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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-493

Filed 5 March 2024

Guilford County, No. 22CVS6698

DEVIN A. MILLER and NATALIE S. MILLER, Plaintiffs,

v.

ANNA M. SOUDRETTE, Defendant.

Appeal by plaintiffs from order entered 17 January 2023 by Judge W. Robert Bell in Guilford County Superior Court. Heard in the Court of Appeals 29 November 2023.

*Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Justin N. Outling and Daniel Smith, for plaintiffs-appellants.*

*Kreider Law PLLC, by Jonathan G. Kreider, for defendant-appellee.*

GORE, Judge.

Plaintiffs, Devin A. Miller and Natalie S. Miller, appeal the trial court's final order granting defendant's 12(b)(6) motion. Upon review of the record and the briefs, we affirm.

I.

On 29 June 2019, plaintiffs and defendant, Anna M. Soudrette, entered into two contracts, a Residential Lease Agreement (“Lease”) and an Offer to Purchase and Contract (“PSA”), for property located in Greensboro, North Carolina. The contracts included a Pet addendum and an “Other Terms and Conditions” addendum. The Lease covered a three-year term, and the PSA listed a closing date of on or before 5 July 2022. The PSA included a provision for plaintiffs to pay an initial earnest money deposit “with th[e] offer OR within five (5) days of the Effective Date of [the PSA].”

Plaintiffs leased the property from 29 June 2019 until 4 July 2022. Plaintiffs never paid the initial earnest money deposit. On 13 April 2022, plaintiffs and defendant met to discuss the purchase of the property; defendant requested a higher purchase price and plaintiffs refused. Defendant discussed plaintiffs’ failure to pay the earnest money deposit and whether plaintiffs could purchase the property. Defendant sent a notice in April that plaintiffs did not receive until July 2022, and a second notice in June 2022, discussing the non-payment of the earnest money deposit and giving notice of termination of the PSA. Plaintiffs reached out to defendant through counsel on or about 20 July 2022, claiming “they were ready, willing, and able to close on the purchase and sale of the property.” After sending the second notice of termination, defendant refused to sell the property to plaintiffs.

On 3 August 2022, plaintiffs filed a lawsuit for breach of contract and specific performance of the PSA. Plaintiffs claim the Lease along with the PSA formed an option contract that was subject to section 47G. Plaintiffs claim defendant’s failure

to comply with the statutory requirements of section 47G-5 resulted in an improper termination of the PSA. Defendant filed a 12(b)(6) motion to dismiss for failure to state a claim upon which relief may be granted, and an answer. On 28 November 2022, the trial court heard the parties' arguments for the motion to dismiss, and on 17 January 2023, the trial court granted defendant's 12(b)(6) motion to dismiss. Plaintiffs timely filed a notice of appeal of the final order.

## II.

Plaintiffs appeal of right pursuant to section 7A-27(b). Plaintiffs argue the trial court erred in granting defendant's 12(b)(6) motion because they properly stated a claim upon which relief could be granted. Specifically, plaintiffs argue the Lease and the PSA formed an option contract that defendant could not terminate prior to the end of the specified date. We disagree.

We review an order granting a 12(b)(6) motion de novo. *Taylor v. Bank of Am., N.A.*, 382 N.C. 677, 679 (2022). We consider "whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *Id.* A 12(b)(6) dismissal is proper in either of the following three situations: "(1) when the complaint on its face reveals that no law supports plaintiff's claim; (2) when the complaint reveals on its face the absence of fact sufficient to make a good claim; [or] (3) when some fact disclosed in the complaint necessarily defeats the plaintiff's claim." *Oates v. Jag, Inc.*, 314 N.C. 276, 278 (1985).

Plaintiffs brought two claims for relief against defendant, breach of contract and specific performance. Plaintiffs argue the PSA signed contemporaneously with the Lease created an option contract pursuant to section 47G-2. According to plaintiffs, defendant's notices to terminate the PSA for plaintiffs' nonpayment of the initial earnest money deposit are a material breach and an improper termination of the contract. Conversely, defendant argues the failure to pay the earnest money deposit was a condition that allowed her to terminate the PSA, and that the PSA was not an option contract.

Plaintiffs' argument qualifying the PSA and the Lease as an option contract requires a strained reading of section 47G-2. Section 47G-2 sets out the minimum contents necessary to create an option contract:

- (b) Contents. An option contract shall contain at least all of the following:
  - (1) The full names and addresses of all the parties to the contract.
  - (2) The date the contract is signed by each party.
  - (3) A legal description of the property to be conveyed subject to an option to purchase.
  - (4) The sales price of the property to be conveyed subject to an option to purchase.
  - (5) The option fee and any other fees or payments to be paid by each party to the contract.
  - (6) All of the obligations that if breached by the purchaser will result in forfeiture of the option.
  - (7) The time period during which the purchaser must exercise the option.
  - (8) A statement of the rights of the purchaser to cure a default, including that the purchaser has the right to cure a default once in any 12-month period during the period of the covered lease agreement.
  - (9) A conspicuous statement, in not less than 14-point boldface type, immediately above the purchaser's signature, that the purchaser has

the right to cancel the contract at any time until midnight of the third business day following execution of the option contract or delivery of the contract, whichever occurs last.

N.C.G.S. § 47G-2(b) (2022). “An option contract is a contract by which the owner agrees to give another the exclusive right to buy property at a fixed price within a specified time. In effect, an owner of property agrees to hold this offer open for a specified period of time.” *Matthews v. Fields*, 284 N.C. App. 408, 414–15 (2022) (cleaned up).

Our Supreme Court has suggested that lease payments may qualify as consideration for an option contract when the lease contains an option to purchase the property prior to the “expiration of the lease.” *First-Citizens Bank & Tr. Co. v. Frazelle*, 226 N.C. 724, 728 (1946) (“The lease is a sufficient consideration to support specific performance of the option of purchase granted therein.”) (quoting *Crotts v. Thomas*, 226 N.C. 385, 387 (1946)). In both *Frazelle* and *Crotts*, the parties argued about whether the disputed leases qualified as option contracts. *Frazelle*, 226 N.C. at 728, *Crotts* 226 N.C. at 387. The language in each lease allowed for the tenant to choose to purchase the property at any point prior to the expiration of the lease. *Frazelle*, 226 N.C. at 728, *Crotts* 226 N.C. at 387. It was within that context that our Supreme Court determined that paying the lease qualified as consideration for the option to purchase.

In the present case, there are two separate agreements, a Lease and a PSA. Looking to both documents that were attached to the complaint, we determine the

documents lack the minimum contents that are required pursuant to section 47G-2. We are not suggesting that the combination of a Lease and a PSA will never form an option contract, to the contrary, if the minimum contents are included within the documents there is no language within section 47G that would prevent such a result. However, in the present case, as a matter of law, the documents lack the necessary components to form an option contract.

Having determined the Lease and PSA did not form an option contract, we now consider whether plaintiffs pled sufficient facts for a breach of contract claim to overcome a 12(b)(6) motion. “The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of [the] contract.” *McLamb v. T.P. Inc.*, 173 N.C. App. 586, 588 (2005) (citation omitted). “When the terms of a contract are plain and unambiguous, there is no room for construction. The contract is to be interpreted as written.” *State v. Philip Morris USA Inc.*, 363 N.C. 623, 632 (2009) (cleaned up).

The facts within the complaint, taken as true, establish that the parties entered into a Lease contract and a PSA contract. Additionally, plaintiffs admit that they did not pay the initial earnest money deposit. Looking to the PSA, attached to the complaint, the plain language of the contract specifies that failure to pay the earnest money by the defined deadline gives defendant the right to terminate the PSA after plaintiffs are given “one (1) banking day after written notice to deliver” the initial earnest money deposit and “upon written notice to the [plaintiffs].” Plaintiffs

admitted defendant sent notices of termination, and plaintiffs included these notices as attachments to the complaint.

Plaintiffs do not appear to contest the validity of the facts within the notices, but instead limit their dispute to whether the notices complied with the requirements under section 47G-5 for a notice of default for an option contract. *See* N.C.G.S. § 47G-5 (2022). The facts, as admitted within the complaint and the attachments, establish that plaintiffs breached the contract through failure to pay the initial earnest money deposit. This breach triggered defendant's right to terminate the PSA once notice was given. The facts, taken as true, reveal defendant provided opportunity to cure and provided notice of termination. Accordingly, we determine the trial court did not err by granting defendant's 12(b)(6) motion to dismiss for failure to state a claim upon which relief may be granted.

We do not discuss the time is of the essence clause, because plaintiffs never paid the earnest money deposit, and we determine the plain language of the contract provided defendant with the right to terminate the contract.

### **III.**

For the foregoing reasons, we affirm the trial court's order granting defendant's 12(b)(6) motion.

**AFFIRMED.**

Judges DILLON and MURPHY concur.

MILLER V. SOUDRETTE

*Opinion of the Court*

Report per Rule 30(e).