

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-565

Filed 3 December 2024

Cabarrus County, No. 23CVS002617-590

SOUTH FORK VENTURES, LLC, DOING BUSINESS IN N.C. UNDER N.C.G.S. § 55D-22(a)(6) AS SOUTH FORK VENTURES REAL ESTATE, LLC, Plaintiff,

v.

JENOAL BLACKWELDER and ROBIN BLACKWELDER, Defendants.

Appeal by plaintiff from order entered 23 February 2024 by Judge William A. Long, Jr., in Cabarrus County Superior Court. Heard in the Court of Appeals 6 November 2024.

Gray Layton Kersh Solomon Furr & Smith, P.A., by Michael L. Carpenter and Kayla N. Butler, for plaintiff-appellant.

Raynor Law Firm, PLLC, by Kenneth R. Raynor, for defendants-appellees.

FLOOD, Judge.

Plaintiff South Fork Ventures, LLC, appeals from the trial court's order dismissing Plaintiff's claims against Defendants Jenoal and Robin Blackwelder for breach of contract and specific performance. On appeal, Plaintiff argues the trial court erred in dismissing Plaintiff's breach of contract and specific performance claims. Upon review, we conclude the trial court properly dismissed Plaintiff's claims,

as there was no breach of contract, and specific performance is not an appropriate remedy.

I. Factual and Procedural Background

Defendants are the owners of real property in Harrisburg, North Carolina (the “Property”). In March 2019, Defendants and Land Development Solutions of the Carolinas, LLC (“Land Development”) signed a purchase agreement (the “Purchase Agreement”) for the sale of the Property. The following month, in April 2019, Land Development assigned its interest in the Purchase Agreement to Plaintiff, which planned to develop the Property into a residential subdivision. After Land Development assigned its interest to Plaintiff, Plaintiff and Defendants executed an amendment to the Purchase Agreement (the “Amendment”) on 22 July 2019. The Purchase Agreement and the Amendment, together, are hereinafter referred to as the “Contract.”

The Contract provided that the due diligence period would start from the “Effective Date,” 25 March 2019, and continue until “Buyer [Plaintiff] is successfully able to obtain all permitting and approvals Buyer deems necessary in its sole discretion to purchase and develop the property and is successfully able to annex and rezone the Property[.]” The Contract went on to explain that if Buyer is unable to rezone the Property, the due diligence period will end ten days after Buyer determines it will not be successful in rezoning the Property and provides a written notice to Seller [Defendants].

The Contract stated the closing would be,

held at a mutually acceptable place thirty (30) days after Buyer's construction drawings have been accepted, as determined by Buyer. Buyer shall be allowed to have, in its sole discretion, up to two (2) separate Closing extensions of sixty (60) days each. If elected, the first Closing extension will expire on July 17, 2020[,] and the second Closing extension will expire on September 15, 2020.

The Contract further provided that, "[i]n the event of default by Seller[] . . . uncured after ten (10) calendar days following Seller's receipt of Buyer's notice detailing such default, Buyer shall be entitled to pursue any and all rights or remedies Buyer may have . . . including specific performance." The Contract also provided that "[i]n the event of default by Buyer[] . . . uncured after ten (10) calendar days following Buyer's receipt of Seller's notice detailing such default, Seller shall be entitled to pursue any and all rights or remedies Seller may have . . . but not the right of specific performance."

The parties thereafter worked together for the next few years. During that time, Plaintiff obtained several permits and approvals for the Property, including zoning approval and preliminary plat approval, that substantially increased the value of the Property. In July 2023, Plaintiff was working toward obtaining another approval, which required Defendants' cooperation, but according to Plaintiff, Defendants "failed to adequately cooperate" by refusing to execute the subdivision sketch plan application, which was necessary to obtain the remaining approvals required before closing on the Property.

On 9 August 2023, four years after the Effective Date and three years after the latest closing date, Defendants sent Plaintiff a letter through their counsel, terminating and repudiating Defendants’ obligations under the Contract. Plaintiff never received notice of default from Defendants prior to receipt of this letter. Plaintiff then filed a complaint against Defendants, claiming breach of contract, specific performance, unjust enrichment, and equitable lien. Defendants filed a motion to dismiss pursuant to Rule 12(b)(6), contending Plaintiff’s complaint failed “to state a claim and should be dismissed with prejudice because the Contract[] . . . violates the North Carolina Common Law Rule Against Perpetuities[,]” or “in the alternative[,] [] Plaintiff had only until September 15, 2020 to close on said Contract.”

On 23 February 2024, the trial court entered an order granting Defendants’ motion to dismiss Plaintiff’s breach of contract and specific performance claims. Plaintiff voluntarily dismissed its other claims, and timely appealed to this Court.

II. Jurisdiction

This Court has jurisdiction to review a final judgment from a superior court pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2023).

III. Standard of Review

“When considering a Rule 12(b)(6) motion to dismiss, the trial court need only look to the face of the complaint to determine whether it reveals an insurmountable bar to [the] plaintiff’s recovery.” *Lovett v. Univ. Place Owner’s Ass’n, Inc.*, 285 N.C. App. 366, 368, 877 S.E.2d 447, 449 (2022) (citation omitted) (cleaned up). “On appeal

from a motion to dismiss under Rule 12(b)(6), this Court reviews *de novo* whether, as a matter of law, the allegations of the complaint . . . are sufficient to state a claim upon which relief may be granted.” *Id.* at 368, 877 S.E.2d at 449 (citation omitted) (cleaned up).

This Court “considers the allegations in the complaint as true, construes the complaint liberally, and only reverses the trial court’s denial of a motion to dismiss if the plaintiff is entitled to no relief under any set of facts which could be proven in support of the claim.” *Id.* at 368, 877 S.E.2d at 449 (citation omitted) (cleaned up). “[I]n reviewing a grant of summary judgment, the evidence presented by the parties must be viewed in the light most favorable to the non-movant.” *Gupton v. Son-Lan Dev. Co.*, 205 N.C. App. 133, 138, 695 S.E.2d 763, 767 (2010) (citation and internal quotation marks omitted).

IV. Analysis

On appeal, Plaintiff argues the trial court erred in dismissing under Rule 12(b)(6) its (A) breach of contract claim and (B) specific performance claim. Plaintiff specifically contends Defendants’ “failure to comply with the Contract’s notice and cure provisions and subsequent unauthorized termination of the Contract were both breaches of the Contract, entitling [Plaintiff] to sue and seek relief.” We address each argument, in turn.

A. Breach of Contract Claim

Plaintiff first contends it sufficiently stated a breach of contract claim and that

the trial court erred in dismissing the claim. We disagree.

“In a contract of sale and purchase, bilateral obligations arise, the purchaser’s obligation to pay the purchase price and the seller’s obligation to sell and convey constituting reciprocal considerations.” *Douglass v. Brooks*, 242 N.C. 178, 185, 87 S.E.2d 258, 263 (1955). To claim a breach of contract, there must be an “(1) existence of a valid contract and (2) [a] breach of the terms of that contract.” *Brennan Station 1671, LP v. Borovsky*, 262 N.C. App. 1, 6, 821 S.E.2d 640, 645 (2018) (citation and internal quotation marks omitted). To be a valid contract for the sale of real property, the contract must: “[1] be in writing; [2] signed by the parties; [3] contain an adequate description of the real property; [4] recite a sum of consideration; and [5] contain all key terms and conditions of the agreement.” *Rawls & Assocs. v. Hurst*, 144 N.C. App. 286, 290, 550 S.E.2d 219, 223 (2001).

Here, upon review, we conclude there was a valid contract between the parties to meet the pleading requirements. *See Lovett*, 285 N.C. App. at 368, 877 S.E.2d at 449. The Contract was in writing, was signed by the parties, contained an adequate description of the real property, recited a sum of consideration, and contained all key terms and conditions of the agreement. *See Hurst*, 144 N.C. App. at 290, 550 S.E.2d at 223.

As for a breach of contract terms, “[g]enerally, the obligations of a buyer and a seller under a real estate purchase agreement are deemed concurrent conditions — meaning, that neither party is in breach of the contract until the other party tenders

his/her performance, even if the date designated for the closing is passed.” *Jim Lorenz, Inc. v. O’Haire*, 212 N.C. App. 648, 652, 711 S.E.2d 820, 823 (2011) (citation and internal quotation marks omitted).

“Time is ordinarily not of the essence of a contract of sale and purchase.” *Furr v. Carmichael*, 82 N.C. App. 634, 638, 347 S.E.2d 481, 484 (1986) (citation omitted). This Court has held that “when the only reference to time in the contract was as to a proposed closing date, and the conditions included a survey and title opinion of the property, time was not of the essence to the agreement and . . . the failure to settle by the stated date did not vitiate the contract.” *Wolfe v. Villines*, 169 N.C. App. 483, 489, 610 S.E.2d 754, 759 (2005) (citation omitted). “When time is not of the essence to an agreement, the parties have a reasonable time to close the sale and purchase[.]” *Litvak v. Smith*, 180 N.C. App. 202, 207, 636 S.E.2d 327, 330 (2006) (citation omitted), and “the date selected for closing can be viewed as an approximation of what the parties regard as a reasonable time under the circumstance of the sale.” *Ball v. Maynard*, 184 N.C. App. 99, 102, 645 S.E.2d 890, 893 (2007) (citation and internal quotation marks omitted).

“What is a ‘reasonable time’ . . . is generally a mixed question of law and fact, and, therefore, for the jury, but when the facts are simple and admitted, and only one inference can be drawn, it is a question of law.” *J.B. Colt Co. v. Kimball*, 190 N.C. 169, 174, 129 S.E. 406, 409 (1925). “Where the delay is so great as to support only one inference in the minds of all reasonable persons, then it is clearly the duty of the

trial court to declare it unreasonable as a matter of law.” *Id.* at 174, 129 S.E. at 409.

Our North Carolina Supreme Court has held that “there does come a point in time when a party’s tender would be too late[, and a]t that time[,] the legal duties of the two parties will be simultaneously discharged.” *Fletcher v. Jones*, 314 N.C. 389, 395, 333 S.E.2d 731, 736 (1985) (citation omitted).

This Court has previously considered varying time lengths to determine whether they were reasonable as a matter of law. In *Harris v. Stewart*, we held that a five-day delay in completing an appraisal was reasonable as a matter of law. 193 N.C. App. 142, 148, 666 S.E.2d 804, 808 (2008). In *Wolfe*, this Court affirmed the trial court’s ruling that a delay of three weeks in completing a survey was reasonable as a matter of law where there was no evidence that the plaintiff “delayed or tarried” in the completion of the contract. *Wolfe*, 169 N.C. App. at 489, 610 S.E.2d at 759. In *Litvak*, on the other hand, we held it was “patently unreasonable to require [the] defendant to keep the contract open pending resolution of [the] plaintiff’s uncertain and indefinite litigation” with regards to obtaining rezoning of the property. *Litvak*, 180 N.C. App. at 209, 636 S.E.2d at 331-32.

Here, three years after the Contract’s latest closing date of 15 September 2020, Plaintiff was still working on obtaining approvals and permits for the Property. Compared to the three weeks for survey completion considered reasonable in *Wolfe*, Plaintiff’s continued efforts to obtain approvals and permits three years past the closing date would indicate Plaintiff “delayed or tarried.” *See Wolfe*, 169 N.C. App. at

489, 610 S.E.2d at 759. Further, Plaintiff was not facing pending litigation regarding rezoning issues, as was the plaintiff in *Litvak*, see *Litvak*, 180 N.C. App. at 209, 636 S.E.2d at 331-32, but Defendants nonetheless faced an uncertain closing date that had been extended three years beyond the agreed-upon date, and there remained uncertainty as to whether or when Plaintiff would receive the approvals it desired before closing. The remaining closing date uncertainty cannot be viewed to be approximately near the date “of what the parties regard[ed] as a reasonable time under the circumstance of the sale.” See *Ball*, 184 N.C. App. at 102, 645 S.E.2d at 893.

Taking the allegations in Plaintiff’s complaint as true, see *Lovett*, 285 N.C. App. at 368, 877 S.E.2d at 449, and viewing the closing date “as an approximation of what the parties regard as a reasonable time under the circumstance of the sale,” see *Ball*, 184 N.C. App. at 102, 645 S.E.2d at 893, we conclude only one inference can be made: as a matter of law, three years past the closing date was an unreasonable amount of time taken to close the sale. See *J.B. Colt Co.*, 190 N.C. at 174, 129 S.E. at 409. Because this was an unreasonable amount of time, the “legal duties of the two parties [were] simultaneously discharged,” and thus, there were no contractual obligations left to breach by the time Defendants sent their termination letter. *Fletcher*, 314 N.C. at 395, 333 S.E.2d at 736. Thus, Plaintiff’s argument that Defendants breached the Contract when Defendants failed to send a notice of default and allow Plaintiff time to cure before terminating the Contract is without merit.

Accordingly, the trial court's dismissal of Plaintiff's breach of contract claim was not in error, and therefore, we affirm. *See Lovett*, 285 N.C. App. at 368, 877 S.E.2d at 449; *see also Fletcher*, 314 N.C. at 395, 333 S.E.2d at 736.

B. Specific Performance Claim

Plaintiff next contends it sufficiently stated a claim for specific performance, and as such, the trial court's denial of its claim was in error. We disagree.

"The party claiming the right to specific performance must show the existence of a valid contract, its terms, and either full performance on his part or that he is ready, willing and able to perform." *Munchak Corp. v. Caldwell*, 301 N.C. 689, 694, 273 S.E.2d 281, 285 (1981) (citation omitted).

Here, since we have affirmed the trial court's dismissal of Plaintiff's breach of contract claim, after concluding that three years was an unreasonable amount of time to close the sale and purchase, and established there were no longer any legal duties, Plaintiff cannot be entitled to specific performance where there is no longer a valid contract to enforce and nothing for Plaintiff to perform on its part. *See id.* at 694, 273 S.E.2d at 285.

Accordingly, the trial court did not err in dismissing Plaintiff's specific performance claim, and we therefore affirm. *See Lovett*, 285 N.C. App. at 368, 877 S.E.2d at 449; *see also Munchak Corp.*, 301 N.C. at 694, 273 S.E.2d at 285.

V. Conclusion

Upon review, we conclude the trial court properly dismissed Plaintiff's breach

of contract and specific performance claims, as neither claim sufficiently stated a claim upon which relief may be granted. Under these specific circumstances, three years past the latest closing date was an unreasonable amount of time to close the sale and purchase such that all legal obligations under the Contract were discharged. We therefore affirm the trial court's denial of Plaintiff's claims.

AFFIRMED.

Judges GORE and THOMPSON concur.

Report per Rule 30(e).