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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-180

Filed 5 December 2023

Mecklenburg County, No. 21CVS876

EASTWOOD CONSTRUCTION PARTNERS, LLC, f/k/a EASTWOOD  
CONSTRUCTION, LLC, d/b/a EASTWOOD HOMES, Plaintiff-Appellee,

v.

WAXHAW DEVELOPERS, LLC, and WAXHAW LLC, Defendant-Appellants.

Appeal by defendant-appellant from judgment entered 29 August 2022 by  
Judge Alan Z. Thornburg in Mecklenburg County Superior Court. Heard in the Court  
of Appeals 4 October 2023.

*Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, by Matthew B. Tynan  
and James C. Adams, II for plaintiff-appellee.*

*Robinson, Bradshaw & Hinson, P.A., by Matthew W. Sawchak, Stephen M.  
Cox, Patrick H. Hill and Jazzmin M. Romero and Fisher Broyles, LLP by  
Deborah L. Fletcher and Christopher R. Kinkade for defendant-appellants.*

DILLON, Judge.

In this matter, defendant-appellants Waxhaw Developers, LLC and Waxhaw  
LLC, (collectively, “Waxhaw”) and plaintiff-appellee Eastwood Construction  
Partners, LLC, (“Eastwood”) dispute whether a valid contract exists between them.

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We conclude that the parties entered into a valid, enforceable contract and thus affirm the trial court's order.

I. Background

Waxhaw owned fifty-eight acres of property located in Union County. Waxhaw planned to subdivide the property into individual single-family residential lots and sell the lots to a homebuilder. Eastwood is a homebuilder. In early 2018, Waxhaw solicited bids and ultimately selected Eastwood to purchase the lots.

In June 2018, after a period of negotiations, Waxhaw and Eastwood prepared a written instrument, titled "Contract to Purchase Real Estate" that memorialized the terms of their agreement.

At issue here is the instrument's two-part execution plan dictating when Eastwood would become bound by its terms:

The "Effective Date" means the latest date of execution by the [Waxhaw] and any officer of [Eastwood], other than Joseph K. Stewart or J. Clark Stewart, as indicated on the signature page. From the Effective Date, this Agreement will be in full force and effect for thirty (30) days (the "Due Diligence Period"), but will automatically terminate if the signature of Joseph K. Stewart or J. Clark Stewart is not affixed within thirty (30) days of the Effective Date.

The instrument emphasized in all caps the requirement that either Joseph K. Stewart or J. Clark Stewart sign the instrument on behalf of Eastwood within 30 days after the effective date:

NOTWITHSTANDING ANYTHING CONTAINED  
HEREIN TO THE CONTRARY, NEITHER THIS

CONTRACT NOR ANY AMENDMENT HERETO SHALL BE A VALID AND ENFORCEABLE OBLIGATION OF PURCHASER UNLESS AND UNTIL THIS CONTRACT OR AMENDMENT IS EXECUTED BY JOSEPH K. STEWART OR J. CLARK STEWART, OFFICERS OF THE PURCHASER WITHIN THIRTY (30) DAYS OF THE EFFECTIVE DATE.

On 25 June 2018, a representative for Eastwood signed on Eastwood's behalf and delivered the instrument to Waxhaw. A representative for Waxhaw subsequently signed the instrument and delivered it to Eastwood on 16 July 2018. Both parties agree that the "effective date" of the instrument was 16 July 2018.

However, within the 30-day due-diligence period which followed, Waxhaw did not receive a copy of the instrument signed by Joseph K. Stewart or J. Clark Stewart for Eastwood. The parties, though, proceeded under the terms of the instrument.

During the next two years, Waxhaw experienced significant delays in developing its land into building lots due to the COVID-19 pandemic and from difficulties obtaining municipal approvals, permits, and easements. These delays significantly increased Waxhaw's costs in developing its land into lots.

In the spring of 2020, representatives for Waxhaw and Eastwood discussed the possibility of increasing the lot prices from the amount called for in the 2018 instrument. Eastwood agreed to a modest increase in the lot prices. However, Waxhaw (wanting even more money for their developed lots) responded that the parties were not bound by the instrument, raising for the first time that Waxhaw never received a copy of the instrument with the signature of either Stewart affixed

to it.

On 15 July 2020, Eastwood sent Waxhaw a copy of the instrument bearing J. Clark Stewart's signature, which indicated that Mr. Stewart had signed it two years earlier, on 10 August 2018, within 30 days of the instrument's effective date. The parties do not dispute that Eastwood did not expressly notify Waxhaw that Mr. Stewart had signed the instrument in August 2018 until July 2020.

On 19 January 2021, Waxhaw sent a letter notifying Eastwood of its position that the instrument was not binding. Eastwood disagreed. This litigation ensued.

Ultimately, the trial court determined that the contract was binding and awarded Eastwood specific performance. Waxhaw appeals.

## II. Analysis

Waxhaw argues essentially that the trial court erred by concluding that a valid and enforceable contract existed between the parties. Specifically, Waxhaw argues that even though it was the second party to sign the instrument, its signature merely operated as *an offer* to Eastwood instead of acceptance of the contract because Mr. Stewart's signature was still required to bind Eastwood to its terms. Waxhaw argues that as a result, Eastwood's failure (as the offeree) to inform Waxhaw that Mr. Stewart had signed the instrument rendered the instrument unenforceable because assent without communication to the offeror is insufficient to create an enforceable contract. *Normile v. Miller*, 313 N.C. 98, 103, 326 S.E.2d 11, 15 (1985) ("assent, or meeting of the minds, requires an offer and acceptance in the exact terms and that

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the acceptance must be communicated to the offeror.”); *Yeager v. Dobbins*, 252 N.C. 824, 828, 114 S.E.2d 820, 823-24 (1960) (“[t]he offer must be communicated, must be complete, and must be accepted in its exact terms.”).

However, during trial, Waxhaw relied upon a ratification theory, instead of the secret assent theory that it argues now, and referred to the instrument as a “contract” that “automatically terminated” for the duration of proceedings before the trial court. Thus, it appears that Waxhaw failed to preserve its argument for appeal pursuant to Rule 10 of our rules of appellate procedure. N.C. R. App. P. 10(a)(1) (2021); *State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) (“This Court has long held that where a theory argued on appeal was not raised before the trial court, “the law does not permit parties to swap horses between courts in order to get a better mount [on appeal].”) Assuming the issue is properly before us, we conclude that Waxhaw’s argument on appeal is unavailing.

Mutual assent is fundamental to the existence of a contract. *See Normille*, 313 N.C. at 103, 326 S.E.2d at 15; *Snyder v. Freeman*, 300 N.C. 204, 218, 266 S.E.2d 593, 602 (1980) (“[t]he essence of any contract is the mutual assent of both parties to the terms of the agreement.”). However, assent may be shown by “acts or conduct or silence.” *Burden Pallet Co. v. Ryder Truck Rental, Inc.*, 49 N.C. App. 286, 289, 271 S.E.2d 96, 97 (1980). “Acceptance by conduct is a well-recognized principle in North Carolina law.” *Exec. Leasing Assocs., Inc. v. Rowland*, 30 N.C. App. 590, 593, 227 S.E.2d 642, 645 (1976); *see also Snyder*, 300 N.C. 204, 266 S.E.2d 593; *Durant v.*

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*Powell*, 215 N.C. 628, 2 S.E.2d 884 (1939). Accordingly, a “signature is not always essential to the binding force of an agreement; that the object of a signature is to show mutuality or assent, which may be shown in other ways.” *Fid. & Cas. Co. v. Charles W. Angle, Inc.*, 243 N.C. 570, 576, 91 S.E.2d 575, 579 (1956).

Our Supreme Court has recognized that:

If [the offerees’] words or acts, judged by a reasonable standard, manifest an intention to agree in regard to the matter in question, that agreement is established. . . The question whether a contract has been made must be determined from a consideration of the expressed intention of the parties--that is, from a consideration of their words and acts.

*Howell v. Smith*, 258 N.C. 150, 153, 128 S.E.2d 144, 146 (1962) (citations omitted) (internal quotation marks omitted).

Here, *assuming* Eastwood was the offeree and Mr. Stewart’s signature was necessary to form a valid contract, the contract is enforceable because Eastwood communicated its assent through subsequent conduct. Specifically, the trial court made the following relevant findings, which we are bound by on appeal. *Mussa v. Palmer-Mussa*, 366 N.C. 185, 191, 731 S.E.2d 404, 409 (2012) (A trial court’s unchallenged findings of fact are “presumed to be supported by competent evidence and [are] binding on appeal.”).

50. The Contract required Eastwood to pay [Waxhaw] a \$600,000 deposit contemporaneous with the recording of a Deed of Trust on the Property in favor of Eastwood...

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56. On August 29, 2018, the Deed of Trust was recorded in the Union County Registry, at Book 7225, Page 283.

57. Contemporaneously with the recordation of the Deed of Trust, the Deposit was paid to [Waxhaw] by Eastwood.

58. [Waxhaw] accepted the \$600,000 Deposit and continued to hold that Deposit through the date of trial.

59. The Deed of Trust recites that Eastwood and [Waxhaw] “have entered into a Contract to Purchase Real Estate having an effective date of July 16, 2018,” that “under the Contract,” Eastwood tendered to [Waxhaw] “an earnest money deposition in the amount of Six Hundred Thousand Dollars . . . (the ‘Deposit’),” that the “Deed of Trust is to secure the return of the Deposit to [Eastwood] pursuant to the terms of the Contract,” and that “[t]his conveyance is made in trust to secure the performance of the obligations of the [Waxhaw] under the Contract until such time as the Deposit is repaid in accordance with the Contract.”

60. In early September 2018, [Waxhaw]... requested that Eastwood execute an amendment to the Contract to clarify the purposes for which [Waxhaw] could use the Deposit.

61. Eastwood... confirmed to [Waxhaw] that [Waxhaw] [was] permitted under the Contract to use the Deposit to fund development of the Property and as equity to support a loan for development of the Property. [Waxhaw] accepted that confirmation and did not continue to seek an amendment to the Contract.

62. In December of 2018 and January of 2019, [Eastwood] and [Waxhaw] communicated regarding [Waxhaw’s] efforts to obtain a development loan from Bank OZK... Eastwood was willing to execute both documents as requested by [Waxhaw].

The above findings show Eastwood manifested its assent to the terms of the instrument in several different ways. First, Eastwood sent the \$600,000 deposit

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amount to Waxhaw, with the knowledge of, and contemporaneously with, Waxhaw's recordation of the deed of trust commemorating the agreement between the parties. Second, the parties entered into discussions concerning the uses for which Waxhaw could use Eastwood's deposit, and Eastwood ultimately clarified that Waxhaw could use the deposit "to fund development of the Property and as equity to support a loan for development of the Property." In doing so, Eastwood referenced the language of the instrument and responded that an amendment to clarify how the deposit could be used was unnecessary, because the language of the contract was sufficient. It is also worth noting that Waxhaw retained the deposit for nearly two years without objection from Eastwood. Lastly, the parties discussed Waxhaw's efforts to secure a development loan. Throughout the process, Eastwood expressed its intent to execute the necessary documents for Waxhaw's benefit.

Thus, from the time the parties settled the terms of the instrument in June of 2018, to the spring of 2020 when the party's relationship began to unravel, both parties acted in accordance with the terms of the instrument. As a result, we conclude that Eastwood's conduct was sufficient to manifest its assent to the terms of the instrument and are thus unconvinced by Waxhaw's argument that a contract was never formed. *See Fid. & Cas. Co.*, 243 N.C. at 576, 91 S.E.2d at 579.

### III. Conclusion

Assuming Eastwood was the offeree to the contract and thus required to communicate its assent by notifying Waxhaw of Mr. Stewart's signature, Eastwood



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sufficiently showed its assent to the terms of the contract through its consistent acts and statements in support of and affirming its existence. And Waxhaw acted for a significant period of time as if it had an agreement to sell the lots, once developed, to Eastwood. Thus, we agree with the trial court's conclusion that a contract was formed between Eastwood and Waxhaw. Accordingly, we affirm the order and award of specific performance to Eastwood.

AFFIRMED.

Judges TYSON and ARROWOOD concur.

Report per Rule 30(e).