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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-792

Filed 19 September 2023

Onslow County, No. 19 CVS 3578

COURTNEY CARTER HOMES, LLC, Plaintiff,

v.

WYNN CONSTRUCTION, INC., Defendant.

Appeal by Defendant from Orders entered 8 February 2022 and 24 May 2022 by Judge Henry L. Stevens, IV in Onslow County Superior Court. Heard in the Court of Appeals 12 April 2023.

*Law Office of John W. King, Jr. PLLC, by John W. King, Jr., for Plaintiff-Appellee.*

*Ragsdale Liggett PLLC, by Amie C. Sivon and William W. Pollock, for Defendant-Appellant.*

HAMPSON, Judge.

**Factual and Procedural Background**

Wynn Construction, Inc. (Defendant) appeals from: (1) an Order entered 8 February 2022, denying Defendant's Motion for Summary Judgment and granting Courtney Carter Homes, LLC's (Plaintiff) Motion for Summary Judgment on the

issue of breach of contract; and (2) an Order entered 24 May 2022, denying Defendant's Motion for Reconsideration and granting Plaintiff's Motion for Summary Judgment on the issue of damages. The Record before us tends to reflect the following:

Plaintiff is a licensed North Carolina real estate brokerage firm. Defendant is a construction company engaged in the business of land acquisition, residential real property development, homebuilding, and home sales. Beginning in 2013, Plaintiff listed various properties for Defendant in Onslow and Pender Counties using an "Exclusive Right to Sell Listing Agreement" (Listing Agreement).

Each Listing Agreement contained the following provision regarding the potential sale of the Properties:

#### FIRM'S COMPENSATION

(a) Fee. Seller agrees to pay Firm a total fee of 5.0% of the gross sales price of the Property, or N/A ("Fee"), which shall include the amount of any compensation paid by Firm as set forth in paragraph 8 below to any other real estate firm, including individual agents and sole proprietors ("Cooperating Real Estate Firm").

(b) Fee Earned. The Fee shall be deemed earned under any of the following circumstances:

(i) If a ready, willing and able buyer is procured by Firm, a Cooperating Real Estate Firm, the Seller, or anyone else during the Term of this Agreement at the price and on the terms set forth herein, or at any price and upon any term acceptable to the Seller;

(ii) If the Property is sold, optioned, exchanged, conveyed or

*Opinion of the Court*

transferred, or the Seller agrees, during the Term of this Agreement or any renewal hereof, to sell, option, exchange, convey or transfer the Property at any price and upon any terms whatsoever; or

(iii) If the circumstances set out in (i) or (ii) above have not occurred, and if, within 90 days after the Expiration Date (“Protection Period”), Seller either directly or indirectly sells, options, exchanges, conveys or transfers, or agrees to sell, option, exchange, convey or transfer the Property upon any terms whatsoever, to any person with whom Seller, Firm, or any Cooperating Real Estate Firm communicated regarding the Property during the Term of this Agreement or any renewal hereof, provided the names of such persons are delivered or postmarked to the Seller within 15 days after the Expiration Date. HOWEVER, Seller shall NOT be obligated to pay the Fee if a valid listing agreement is entered into between Seller and another real estate broker and the Property is subsequently sold, optioned, exchanged, conveyed or transferred during the Protection Period.

....

(d) Transfer of Interest in Business Entity. If Seller is a partnership, corporation or other business entity, and an interest in the partnership, corporation or other business entity is transferred, whether by merger, outright purchase or otherwise, in lieu of a sale of the Property, and applicable law does not prohibit the payment of a fee or commission in connection with such sale or transfer, the Fee shall be calculated on the fair market value of the Property, rather than the gross sales price, multiplied by the percentage of interest so transferred, and shall be paid by Seller at the time of the transfer.

On or about 2 August 2018, Defendant entered into an Asset Purchase Agreement (Purchase Agreement) with LGI Homes-N.C., LLC (LGI Homes).<sup>1</sup> As part

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<sup>1</sup> The Purchase Agreement was not produced in discovery or offered into evidence, and it is not included in the Record on Appeal.

*Opinion of the Court*

of the Purchase Agreement, Defendant agreed to convey and LGI Homes agreed to purchase all of Defendant's current listing agreements with all real estate agents, including those listed with Plaintiff.

On 8 October 2019, Plaintiff filed a Complaint alleging breach of contract. Plaintiff sought attorney fees and the sales commission for the properties conveyed to LGI Homes. Defendant filed its Answer on 27 December 2019, asserting among many defenses, the affirmative defense of unclean hands. Both parties moved for Summary Judgment, and these Motions were heard on 18 January 2022. On 8 February 2022, the trial court entered an Order: (I) granting Plaintiff's Motion for Summary Judgment, save for the issue of damages, finding Defendant breached the contracts between the parties; and (II) denying Defendant's Motion for Summary Judgment. On 16 March 2022, Defendant filed a Motion for Reconsideration. On 18 April 2022, the trial court heard from both parties on the issue of damages and Defendant's Motion for Reconsideration. On 24 May 2022, the trial court entered an Order denying Defendant's Motion for Reconsideration and granting Plaintiff's Motion for Summary Judgment, entering judgment in favor of Plaintiff for \$240,818.95. On 21 June 2022, Defendant timely filed written Notice of Appeal.

**Issue**

The sole issue on appeal is whether the trial court erred in granting Summary Judgment in favor of Plaintiff on its claim for breach of contract.

**Analysis**

“Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows 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.” *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation and quotation marks omitted). “Since summary judgment is proper only where there is no genuine issue of material fact, summary judgment orders should not include findings of fact.” *Raymond v. Raymond*, 257 N.C. App. 700, 707, 811 S.E.2d 168, 173 (2018).

Defendant contends the trial court erred in granting summary judgment to Plaintiff for breach of contract because “[t]he assignment of the listing agreements to LGI Homes did not trigger the payment of commission to Carter Homes.” We disagree.

Summary judgment is appropriate when “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. Gen. Stat. § 1A-1, Rule 56(c) (2021). “A party moving for summary judgment may prevail if it meets the burden (1) of proving an essential element of the opposing party’s claim is nonexistent, or (2) of showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim.” *Lowe v. Bradford*, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982) (citation omitted). “If the moving party meets this burden, the

non-moving party must in turn either show that a genuine issue of material fact exists for trial or must provide an excuse for not doing so.” *Id.* (citations omitted). “The non-moving party ‘may not rest upon the mere allegations of his pleadings.’ ” *Id.* at 370, 289 S.E.2d at 366 (quoting N.C. Gen. Stat. § 1A-1, Rule 56(e) (2021)).

In the case *sub judice*, each Listing Agreement expressly provided: “The Fee shall be deemed earned . . . If the Property is sold, optioned, exchanged, *conveyed* or transferred, or the Seller agrees, during the Term of this Agreement or any renewal hereof to sell, option, exchange, convey or transfer the Property at any price and upon any terms whatsoever[.]” (emphasis added). The Listing Agreements also provided for what happens in the event of the sale or merger of Defendant’s business:

If Seller is a partnership, corporation or other business entity, and an interest in the partnership, corporation or other business entity is transferred, whether by merger, outright purchase or otherwise, in lieu of a sale of the Property, and applicable law does not prohibit the payment of a fee or commission in connection with such sale or transfer, the Fee shall be calculated on the fair market value of the Property, rather than the gross sales price, multiplied by the percentage of interest so transferred, and shall be paid by Seller at the time of the transfer.

It is undisputed the properties subject to the Listing Agreements were conveyed by Defendant to LGI Homes. By Defendant’s own admission, “[o]n or about August 2, 2018, Defendant entered into an Asset Purchase Agreement with LGI Homes[.] . . . As part of the Asset Purchase Agreement, Defendant agreed to *convey* and LGI Homes . . . agreed to purchase” the properties listed with Plaintiff. (emphasis added). Thus, this conveyance entitled Plaintiff to the Fee earned pursuant to the express

language of the Listing Agreements. Therefore, there was no genuine issue as to any material fact on Plaintiff's claim for breach of contract. Consequently, the trial court did not err in granting Summary Judgment in favor of Plaintiff.

Alternatively, Defendant contends the trial court erred in granting summary judgment to Plaintiff because "the issue of [Plaintiff's] unclean hands is a question of fact for the jury." In its Answer, Defendant simply stated: "Plaintiff's claims are barred by the equitable doctrines of unclean hands and failure of consideration." Defendant provided no further argument to support this affirmative defense.

The doctrine of unclean hands "denies equitable relief only to litigants who have acted in bad faith, or whose conduct has been dishonest, deceitful, fraudulent, unfair, or overreaching in regard to the transaction in controversy." *Collins v. Davis*, 68 N.C. App. 588, 592, 315 S.E.2d 759, 762 (1984). Here, Defendant failed to forecast any evidence to establish Plaintiff acted with unclean hands. In its briefing to this Court, Defendant contends Plaintiff acted with unclean hands either by: "consent[ing] to the assignment of the Listing Agreements, agreeing that it would continue to work to sell the Properties to potential homebuyers," or "trick[ing Defendant] into signing extensions of the existing Listing Agreements and agreeing to nine new Listing Agreements on the eve of the sale of the assets to LGI Homes so that it could allege it was owed payment due to the conveyance of the Properties." On the Record before us, Defendant forecasts no evidence to support this contention. To the contrary, the Record reflects Plaintiff simply continued to operate within the scope of the Listing

*Opinion of the Court*

Agreements. Thus, Defendant failed to forecast any evidence to support the affirmative defense of unclean hands. Therefore, the trial court did not err in awarding Summary Judgment to Plaintiff. Consequently, we affirm the trial court's Orders.

**Conclusion**

Accordingly, for the foregoing reasons, we affirm the trial court's Orders granting Summary Judgment to Plaintiff.

AFFIRMED.

Judges ARROWOOD and GRIFFIN concur.

Report per Rule 30(e).