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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-943

Filed 2 April 2024

Wake County, No. 20CVS5286

603 GLENWOOD, INC. and GLENPEACE, LLC, Plaintiffs,

v.

616 GLENWOOD, LLC, TIMOTHY S. WOOD and MICHAEL LORE, Defendants,

616 GLENWOOD, LLC, Counterclaimant,

v.

603 GLENWOOD, INC., GLENPEACE, LLC and DANIEL A. LOVENHEIM,
Counterclaim & Third-Party Defendants.

Appeal by defendant 616 Glenwood, LLC from order entered 17 May 2022 by
Judge Paul C. Ridgeway in Superior Court, Wake County. Heard in the Court of
Appeals 23 May 2023.

*Stevens Martin Vaughn & Tadych, PLLC, by Michael J. Tadych and K.
Matthew Vaughn, for plaintiff-appellees.*

*Ellis & Winters LLP, by Paul K. Sun, Jr. and Kelly Margolis Dagger and
Safran Law Offices, by Brian J. Schoolman, for defendant-appellant 616
Glenwood, LLC.*

STROUD, Judge.

Defendant 616 Glenwood, LLC appeals from an order enforcing a purported settlement agreement by ordering a conveyance of real property from defendants to plaintiffs. Because there was no valid contract for the conveyance of real property, the trial court erred by granting plaintiff's motion to enforce a purported settlement agreement and improperly ordered defendant to convey the property. Accordingly, we reverse.

I. Background

Defendants 616 Glenwood, LLC, Dr. Timothy Wood, and Mr. Michael Lore (collectively "Defendants")¹ own a parcel of commercial property at 616 Glenwood Avenue in Raleigh ("the Premises"). Dr. Wood is the sole member and manager of Defendant 616 Glenwood ("Defendant Glenwood"). Starting in December 2015, Defendants leased the Premises to two entities, 603 Glenwood, Inc., and Glenpeace, LLC (collectively "Plaintiffs"). Furthermore, Mr. Daniel Lovenheim controlled Plaintiffs and was a Third-Party Defendant.

On 24 April 2020, Plaintiffs filed this action against Defendant Glenwood for claims of breach of contract, breach of the covenant of good faith and fair dealing, declaratory relief, and conversion; Plaintiffs also alleged civil conspiracy and unfair and deceptive trade practices against all named Defendants. On 5 June 2020, Defendants filed an answer to Plaintiffs' complaint, and asserted counterclaims for

¹ While Dr. Wood and Mr. Lore were defendants in the trial court proceedings, only Defendant Glenwood appealed from the trial court order.

breach of contract against Plaintiff 603 Glenwood and Plaintiff Glenpeace, and requested declaratory judgment against all Plaintiffs and enforcement of guaranty against Mr. Lovenheim.

On 20 December 2021, with discovery underway and motions for summary judgment pending, the parties agreed to pause the litigation to “permit settlement discussions[.]” Dr. Wood and Mr. Lovenheim began to negotiate the terms on which Defendants would be willing to sell the Premises in exchange for mutual agreements to dismiss the claims and counterclaims. The primary mode of communication was direct e-mail between the parties.

On 10 January 2022, Dr. Wood wrote to Mr. Lovenheim saying:

At your request we paused these legal proceedings to come to a resolution through the purchase of 616 Glenwood. During these past few weeks you have negotiated additional months to close on the property, lowered the down payment, and requested that I drop the attorney’s fees.

. . . .

The attorneys will be meeting with the judge on [12 January] about pausing the litigation, so we should execute the purchase contract before then. If you agree I can have the document ready for your signature tomorrow.

Mr. Lovenheim responded by asking if Dr. Wood would reduce the nonrefundable deposit and grant an option to extend the closing date. On 11 January 2022 at 3:39 PM, Dr. Wood wrote:

I believe that \$500,000 is an appropriate demonstration of

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your commitment to purchase the property. This is to be not only (a) your personal guarantee to follow through with the purchase, but also (b) a tangible consideration for pausing the litigation[.]

In consideration for the \$500,000 guarantee commitment the final purchase price will be \$2,265,000.

Attached to this email is the purchase contract that includes the above terms. It is to be executed within seven days. This will conclude our negotiations.

On 11 January 2022 at 7:59 PM, Mr. Lovenheim replied:

If you can accept a 400k guaranteed deposit (which is about 15% of the purchase price) and 2.365M at closing we have a deal.

I will get everything ready on my side for contract execution and certified check for the beginning of next week.

Less than one hour later, on 11 January 2022 at 8:53 PM, Dr. Wood wrote:

I accept the modified terms, and the attached purchase contract is adjusted accordingly. Please sign and return the contract within 24 hours. An electronic signature is sufficient.

Dr. Wood attached a standard form purchase and sale agreement (“Draft PSA 1”), but the material terms did not reflect the e-mail negotiations. In Draft PSA 1, the total purchase price was \$2,365,000, the earnest deposit section was left blank, and the price at closing was also \$2,365,000. In the integration clause, Draft PSA 1 stated: “This Agreement may be executed in one or more counterparts, which taken together, shall constitute one and the same original document. Copies of original signature pages of this Agreement may be exchanged via facsimile or e-mail, and any

such copies shall constitute originals.” Furthermore, in the enforceability section, Draft PSA 1 states, “This Agreement shall become a contract when signed by both Buyer and Seller and such signing is communicated to both parties[.]” No party signed Draft PSA 1. In response to Dr. Wood’s e-mail, Mr. Lovenheim said he would “review the contract tonight and be back in touch tomorrow.”

On 12 January 2022, in a joint motion, the parties asked the court to place the litigation on inactive status because they had “agreed to attempt to resolve this matter via conveyance of the Property,” and that they “are negotiating in good faith to determine the details and timing of that conveyance.” The trial court placed the case on its inactive docket. Counsel for Defendants began drafting a settlement agreement (“Draft Settlement Agreement”) to dismiss all pending claims.

On 13 January 2022, at 12:36 PM, after the twenty-four-hour execution period had lapsed, Mr. Lovenheim wrote to Dr. Wood, “I have my real estate attorney looking over the contract and I should have his feedback soon.” On 13 January 2022, at 1:51 PM, Mr. Lovenheim’s counsel e-mailed Dr. Wood’s counsel writing, “As for the PSA, there are some things that need to be addressed.” Without identifying the specific issues with Draft PSA 1, Mr. Lovenheim’s attorney wrote a “dirt lawyer” would “get to it the first of next week[.]”

By 15 January 2022, Dr. Wood decided that he was “changing the agreement slightly by removing the extended closing date[]” and attached another purchase and sale agreement (“Draft PSA 2”). Draft PSA 2 contained the parties’ agreed total

purchase price of \$2,765,000, increased the earnest money deposit from \$400,000 to \$500,000, and removed the option to extend the closing date. Like Draft PSA 1, Draft PSA 2 stated it would “become a contract when signed by both Buyer and Seller and such signing is communicated to both parties[.]” And like Draft PSA 1, Draft PSA 2 was unsigned.

On 18 January 2022, Dr. Wood’s counsel explained to Mr. Lovenheim’s counsel that he had not sent the Draft Settlement Agreement because he “thought the PSA[, one of the Draft PSAs,] was about to be completed.” Dr. Woods’ counsel attached a “rough draft” of the Draft Settlement Agreement which was “not approved by [Dr. Wood], so it may be subject to revision[.]” On 20 January 2022, Mr. Lovenheim’s counsel sent “suggested revisions to the [Draft Settlement Agreement] and PSA[, Draft PSAs,] based on the agreements reached via email.”

Mr. Lovenheim’s counsel attached a different version of the form purchase and sale agreement (“Draft PSA 3”), this time with an earnest deposit of \$400,000 and the same total purchase price of \$2,765,000. A one-page list of additional terms was attached to Draft PSA 3, including an option to extend the closing date. Each of the Draft PSAs contained language which states the settlement agreement and purchase and sale agreement would be executed contemporaneously.

On 25 January 2022, Dr. Wood reviewed the revisions to Draft PSA 3 and determined these suggestions did not align with his 15 January e-mail, where Dr. Wood made clear he was not “willing to agree to the option to extend the time for

closing.” Dr. Wood e-mailed Mr. Lovenheim to inform him he was “electing not to sign the PSA as amended by Mr. Lovenheim.”

On 27 January 2022, Plaintiffs filed a motion to enforce settlement agreement. We pause here in the narrative to note, just as with the Draft PSA documents, the parties went back and forth over a “settlement agreement,” but the primary term for settlement was the execution of one of the Draft PSAs. In other words, there is clearly no settlement without an enforceable PSA.

Plaintiffs argued that on 11 January 2022 – a date prior to most of the e-mail communications noted above – “Mr. Lovenheim and Dr. Wood *reached an agreement* as to the material terms of the sale of 616 Glenwood to Mr. Lovenheim or his assigns.” (Emphasis added.) Defendants submitted an affidavit from Dr. Wood, where Dr. Wood stated that neither he nor Mr. Lovenheim accepted or signed a Draft PSA.

On 17 May 2022, the trial court entered an order granting the motion to enforce a settlement agreement. The court found “the parties entered into a binding and enforceable agreement to convey 616 Glenwood Avenue in accordance with the [Draft PSA 1].” Draft PSA 1 reflected a total purchase price of \$2,765,000 with a \$400,000 earnest money deposit. The trial court concluded:

The settlement agreement between the parties, which is being enforced herein, was not characterized by the parties as a full and final settlement of all matters in dispute, but rather was to “pause” the litigation while the transaction was concluded. As such, the above-captioned litigation is stayed until such time as the conveyance of 616 Glenwood Avenue is concluded, or upon further order of the Court.

The court did not enter final judgment on any of the claims or counterclaims. Defendant Glenwood filed a notice of appeal.

II. Jurisdiction

The determination of whether an appeal is interlocutory presents a jurisdictional issue. *See High Rock Lake Partners, LLC v. N.C. Dep't of Transp.*, 204 N.C. App. 55, 60, 693 S.E.2d 361, 366 (2010) (“As an initial matter, we must address the interlocutory nature of the trial court’s order, as it presents a jurisdictional issue.” (citation omitted)). This appeal is interlocutory because the trial court did not enter final judgment on any of the claims or counterclaims and ordered a stay on litigation until compliance with the court’s order to convey real property. *See Waters v. Qualified Pers., Inc.*, 294 N.C. 200, 207, 240 S.E.2d 338, 343 (1978) (“An order is interlocutory if it does not determine the issues but directs some further proceeding preliminary to final decree.” (citations and quotation marks omitted)).

Generally, there is no right of immediate appeal from an interlocutory order. For an interlocutory appeal to be heard, the appellant must establish (1) that the trial court’s order certified the case for appeal pursuant to N.C. R. Civ. P. 54(b); or (2) the order deprived the appellant of a substantial right that will be lost absent review before final disposition of the case.

Hanna v. Wright, 253 N.C. App. 413, 415, 800 S.E.2d 475, 476 (2017) (citation and quotation marks omitted); *see* N.C. Gen. Stat. § 1-277(a) (2021) (“An appeal may be taken from every judicial order or determination . . . that affects a substantial right claimed in any action or proceeding[.]”).

The trial court did not certify this case for appeal, but Defendants contend they have a substantial right that will be lost without review of the trial court's order enforcing the settlement agreement. This Court has a two-part test for determining the right to interlocutory appeals based on a substantial right: (1) "the right itself must be substantial" and (2) "the deprivation of that substantial right must potentially work injury to [the appellant] if not corrected before appeal from final judgement." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990) (citation omitted). "Whether a substantial right is affected usually depends on the facts and circumstances of each case and the procedural context of the orders appealed from." *Estrada v. Jaques*, 70 N.C. App. 627, 642, 321 S.E.2d 240, 250 (1984).

"[O]ur courts have recognized the . . . deprivation of a significant property interest to be substantial rights." *Hanna*, 253 N.C. App. at 415, 800 S.E.2d at 476 (citation and quotation marks omitted); see *Phoenix Ltd. P'ship of Raleigh v. Simpson*, 201 N.C. App. 493, 499, 688 S.E.2d 717, 721 (2009) (determining that an order granting a partial motion for summary judgment and ordering specific performance for the conveyance of real property affects a substantial right). Real property is unique and thus transfer of the title to the real property could deprive Defendant Glenwood of rights which cannot be recovered by a later appeal. See *Bank of New York Mellon v. Withers*, 240 N.C. App. 300, 303, 771 S.E.2d 762, 765 (2015) ("However, the remedies defendants identify are inadequate because of the failure to account for the unique nature of real property.").

Here, the trial court's order for Defendant Glenwood to convey the Premises affects Defendant Glenwood's substantial right to hold title. *See Hanna*, 253 N.C. App. at 415, 800 S.E.2d at 476. Further, the trial court's order risks injury to Defendant Glenwood because the trial court did not limit the rights of Mr. Lovenheim or his assigns upon conveyance of the real property in any way. In fact, Defendant Glenwood notes that Mr. Lovenheim could even resell the Premises to a non-party so there is "no way to ensure that the Premises will be returned to . . . Glenwood if it succeeds on appeal." Thus, we conclude this Court has jurisdiction over Defendant Glenwood's interlocutory appeal because it affects substantial rights over a significant property interest which would be lost without an interlocutory review.

III. Motion to Enforce

Defendant Glenwood contends the trial court erred by "granting the motion to enforce settlement agreement" "by enforcing an alleged agreement to convey the premises because [Plaintiffs] failed to show that the parties formed a valid contract." (Capitalization altered.) Defendant Glenwood argues there was not a valid contract since "the parties intended that [Defendant] Glenwood would sell the Premises only as part of a settlement agreement."

A. Standard of Review

"A motion to enforce a settlement agreement is treated as a motion for summary judgment for purposes of appellate review." *Williams v. Habul*, 219 N.C. App. 281, 288, 724 S.E.2d 104, 109 (2012) (citations and quotation marks omitted).

The standard of review for a motion for summary judgment is well-established:

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. When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party. If the movant demonstrates the absence of a genuine issue of material fact, the burden shifts to the nonmovant to present specific facts which establish the presence of a genuine factual dispute for trial. Nevertheless, if there is any question as to the weight of evidence summary judgment should be denied.

In re Will of Jones, 362 N.C. 569, 573-74, 669 S.E.2d 572, 576 (2008) (citations and quotation marks omitted).

B. Purchase and Sale Agreement

“Under longstanding North Carolina law, a valid contract requires (1) assent; (2) mutuality of obligation; and (3) definite terms.” *Charlotte Motor Speedway, LLC v. Cnty. of Cabarrus*, 230 N.C. App. 1, 7, 748 S.E.2d 171, 176 (2013) (citation omitted).

In the formation of a contract an offer and an acceptance are essential elements; they constitute the agreement of the parties. The offer must be communicated, must be complete, and must be accepted in its exact terms. Mutuality of agreement is indispensable; the parties must assent to the same thing in the same sense, *idem re et sensu*, and their minds must meet as to all the terms.

Washington v. Traffic Markings, Inc., 182 N.C. App. 691, 697, 643 S.E.2d 44, 48 (2007) (citation omitted). “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 purpose

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) (citations omitted). “The manifestation of mutual assent is judged by an objective standard[.]” *Schwarz v. St. Jude Med., Inc.*, 254 N.C. App. 747, 755, 802 S.E.2d 783, 790 (2017).

The offeror is free to modify the method of a valid acceptance:

An acceptance is not effective unless it is (a) absolute and unconditional; (b) identical with the terms of the offer; (c) in the mode, at the place, and within the time . . . required by the offer. The offeror is thus said to be master of his offer. As such, the offeror may require acceptance in precise conformity with his offer[,] and also may by the terms of the offer permit acceptance by performing a specific act rather than by making a return promise.

Brown v. Between Dandelions, Inc., 273 N.C. App. 408, 411, 849 S.E.2d 67, 70 (2020) (ellipsis in original) (citations and quotation marks omitted).

Where an offeror’s manifest intent is for a formal execution of a document to constitute acceptance, the contract is not valid until the offeree complies by signing the document:

There is no meeting of the minds, and, therefore, no contract, when in the contemplation of both parties . . . something remains to be done to establish contract relations. This rule has been described as too well established to require the citation of authority. Thus, if negotiating parties impose a condition precedent on the effectiveness of their agreement, no contract is formed until the condition is met. Likewise, when negotiating parties make it clear that they do not intend to be bound by a contract until a formal written agreement is executed, no contract exists until that time.

Parker v. Glosson, 182 N.C. App. 229, 232, 641 S.E.2d 735, 737 (2007) (citations, quotation marks, and ellipsis omitted).

Additionally, the statute of frauds provides mandatory, minimum requirements that all contracts for the sale of an interest in real property must meet to become enforceable. *See id.* (noting the statute of frauds determines the enforceability of a contract, not whether there was complete contract formation). The statute of frauds requires:

All contracts to sell or convey any lands, tenements or hereditaments, or any interest in or concerning them . . . shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized.

N.C. Gen. Stat. § 22-2 (2021).

Plaintiffs argue, based upon *Powell v. City of Newton*, 200 N.C. App. 342, 684 S.E.2d 55 (2009), *aff'd as modified*, 364 N.C. 562, 703 S.E.2d 723 (2010), that the parties had “impliedly agreed to conduct themselves via electronic means, subjecting themselves to the provisions of the Uniform Electronic Transactions Act,” and the “electronic signature” affixed to e-mails regarding the transaction are sufficient both to create the settlement agreement and to satisfy the requirements of the statute of frauds, which requires a signed writing for an agreement to convey real estate. *See* N.C. Gen. Stat. § 22-2. In other words, Plaintiffs contend they had implicitly agreed with Defendants that the names at the bottom of the e-mails were sufficient to create

a valid contact.

In support of Plaintiff's contention, they note the opinion from this Court which provided that in *Powell*

the hearing transcript, draft agreement, draft quitclaim deed, and associated emails are read together, as permitted by the statute of frauds, the settlement agreement that plaintiff was ordered to execute is in total compliance with the statute of frauds. Therefore, the trial court did not err in ordering plaintiff to execute the agreement.

Id. at 358, 684 S.E.2d at 60. But Plaintiffs fail to mention that *Powell* was modified on appeal to the Supreme Court from this Court and did not conclude that the e-mails satisfied the statute of frauds, but rather, they affirmed the Court of Appeals opinion based specifically upon judicial estoppel as in that case the parties' acknowledged in court there was already a binding settlement agreement. *Powell*, 364 N.C. at 563-64, 703 S.E.2d at 725. Thus, *Powell* is inapposite to this case where no such admission exists.

Here, Plaintiffs and Defendant Glenwood did not create a valid contract for the sale of the Premises because there was no meeting of the minds, acceptance, or execution. *See Charlotte Motor Speedway, LLC*, 230 N.C. App. at 7, 748 S.E.2d at 176. The express communication between Plaintiffs and Defendant Glenwood demonstrates they both manifestly intended the sole means of acceptance was for the PSA to be signed. Throughout their e-mail exchanges, Mr. Lovenheim and Dr. Wood referred to the Draft PSAs as the "document" attached to the e-mails which was to be

signed, indicating any signature affixed to the e-mail was not a signature.

On 11 January, the day the trial court and Plaintiffs identified as the date of contract formation, Mr. Lovenheim wrote to Dr. Wood, “I will get everything ready on my side for *contract execution* and certified check for the beginning of next week.” (Emphasis added.) Similarly, Dr. Wood’s response e-mail contained an “attached purchase contract[,]” and he asked Mr. Lovenheim to “[p]lease sign and return the contract within 24 hours.” Together, the intention of the parties was for the e-mails to constitute negotiations, while the attached Draft PSAs were the formal written documents to be executed by the parties. Also, the Draft PSAs provided, “This Agreement shall become a contract when signed by both Buyer and Seller and such signing is communicated to both parties.”

In addition, the parties’ actions following the alleged moment of contract formation provide additional evidence that neither party assented to the purchase and sale of the Premises on 11 January. *See N.C. Nat’l Bank v. Wallens*, 26 N.C. App. 580, 584, 217 S.E.2d 12, 15 (1975) (“The subsequent conduct and interpretation of the parties themselves may be decisive of the question as to whether a contract has been made[.]” (citation omitted)). After Dr. Wood’s 11 January e-mail, the date the trial court found as the date of contract formation, Mr. Lovenheim responded that he would “review the contract tonight and be back in touch tomorrow.” On 13 January, Mr. Lovenheim e-mailed Dr. Wood, “I have my real estate attorney looking over the contract and I should have his feedback soon.” On 15 January, after the 24-hour

period expired for the 11 January draft agreement, Dr. Wood sent a new draft agreement with updated terms. On 20 January, Mr. Lovenheim's counsel sent a different PSA, which made changes to the earnest deposit amount and included a one-page list of additional terms. Taken together, the manifest acts and words of the parties throughout the e-mail exchanges demonstrate a negotiation process that was never completed. As there was no formation of a valid contract for the sale of the Premises, and it is clear the conveyance of the premises was a material term of the purported settlement agreement, the trial court erred in enforcing a settlement agreement and ordering Defendant Glenwood to convey the Premises.² We note that Defendant Glenwood also makes an argument regarding the purported settlement agreement, but we need not address it as there was no valid sale and purchase contract entered into by the parties.

IV. Conclusion

We conclude the trial court erred by granting Plaintiffs' motion to enforce a settlement agreement as the parties did not form a valid contract for the sale of the Premises, which was a material term of the purported settlement agreement. Therefore, we reverse and remand to the trial court for further litigation.

² While Defendant 616 Glenwood also raises a statute of frauds argument, the issue in this case is "one of contract formation, not enforceability." See *Parker v. Glosson*, 182 N.C. App. 229, 234, 641 S.E.2d 735, 738 (2007) ("Although we agree with plaintiff that a contract to sell or convey an interest in real property is enforceable if the essential terms of the parties' agreement are evidenced in writing and that writing is signed by the party to be charged, . . . the issue *sub judice* is one of contract formation, not contract enforceability." (emphasis in original) (citations and quotation marks omitted)).

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REVERSED and REMANDED.

Chief Judge DILLON and Judge CARPENTER concur.

Report per Rule 30(e).