *10 (E.D.N.C. Oct. 25, 2021).

¶ 38 In *MLU Servs., Inc.*, the E.D.N.C. court noted,

> [t]he concept of agreements to negotiate in good faith seems at odds with North Carolina Supreme Court precedent, including *Boyce v. McMahan*, 285 N.C. 730, 208 S.E.2d 692 (1974), which held that "a contract to enter into a future contract must specify all its material and essential terms, and leave none to be agreed upon as a result of future negotiations."

2021 U.S. Dist. LEXIS 204895 at *10 (citing *Boyce*, 285 N.C. at 734, 208 S.E.2d at 695). The court did not determine "whether a claim for breach of an agreement to negotiate in good faith is cognizable under North Carolina law[,]" because "[e]ven adopting the North Carolina Business Court's reasoning, [the plaintiff's] claim here fails." *Id.* at *10-11.

¶ 39 Here, we also decline to address whether a claim for breach of duty to negotiate in good faith is cognizable in North Carolina considering our Supreme Court's long-standing precedent in *Boyce* that "a contract, or offer to contract, leaving material portions open for future agreement is nugatory and void for indefiniteness." 285 N.C. at 734, 208 S.E.2d at 695.

¶ 40 In their brief, HD argues, considering

> Live Oak's loan commitment, taken together with the substantial number of material loan terms upon which the parties reached agreement, the parties' continued course of

> negotiations for over one year, and Live Oak's express representations particularly towards negotiating a final deal, illustrate that HD and Live Oak entered into a binding preliminary agreement to continue to negotiate the loan proposal in good faith.

However, as previously discussed, the parties had not reached agreement about the material terms of the loan, Live Oak did not guarantee loan approval, and there was no express agreement to negotiate in good faith. Vaidya admitted there was no written agreement to continue negotiating in good faith, and no Live Oak representative communicated an agreement to negotiate the loan in good faith. As the court observed in *MLU Servs., Inc.*,

> there is no evidence of a meeting of the minds as to any material terms of their arrangement. Instead, the evidence shows the parties engaged in nonbinding discussions concerning the project in which they agreed upon a contractual objective with the expectation of finalizing a written agreement following further negotiations. The . . . [a]greement proposed by [the plaintiff] and the parties' post-award negotiations contained pricing terms substantially different from those discussed prior to bid submission, further demonstrating the lack of mutual assent as to material terms.
>
> The terms agreed upon by [the parties] are simply too vague and indefinite to provide the framework for a valid and enforceable agreement to negotiate in good faith.

MLU Servs., Inc., 2021 U.S. Dist. LEXIS 204895 at *12-13.

¶ 41 We agree with this rationale and apply it to the case at bar. Accordingly, Live Oak is entitled to summary judgment on HD's claim for breach of the duty to

negotiate in good faith as well.

IV.

¶ 42 For the foregoing reasons, we affirm the trial court's Order granting summary judgment in favor of Live Oak on all of HD's claims.

AFFIRMED.

Judges TYSON and WOOD concur.

Report per Rule 30(e).