IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-703

No. COA22-40

Filed 18 October 2022

Mecklenburg County, No. 20 CVS 16075

VELMONT ENTERPRISES, INC., Plaintiff,

v.

PATCH OF LAND LENDING, LLC, Defendant,

and

PATCH OF LAND LENDING, LLC, Counterclaim/Third-Party Plaintiff,

v.

VELMONT ENTERPRISES, INC., Counterclaim Defendant and DENNIS M. VELASQUEZ, Third-Party Defendant.

Appeal by Defendant from order entered 29 September 2021 by Judge George C. Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 24 August 2022.

Hutchens Law Firm, by Jeffrey A. Bunda, for Defendant and Counterclaim/Third-Party Plaintiff.

Raynor Law Firm, PLLC, by Kenneth R. Raynor, for Plaintiff, Counterclaim Defendant, and Third-Party Defendant.

JACKSON, Judge.

¶ 1 Patch of Land Lending, LLC ("Defendant") [1] appeals from the trial court's order granting summary judgment in favor of Velmont Enterprises, Inc. ("Plaintiff") and dismissing Defendant's counterclaim and third-party complaint. For the reasons detailed below, we affirm the order of the trial court.

I. Background

¶ 2 On 3 January 2020, Plaintiff obtained four construction loans for four separate lots from Defendant. A separate deed of trust was executed for each of these loans. On 8 September 2020, Kelvin Munemitsu, the Vice President of Asset Management for Defendant, contacted Dennis Velasquez, Plaintiff's owner, to inquire if Plaintiff would be in a position to pay the loans off early in 45 to 60 days and in return Defendant would accept a discount of 85% of the outstanding balances due on each loan in full and final payment. In response, Plaintiff sought additional lenders to be able to obtain the financing to make the early loan payoffs.

¶ 3 After conducting an appraisal of the properties, the lender Plaintiff secured was only willing to lend Plaintiff up to 80% of the combined outstanding loan balance. On 24 September 2020, Mr. Velasquez asked Mr. Munemitsu by email if Defendant

[1] Plaintiff and Defendant in the original suit are Defendant and Plaintiff respectively in the counterclaim/third-party action. For ease of reading, we refer to them by the original designations.

would be willing to take 70% of the loan balance instead of 85%. That same day, Mr. Munemitsu responded that the best Defendant could do was 80% and that "[i]f [Plaintiff's] loan goes 60 days down, all offers will be off the table[.]"

¶ 4 On 28 September 2020, Mr. Munemitsu, on behalf of Defendant, sent a letter entitled "Offer Letter" to Plaintiff. This letter listed the following offer conditions:

- All four loans must payoff on or before 10/15/20.
- The loans must not be past due for more than 59 days.
- In addition to the discounted principal balance, all accrued interest up to the date of payoff will be due.

¶ 5 On 6 October 2020, Mr. Munemitsu emailed Mr. Velasquez an updated demand. In this email Mr. Munemitsu stated "[p]lease keep in mind you have until the 15th to take this deal."

¶ 6 On 14 October 2020, Mr. Velasquez emailed Mr. Munemitsu to let him know that Plaintiff was closing on the refinance loans the next day and requested new payoff demand letters. Mr. Munemitsu responded that he had ordered the updated demands.

¶ 7 Plaintiff retained attorney Sarah Lucente to help with the closing of its refinance loans. Ms. Lucente was concerned about Plaintiff's ability to finalize the financing for the loan payoff by the timing of the closing. Ms. Lucente emailed Nathaniel Nunez, the contact for FCI Lender Services, Defendant's loan servicer, informing him that the payoff letters needed to be good until 23 October 2020. On 15

October 2020, Ms. Lucente received four updated payoff letters for the payoff of each of the four loans. Each of these letters included a provision for the "Daily Interest Amount if Paying After 10/15/2020 and Before Expiration on 10/30/2020." Each payoff letter also included the special instruction "PLEASE NOTE THIS DEMAND EXPIRES AND BECOMES NULL AND VOID ON 10/30/2020." These payoff demand letters were approved by Defendant.

¶ 8 On 15 October 2020, Mr. Munemitsu sent an email to FCI requesting that FCI "hold off on releasing the approved payoff demands to the borrower" and that Defendant was "retracting the approved demands until further notice." Neither Mr. Munemitsu, nor anyone else from Defendant, contacted Plaintiff with this information.

¶ 9 Mr. Munemitsu sent an email to FCI on 16 October 2020, telling FCI that Defendant would not be accepting funds to pay off the loans because the agreement was that the funds needed to be received by 15 October 2020. Mr. Munemitsu informed FCI that if funds were received, they were to be returned. Neither Mr. Munemitsu, nor anyone else associated with Defendant, contacted Plaintiff with this information until after Plaintiff had already sent the payoff funds.

¶ 10 Ms. Lucente closed the refinance loan on 15 October 2020. However, the funds were not released until late 16 October 2020. Because 16 October 2020, was a Friday, Ms. Lucente was not able to wire the funds for the payoff amount on that day. On

Monday, 19 October 2020, Ms. Lucente called Wes Harada, the individual from FCI Lender Services whose name appeared on the payoff letters, and confirmed that the payoff figures were still valid. Mr. Harada confirmed that the payoff figures were good, and Ms. Lucente subsequently wired the funds with interest through 19 October 2020, to FCI. Later that same day, Plaintiff received wire notifications that FCI had returned the funds for the four loans because Defendant—the lender—would not accept them. Ms. Lucente then emailed Mr. Munemitsu to inquire as to why the wires had been rejected. Mr. Munemitsu responded that Defendant had an agreement for the funds to be received by 15 October 2020, and it only had the ability to accept the discounted funds through that date.

¶ 11 On 7 December 2020, Plaintiff filed a complaint in Mecklenburg County Superior Court alleging breach of contract for Defendant's failure to accept the early payment of the loans at a reduced amount of 80% of the loan balance. Plaintiff also asserted that Defendant was required to cancel the deeds of trust securing the four loans pursuant to N.C. Gen. Stat. § 45-36.9, and that its failure to do so entitled Plaintiff to statutory damages. Plaintiff filed an amended complaint on 29 December 2020.

¶ 12 Defendant filed its answer and counterclaim/third-party complaint on 5 March 2021. The counterclaim/third-party complaint sought foreclosure and monetary damages against Plaintiff and Mr. Velasquez jointly and severally for defaulting in

the repayment of the four loans.

¶ 13 Plaintiff moved for summary judgment on 13 July 2021. A hearing was held on 9 September 2021 in Mecklenburg County Superior Court before the Honorable George C. Bell. On 29 September 2021, the trial court ordered that Plaintiff was entitled to summary judgment and dismissed Defendant's counterclaims and third-party complaint.

¶ 14 Defendant timely filed written notice of appeal.

II. Analysis

¶ 15 Defendant makes two arguments on appeal: (1) the trial court erred in granting Plaintiff's motion for summary judgment; and (2) the trial court erred in dismissing Defendant's counterclaim against Plaintiff and its third-party complaint against Mr. Velasquez.

A. Standard of Review

¶ 16 On an appeal from a grant of summary judgment, we review the case *de novo* to determine whether, when viewing the evidence in the light most favorable to the non-movant, "there is a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law." *Sellers v. Morton*, 191 N.C. App. 75, 81, 661 S.E.2d 915, 920 (2008). "The moving party bears the burden of showing the lack of a triable issue of fact." *Allstate Ins. Co. v. Lahoud*, 167 N.C. App. 205, 207, 605 S.E.2d 180, 182 (2004).

B. Breach of Contract

¶ 17 The parties agree that, under the terms of their contract, Defendant would allow Plaintiff to pay off its outstanding loans at a reduced price of 80% of the loan balances if Plaintiff paid the balance at a date earlier than the one previously agreed upon when the loans were originally executed. The point of dispute is whether it was a material and certain term of the contract that the reduced loan amount be received by Defendant on or before 15 October 2020. We hold that it was not.

¶ 18 The elements for a breach of contract claim are "(1) existence of a valid contract and (2) breach of the terms of that contract." *Parker v. Glosson*, 182 N.C. App. 229, 232, 641 S.E.2d 735, 737 (2007).

1. Existence of a Contract

¶ 19 Offer and acceptance are essential elements to the formation of a contract. *Snyder v. Freeman*, 300 N.C. 204, 218, 266 S.E.2d 593, 602 (1980). "The offer must be communicated, must be complete, and must be accepted in its exact terms." *Dodds v. St. Louis Trust Co.*, 205 N.C. 153, 156, 170 S.E.2d 652, 653 (1933). "The heart of a contract is the intention of the parties, which is ascertained by the subject matter of the contract, the language used, the purposes sought, and the situation of the parties at the time." *Pike v. Wachovia Bank & Trust Co.*, 274 N.C. 1, 11, 161 S.E.2d 453, 462 (1968).

¶ 20 Here, Defendant made an oral offer to Plaintiff to allow Plaintiff to pay a

reduced percentage of its outstanding loans if Plaintiff paid that amount at an earlier date than contained in the loan agreement originally. The parties engaged in negotiations and came to an initial agreement that Defendant would accept 80% of the original loan amount if Plaintiff paid that amount by 15 October 2020. Defendant memorialized this offer by written letter dated 28 September 2020. However, this letter cannot be categorized as a finalized agreement, as the body of the letter itself contained conditional language that the payoff demands would only be provided upon acceptance of the terms listed.

¶ 21 Defendant contends that it did not abandon the 15 October 2020 deadline by approving the FCI payoff statements which unambiguously stated that the demand expired and became null and void on 30 October 2020, not 15 October 2020. Defendant refers to the 30 October 2020 deadline in the payoff statements as an "errant 'good through'" statement, and that it had on numerous prior occasions relayed the 15 October 2020 deadline, which it asserts should control. We disagree.

¶ 22 The evidence in the record shows that, rather than being a mistake, the 30 October 2020 deadline in the payoff statements was in response to a specific request from Plaintiff due to concerns about the timing of the loan that Plaintiff was securing to be able to complete the early payoff of the four loans Plaintiff had with Defendant. A contract may be modified by subsequent conduct of the parties. *Zinn v. Walker*, 87 N.C. App. 325, 336, 361 S.E.2d 314, 320 (1987). Here, not only did an agent of

Defendant communicate acceptance to Plaintiff of its need to modify the deadline for payment of Plaintiff's loans, but Defendant also approved the subsequent revised payoff statements that had a new deadline of 30 October 2020.

¶ 23 Further, while "the formation of a binding contract may be affected by a mistake," the mistake must be mutual. *Howell v. Waters*, 82 N.C. App. 481, 486, 347 S.E.2d 65, 69 (1986) (internal citation omitted). "A unilateral mistake, unaccompanied by fraud, imposition, undue influence, or like oppressive circumstances, is not sufficient to avoid a contract or conveyance." *Id.* at 487, 347 S.E.2d at 69. If the inclusion of the 30 October 2020 deadline was a mistake, there is no evidence that it was a mutual mistake, nor one procured by the circumstances listed above.

¶ 24 When it provides for it, an offer may be accepted by the performance of a specific act instead of a formal return promise. *MacEachern v. Rockwell Intern. Corp.*, 41 N.C. App. 73, 76, 254 S.E.2d 263, 266 (1979). Here, Plaintiff properly accepted the offer set out in the payoff demands by tendering the amount specified therein via wire transfer on 19 October 2020, thereby completing the formation of the contract.

2. Breach of Contract

¶ 25 Having held, as we do herein above, that a contract existed between Plaintiff and Defendant, we now move to whether Defendant breached that contract. We hold that it did.

¶ 26 While Defendant instructed its lender, FCI, on 15 October 2020, that Defendant was rescinding the approved payoff demands, this recission of the offer was not communicated to Plaintiff. Defendant informed FCI that if funds were received, they should be returned, rather than informing Plaintiff that the offer was off the table and that no funds should be sent at all. In fact, when Plaintiff's closing attorney called FCI on 16 October 2020, she was informed that the payoff demands were still valid.

¶ 27 As discussed *supra*, the contract was completed upon Plaintiff's acceptance when the funds were wired to Defendant—i.e., when Plaintiff performed. Defendant was thereafter unable to rescind its offer. This is a core principle of our common law. *See, e.g., Wylie v. Brice*, 70 N.C. 422, 426 (1874) ("We think that after the acceptance of the offer by the plaintiff, the bargain was closed, and that defendant could not retract[.]").

¶ 28 Defendant's action in returning the wired funds was a breach of its contract with Plaintiff. The offer in its final form provided that Defendant would accept the reduced loan payment if Plaintiff paid the loans off early, and, given the null and void date provided in the final payoff letters, that early payoff deadline was 30 October 2020. Plaintiff accepted this offer by wiring the funds before the null and void date, thereby completing the bargain. Defendant breached the contract by not accepting Plaintiff's wired funds.

¶ 29 Having held that a valid contract existed, and held that Defendant breached it, we affirm the trial court's award of summary judgment in favor of Plaintiff on its breach of contract claim.

C. North Carolina General Statute § 45-36.9

¶ 30 In addition to its breach of contract claim, Plaintiff also brought a claim under N.C. Gen. Stat. § 45-36.9, contending Defendant is required to cancel the liens of the deeds of trust for the four loans and that it is entitled to statutory damages for Defendant's failure to comply with N.C. Gen. Stat. § 45-36.9. Defendant asserts that the trial court erred in granting summary judgment in Plaintiff's favor on this claim. We disagree.

¶ 31 North Carolina General Statute § 45-36.9(a1) provides that a creditor must release the property that is subject to a short-pay statement from the lien of the security interest within 30 days after the short-pay date, as long as the short-pay statement is fully satisfied on or before the short-pay date. If a secured creditor who is subject to section (a1) does not comply, it is liable to the landowner for any actual damages caused. N.C. Gen. Stat. § 45-36.9(b) (2021). In addition, if a secured creditor is subject to the requirements in section (a1) and does not comply, it is liable to the landowner for $1,000.00 and reasonable attorney's fees, if all of the following occur:

> (1) The landowner gives the secured creditor a notification, by any method authorized by G.S. 45-36.5 that provides proof of receipt, demanding that the secured

> creditor submit a satisfaction or release for recording.
>
> (2) The secured creditor does not submit a satisfaction or release for recording within 30 days after the secured creditor's receipt of the notification.
>
> (3) The security interest is not satisfied of record by any of the methods provided in G.S. 45-37(a) or the release is not filed within 30 days after the secured creditor's receipt of the notification.

Id. § 45-36.9(c).

¶ 32 Notice may be provided under N.C. Gen. Stat. § 45-36.5 by any of the following:

> (1) Depositing it with the United States Postal Service with first-class postage paid or with a commercially reasonable delivery service with cost of delivery provided, properly addressed to the recipient's address for giving a notification.
>
> (2) Sending it by facsimile transmission, electronic mail, or other electronic transmission to the recipient's address for giving a notification, but only if the recipient agreed to receive notification in that manner.
>
> (3) Causing it to be received at the address for giving a notification within the time that it would have been received if given pursuant to subdivision (1) of this subsection.

¶ 33 Defendant asserts that its 28 September 2020 letter was the controlling short pay statement for this transaction, and as Plaintiff did not comply with the 15 October 2020 deadline contained therein, there can be no liability under N.C. Gen. Stat. § 45-36.9(b). We disagree.

¶ 34 A short-pay amount is defined by our General Statutes as "[t]he sum necessary

to obtain the release of all or a specific portion of the real property from the lien of a security instrument without satisfying the secured obligation in full." *Id.* § 45-36.4(19a). To constitute a short-pay statement, a document must contain:

> (1) The information reasonably necessary to calculate the short-pay amount as of the requested short-pay date, including the per diem interest amount, if any;
>
> (2) The payment cutoff time, if any, the address or place where payment of the short-pay amount must be made, and any limitation as to the authorized method of payment;
>
> (3) Any conditions precedent that must be satisfied to obtain the release of the property identified in the request for the short-pay statement from the lien of the security instrument; and
>
> (4) Confirmation of the specific real property to be released from the lien of the security instrument upon receipt of the timely payment of the short-pay amount and satisfaction of the other conditions precedent to the release of that property.

Id. § 45-36.7(e1).

¶ 35 The 28 September 2020 letter specifically states that payoff demands will be provided upon acceptance of the offer in the letter, contradicting Defendant's contention that the letter itself constitutes a short-pay statement. Further, the letter only refers to a lump-sum payment that would satisfy all four of the loans, it does not specifically identify what payment is required for each of the loans individually, nor does it identify what interest is owed on the properties.

¶ 36 In contrast, the payoff demands sent on 15 October 2020 specifically and

separately identify each of the four loans and the property they are associated with. These letters include the interest due on each loan, the unpaid balance of each loan, the amount required to pay off each loan, and the per diem interest rate if Plaintiff paid the loan after 15 October 2020, and before expiration on 30 October 2020. Unlike the 28 September 2020 letter, the payoff demands fulfill the requirements of N.C. Gen. Stat. § 45-36.7(e1) to constitute short-pay statements.

¶ 37 Plaintiff satisfied the short-pay statements in a timely manner for the four loans by wiring the full fund amounts, including interest, on 19 October 2020, entitling it to cancellation of the deeds of trust securing the loans. *See* N.C. Gen. Stat. § 45-36.9(a1) (2021). Defendant did not release the properties within 30 days of Plaintiff's payment, thereby subjecting it to liability for actual damages. *Id.* § 45-39.9(b).

¶ 38 Further, Plaintiff provided Defendant with notice of satisfaction of the short-pay statements, and demand for acceptance, via email. Defendant does not appear to contest notice. Therefore, Plaintiff is entitled to statutory damages and attorney's fees as set out in N.C. Gen. Stat. § 45-36.9(c).

¶ 39 Based on the above, we affirm the trial court's award of summary judgment in Plaintiff's favor for its claims under N.C. Gen. Stat. § 45-36.9.

D. Counterclaim/Third-Party Complaint

¶ 40 Because we hold that the trial court properly granted summary judgment in

Plaintiff's favor, thereby holding that Plaintiff has properly satisfied the short-pay statements for its loans with Defendant and that it is entitled to have the deeds of trust for those loans canceled, we also hold that the trial court properly dismissed Defendant's counterclaim and third-party complaint, the survival of which depended on the loans still being outstanding.

III. Conclusion

¶ 41 For the foregoing reasons, we hold that the trial court properly granted summary judgment in Plaintiff's favor, and properly dismissed Defendant's counterclaim and third-party complaint.

AFFIRMED.

Judges COLLINS and HAMPSON concur.

Report per Rule 30(e).