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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 20-112

Filed: 31 December 2020

Wake County, No. 17 CVD 013381

DAWN REYNOLDS-DOUGLASS, Plaintiff,

v.

KARI TERHARK, Defendant.

Appeal by defendant from judgment entered 17 October 2019 by Judge Ned W. Mangum in Wake County District Court. Heard in the Court of Appeals 12 August 2020.

*Omer Law Firm, PLLC, by David G. Omer, for plaintiff-appellee.*

*Kari Terhark, pro se, for defendant-appellant.*

YOUNG, Judge.

This appeal arises out of a breach of contract. The trial court did not err in granting summary judgment in Plaintiff's favor, nor did the trial court err in awarding Plaintiff attorney's fees and damages. Accordingly, we find no error.

I. Factual and Procedural History

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In July 2017, Dawn Reynolds-Douglass (“Plaintiff”) placed her home (“the property”) on the market for sale. Plaintiff hired real estate agent Dee Love (“Agent”), who advised Douglass to complete a North Carolina Residential Property and Owner’s Association Disclosure Statement (“Disclosure Statement”) pursuant to Chapter 47E of the North Carolina General Statutes. When Plaintiff did so, she inadvertently left two items unanswered: Item Number 27, inquiring as to whether there existed any easements, driveways, shared walls, or encroachments from or on adjacent property, and Item Number 33, asking whether any conveyance or transfer fees would be levied by the community homeowner’s association. Plaintiff signed the Disclosure Statement on 14 July 2017.

On 24 July 2017, Kari Terhark (“Defendant”) reviewed a copy of the Disclosure Statement and signed each page, including the pages containing Items Numbers 27 and 33. Defendant then reviewed and signed an Offer to Purchase and Contract (“Agreement”) for \$250,000. Plaintiff accepted Defendant’s offer by signing the Agreement on 24 July 2017 and took the property off the market.

The Agreement included several provisions that are significant to this litigation. Paragraph 1(d) of the Agreement, entitled “Purchase Price,” provides for (i) a “Due Diligence Fee” of \$2,000.00, delivered to the Seller by the Effective Date (in this case 24 July 2017), as well as (ii) an “Earnest Money Deposit” of \$2,500.00 delivered no later than 14 August 2017. The Agreement also provided in Paragraph

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1(e) that the Earnest Money Deposit was to be paid to the Seller in the event of the Buyer's breach of the Agreement, "as liquidated damages and as Seller's sole and exclusive remedy for such breach, but without limiting . . . Seller's right to retain the Due Diligence Fee."

Further, Paragraph 1(e) of the Agreement provides that "[i]f legal proceedings are brought by Buyer or Seller against the other to recover the Earnest Money Deposit, the prevailing party in the proceeding shall be entitled to recover from the non-prevailing party reasonable attorney's fees and court costs incurred in connection with the proceeding." Paragraph 1(i) of the Agreement provides that the Due Diligence Fee "shall be the property of Seller upon the Effective Date and shall be a credit to Buyer at Closing." The same paragraph continues, "[t]he Due Diligence Fee shall be non-refundable except in the event of a material breach of this Contract by seller ..."

Defendant did not deliver the Due Diligence Fee on the Effective Date of 24 July 2017 as required by the Agreement. Defendant later informed Plaintiff, through Agent, that she refused to tender the fee until Plaintiff agreed to reduce the purchase price by \$5,500.00, in order to allow Defendant to purchase new appliances and carpet for the property. Plaintiff refused, and Defendant attempted to terminate the Agreement by sending an email to Agent on 27 July 2017. Plaintiff terminated the Agreement on 28 July 2017 by serving Defendant with a "Notice to Buyer That Seller

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is Exercising Their Unilateral Right to Terminate the Offer to Purchase and Contract.”

Plaintiff relisted the property. Defendant ended her relationship with Agent, obtained her own buyer’s agent, and made a second offer. Plaintiff countered this offer with an asking price of \$245,000.00, no due diligence period and all major appliances not included. There were no further negotiations.

On 29 September 2017, Plaintiff sued Defendant in small claims court for the \$2,000.00 Due Diligence Fee and the \$2,500.00 Earnest Money Deposit included in the Agreement. On 30 October 2017, the presiding magistrate found that Defendant had breached the Agreement and entered judgment in favor of Plaintiff for \$2,000.00.

Defendant appealed to Wake County District Court for *de novo* review. The matter was referred to arbitration, resulting in an arbitrator’s decision affirming the small claims judgment. Defendant then sought trial *de novo* in a district court trial. Following discovery, the parties filed cross motions for summary judgment. On 26 February 2019, the Court granted Plaintiff’s motion for summary judgment. Plaintiff then filed a Motion for Determination of Damages.

On 20 September 2019, the Court entered an Order awarding Plaintiff damages as follows: \$2,000.00 for the Due Diligence Fee; \$2,500.00 for the Earnest Money Deposit; \$4,500.00 in prejudgment interest; and \$13,067.70 in attorney fees, for Plaintiff’s claim of breach of contract but not for Plaintiff’s claim for promissory

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estoppel or for fraud and punitive damages. Defendant filed timely written notice of appeal.

Plaintiff filed a Motion to Strike Portions of Defendant's Reply Brief, and a Motion to Dismiss the appeal. This Court denied both motions.

II. Summary Judgment

“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) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)).

Defendant contends that the trial court erred in granting summary judgment in Plaintiff's favor, because there were genuine issues of material fact that Plaintiff failed to comply with the Residential Property Disclosure Act. We disagree.

North Carolina requires most sellers of residential property to provide potential purchasers with a disclosure statement containing disclosures regarding the property being sold. N.C. Gen. Stat. § 47E-4 (2020). The Disclosure Statement that Plaintiff provided was a standard form that the North Carolina Association of Realtors provided in compliance with Chapter 47E. Chapter 47E further provides that when the required disclosures are not timely provided, potential purchasers are vested with the ability to cancel any resulting contract, without penalty and under

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limited circumstances. N.C. Gen. Stat. § 47E-5(b) (2020). When the disclosure is timely received, however, the purchaser's right to cancel the contract is subject to the terms of the contract itself.

Furthermore, North Carolina law provides that “[o]ne who signs a written contract without reading it, when he can do so understandingly is bound thereby unless the failure to read is justified by some special circumstance.” *Davis v. Davis*, 256 N.C. 468, 472, 124 S.E.2d 130, 133 (1962).

Here, Defendant attended the “Open House” on 24 July 2017, where she was given both the Disclosure Statement and Agreement. Defendant had as much time as needed to review both documents. Defendant reviewed both documents, attested that she had received and examined Disclosure Statement by signing each page, including the pages upon which Items Number 27 and 33 appeared. Defendant voluntarily made an offer to purchase the property subject to the terms described therein and attested once again that she had received and reviewed a copy of the Disclosure Statement before signing the Agreement. When Defendant breached the Agreement by refusing to tender the Due Diligence Fee, her purpose for doing so was entirely unrelated to any perceived deficiency with regard to the Disclosure Statement. In fact, Defendant did not argue that the Disclosure Statement was invalid until well after litigation had commenced in this matter.

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Defendant was given the opportunity to read and review both documents and she attested that she did so. She had the opportunity to ask for clarification, but she failed to do so. Defendant had no justification for any failure to read either document, nor the presence of any mistake, fraud, or oppression, nor any evidence that a special circumstance exists in this case which should operate to excuse any such failure. As such, the requirements of Chapter 47E were satisfied, and Defendant did not have the ability to terminate the Agreement. Defendant failed to show that there were any genuine issues of material fact that would have made summary judgment in Plaintiff's favor an error. Accordingly, the trial court did not err in granting summary judgment in Plaintiff's favor.

III. Attorney's Fees

"Recovery of attorney's fees, even when authorized by statute is within the trial court's discretion and will only be reviewed for an abuse of that discretion. In order to demonstrate an abuse of discretion, the party challenging an award of attorney's fees must show that the trial court's ruling was manifestly unsupported by reason, or could not be the product of a reasoned decision." *In re Clark*, 202 N.C. App. 151, 168, 688 S.E.2d 484, 494 (2009).

Defendant contends that the trial court committed reversible error in granting Plaintiff's award for attorney's fees and damages. Defendant does not challenge the

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amount of the attorney's fees award, only the award itself. After careful review, we affirm the trial court.

A. The Agreement

Paragraph 1(d) of the Agreement provides that the Due Diligence Fee of \$2,000.00 is due "by the Effective Date," in this case July 24, 2017. Paragraph 1(e) of the Agreement further provides that upon a breach of the Agreement by the buyer, the Earnest Money Deposit of \$2,500.00 is to be "paid to Seller as liquidated damages as Seller's sole and exclusive remedy for such breach, but without limiting . . . Seller's right to retain the Due Diligence Fee." Finally, Paragraph 1(e) provides that "If legal proceedings are brought by Buyer or Seller against the other to recover the Earnest Money Deposit, the prevailing party in the proceeding shall be entitled to recover from the non-prevailing party reasonable attorney's fees and costs incurred in connection with the proceeding."

When Defendant refused to deliver the Due Diligence Fee, she breached the Agreement. Plaintiff then sued to recover both the Due Diligence Fee and the Earnest Money Deposit. Since Plaintiff was required to institute a legal proceeding in order to recover the money, which included the Earnest Money Deposit, and prevailed, Plaintiff was entitled to recover attorney's fees incurred in the proceeding. *Id.*

Our dissenting colleague argues that Plaintiff is not entitled to recover attorneys' fees because she also sought to recover the Due Diligence Fee in the same



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proceeding. Given language in the Agreement expressly providing for recovery of both the Due Diligence Fee *and* the Earnest Money Deposit as liquidated damages for breach by the buyer, we disagree with that analysis.

B. Statutory Authority

Generally, “a party may not recover it’s attorney’s fees unless authorized by statute.” *Martin Architectural Prods., Inc. v. Meridian Constr. Co.*, 155 N.C. App. 176, 181 574 S.E.2d 189, 192 (2002). However, North Carolina law permits parties to “any note, conditional sale contract or other evidence of indebtedness” to recover attorney’s fees resulting from a breach of the same, “not in excess of fifteen percent (15%) of the outstanding balance owing.” N.C. Gen. Stat. § 6-21.2 (2020).

Our dissenting colleague argues this case falls outside the scope of Section 6-21.2 so that regardless of the terms of the Agreement, the trial court had no authority to award attorney’s fees.

In *Stillwell Enter. v. Interstate Equipm. Co.*, 300 N.C. 286, 266 S.E.2d 812 (1980), our Supreme Court examined what constituted evidence of indebtedness. “The term ‘evidence of indebtedness’ as used in N.C. Gen. Stat. § 6-21.2 refers to any printed or written instrument, signed or otherwise executed by the obligor(s), which evidences on its face a legally enforceable obligation to pay money.” *Id.* at 294, 266 S.E.2d at 817.

Viewed in light of this definition, defendant’s lease agreement with plaintiff is obviously an “evidence of

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indebtedness.” The contract acknowledges a legally enforceable obligation by plaintiff-lessee to remit rental payments to defendant-lessor as they become due, in exchange for the use of the property which is the subject of the lease. The contract . . . is in writing and is executed by the parties obligated under its terms. . . . Under these circumstances, we see no reason why the obligation by plaintiff to pay attorneys’ fees incurred by defendant upon collection of the debts arising from the contract itself should not be enforced to the extent allowed by [N.C. Gen. Stat. § 6-21.2.

*Id.* at 294-95, 266 S.E.2d at 818. Thus, in *Stillwell*, our Supreme Court held that a contract acknowledging a legally enforceable obligation constituted “evidence of indebtedness.”

In the present case, the Agreement was a printed instrument signed by both parties. The Agreement on its face evidenced a legally enforceable obligation for Defendant to pay the Due Diligence fee and Earnest Money Deposit to Plaintiff. We hold that, as in *Stillwell*, the Agreement served as “evidence of indebtedness” within the meaning of N.C. Gen. Stat. § 6-21.2.

The dissent argues that this case falls outside the scope of Section 6-21.2 because the sale of a residence by owner is not a commercial transaction, citing the “homeowner exception” to claims for unfair and deceptive trade practices. We are not persuaded that the exception should be extended to the application of Section 6-21.2, based on the text of the statute and its remedial nature. Section 6-21.2 provides for the recover of attorney’s fees “upon *any* note, conditional sale contract or other

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evidence of indebtedness.” (emphasis added). The word “any” is inconsistent with an exception not otherwise provided in the same statute. See also *Stillwell*, 300 N.C. at 294, 266 S.E.2d at 817 (“[W]e hold that the term ‘evidence of indebtedness’ as used in [N.C. Gen. Stat. § 6-21.2 has reference to *any* printed or written instrument . . .which evidences on its face a legally enforceable obligation to pay money. Such a definition . . .accords well with its *general purpose* to validate a debt collection remedy expressly agreed upon by contracting parties.” (emphasis added)). And, as noted in *Stillwell*, Section 6-21.2 should be construed liberally by this Court because it is a remedial statute. *Id.* at 293, 266 S.E.2d at 817. As of the date of Defendant’s breach by refusal to pay the Due Diligence Fee, she owed Plaintiff \$2,000.00 plus another \$2,500.00 for an Earnest Money Deposit.

The award of attorney’s fees was authorized by both statute and the Agreement. There is no evidence to suggest that the trial court’s decision was manifestly unsupported by reason, or that the award could not be the product of a reasoned decision. Accordingly, the trial court did not err in granting Plaintiff’s award for attorney’s fees and damages, and thus, we uphold the decision of the trial court.

NO ERROR.

Judge INMAN concurs.

Judge MURPHY concurs in part, dissents in part.

Report per Rule 30(e).

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MURPHY, Judge, concurring in part and dissenting in part.

While I concur fully with the Majority’s conclusion in Part II that the trial court did not err in granting Plaintiff summary judgment, I respectfully dissent as to Part III regarding the award of attorney’s fees. If published, the Majority opinion would enact a sweeping change to the recoverability of attorney’s fees in North Carolina. This would be a change to public policy, and whether such a change is good or bad, it is a decision properly left to the General Assembly and not for this panel to make under the guise of statutory interpretation. N.C. CONST. art. I, § 6; *id.* art. II, § 1.

Generally, a party’s attorney’s fees are not recoverable. *Martin Architectural Prods., Inc. v. Meridian Constr. Co.*, 155 N.C. App. 176, 181, 574 S.E.2d 189, 192 (2002). However, this common law principle is subject to statutory exceptions. *Id.* One such exception is N.C.G.S. § 6-21.2, which allows for the recovery of attorney’s fees up to 15% of the disputed amount when there is an obligation to pay attorney’s fees upon any note, conditional sale contract, or other evidence of indebtedness. N.C.G.S. § 6-21.2 (2019). However, N.C.G.S. § 6-21.2 is inapplicable here and the trial court erred by ordering attorney’s fees to be paid as there was nothing in the *Offer to Purchase and Contract* (“Agreement”) to authorize the award and no statutory authority to support the amount of the award.

#### **A. The Agreement Does Not Authorize Attorney’s Fees**

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The dispute between the parties involved only the due diligence fee. However, the Agreement only provides for the recovery of attorney's fees by the prevailing party when either party initiates a legal proceeding to recover the earnest money deposit.

Paragraph 1(d) of the Agreement contains the following provisions:

\$2,000.00 BY DUE DILIGENCE FEE made payable and delivered to Seller by the Effective Date.

. . .

\$2,500.00 BY (ADDITIONAL) EARNEST MONEY DEPOSIT made payable and delivered to Escrow Agent named in Paragraph 1(f) by cash, official bank check, wire transfer or electronic transfer no later than [14 August 2017], TIME BEING OF THE ESSENCE with regard to said date.

Further, paragraph 1(e) of the Agreement, in relevant part, allows for the recovery of attorney's fees in a limited provision:

"Earnest Money Deposit": The Initial Earnest Money Deposit, the Additional Earnest Money Deposit and any other earnest monies paid or required to be paid in connection with this transaction, collectively the "Earnest Money Deposit", shall be deposited and held in escrow by Escrow Agent until Closing, at which time it will be credited to Buyer, or until this Contract is otherwise terminated. . . . In the event of breach of this Contract by Seller, the Earnest Money Deposit shall be refunded to Buyer upon Buyer's request, but such return shall not affect any other remedies available to Buyer for such breach. In the event of breach of this Contract by Buyer, the Earnest Money Deposit shall be paid to Seller as liquidated damages and as Seller's sole and exclusive remedy for such breach . . . *If legal proceedings are brought by Buyer or Seller against the other to recover the Earnest Money Deposit, the prevailing party in the proceeding shall*

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*be entitled to recover from the non-prevailing party reasonable attorney fees and court costs incurred in connection with the proceeding.*

(Emphasis added). These paragraphs specify attorney's fees will be recovered only when there is a legal proceeding to recover the *earnest money deposit*. When the trial court awarded Plaintiff "\$13,067.70 as reasonable attorney's fees incurred[.]" it was in response to the lawsuit brought by Plaintiff to recover the *due diligence fee*. The Agreement did not provide for attorney's fees in an action such as this and therefore the order must be vacated. As the Agreement itself did not authorize the recovery of attorney's fees in an action related to the due diligence fee, the trial court erred in awarding any attorney's fees.

### **B. N.C.G.S. § 6-21.2 Does Not Apply**

In quoting N.C.G.S. § 6-21.2, the Majority states "North Carolina law permits parties to 'any note, conditional sale contract or other evidence of indebtedness' to recover attorney's fees resulting from a breach of the same, 'not in excess of fifteen percent (15%) of the outstanding balance owing.'" *Supra* at 9. N.C.G.S. § 6-21.2 provides, in relevant part:

Obligations to pay attorney[s] fees *upon* any note, conditional sale contract or other evidence of indebtedness, in addition to the legal rate of interest or finance charges specified therein, shall be valid and enforceable, and collectible as part of such debt, if such note, contract or other evidence of indebtedness be collected by or through an attorney at law after maturity, subject to the following provisions:

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(1) If such note, conditional sale contract or other evidence of indebtedness provides for attorney[’s] fees in some specific percentage of the “outstanding balance” as herein defined, such provision and obligation shall be valid and enforceable up to but not in excess of fifteen percent (15%) of said “outstanding balance” owing on said note, contract or other evidence of indebtedness.

(2) If such note, conditional sale contract or other evidence of indebtedness provides for the payment of reasonable attorney[’s] fees by the debtor, without specifying any specific percentage, such provision shall be construed to mean fifteen percent (15%) of the “outstanding balance” owing on said note, contract or other evidence of indebtedness.

N.C.G.S. § 6-21.2 (2019) (emphasis added). While the Majority accurately describes this statute, it is inapplicable here.

### **1. The Agreement Is Not a Note or Conditional Sale Contract**

As a preliminary matter, the Agreement does not fall within the definition of a note or a conditional sale contract. A note is defined as “[a] written promise by one party . . . to pay money to another party . . . . A note is a two-party negotiable instrument. . . .” *Note*, BLACK’S LAW DICTIONARY (11th ed. 2019). A conditional sale contract is “[a] contract for the sale of goods under which the buyer makes periodic payments and the seller retains title to or a security interest in the goods.” *Conditional Sales Contract, Retail Installment Contract*, BLACK’S LAW DICTIONARY (11th ed. 2019). The Agreement is neither a note nor a conditional sale contract because it does not involve a negotiable instrument or the seller retaining title to the real property.

## **2. The Agreement Is Not Evidence of Indebtedness**

Our caselaw has previously defined “evidence of indebtedness” as used in N.C.G.S. § 6-21.2 to mean “a *writing* which acknowledges a debt or obligation and which is executed by the party obligated thereby.” *Stillwell Enters., Inc. v. Interstate Equip. Co.*, 300 N.C. 286, 294, 266 S.E.2d 812, 817 (1980); *see also State Wholesale Supply, Inc. v. Allen*, 30 N.C. App. 272, 277, 227 S.E.2d 120, 124 (1976). In the case before us, the Majority characterizes the Agreement as “evidence of indebtedness” using the definition from a limited portion of *Stillwell* and holds N.C.G.S. § 6-21.2 applies to this agreement. *Supra* at 9-10. I disagree with this characterization of the Agreement and the application of N.C.G.S. § 6-21.2. I do not read *Stillwell* through the same lens as the Majority.

In *Stillwell*, our Supreme Court discussed the proper scope of the term “evidence of indebtedness” and held “[its] application must [] be gleaned from the context of the statute in which it appears and the factual circumstances surrounding the instrument or transaction to which it is sought to be applied.” *Stillwell*, 300 N.C. at 292, 266 S.E.2d at 816. While the Majority is correct in stating “[t]he term ‘evidence of indebtedness’ as used in [N.C.G.S.] § 6-21.2 refers to any printed or written instrument, signed or otherwise executed by the obligor(s), which evidences on its face a legally enforceable obligation to pay money[,]” the Majority applies this definition out of context. *Supra* at 9. The full passage reads:



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[W]e hold that the term “evidence of indebtedness” as used in [N.C.]G.S. 6-21.2 has reference to any printed or written instrument, signed or otherwise executed by the obligor(s), which evidences on its face a legally enforceable obligation to pay money. *Such a definition, we believe, does no violence to any of the statute’s specific provisions and accords well with its general purpose to validate a debt collection remedy expressly agreed upon by contracting parties.* Viewed in light of this definition, [the] defendant’s lease agreement with [the] plaintiff is obviously an “evidence of indebtedness.” The contract acknowledges a legally enforceable obligation by [the] plaintiff-lessee to remit rental payments to [the] defendant-lessor as they become due, in exchange for the use of the property which is the subject of the lease.

*Stillwell*, 300 N.C. at 294, 266 S.E.2d at 817-18 (emphasis added). It is clear when reading *Stillwell* as a whole that N.C.G.S. § 6-21.2 applies to “supplement those principles of law generally applicable to commercial transactions” and is only relevant for commercial transactions. *Id.* at 293, 266 S.E.2d at 817. Under the Majority’s application of *Stillwell*, every contract where one party is to pay money would be evidence of indebtedness, an interpretation that is overbroad by its terms.

In *Stillwell*, the lease agreement at issue was a contract between two corporations for the lease of specific goods. *Stillwell*, 300 N.C. at 287, 266 S.E.2d at 813. The Agreement here is a form agreement created and approved by the North Carolina Association of Realtors, Inc. and the North Carolina Bar Association. According to the *Guidelines for Completing the Offer to Purchase and Contract Form*, the form is for use “in a variety of real estate sales transactions, but it was developed primarily for use in the sale of existing single-family residential properties. Do not

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use this form as a substitute for a lease-option agreement, lease-purchase agreement or installment land contract.” GUIDELINES FOR COMPLETING THE OFFER TO PURCHASE AND CONTRACT, <https://www.ncrealtors.org/wp-content/uploads/markup0717-2G.pdf> (last visited Oct. 27, 2020). At no point in the terms of the Agreement is there an acknowledgment of a debt. The Agreement is not the same as an acknowledgement of debt, but rather a

basic agreement whereby [seller] agrees to sell and [buyer] agrees to purchase real property. . . . It is not a financing device, but rather contemplates that the [buyer] will pay the balance due on the property at the closing date, either by securing permanent mortgage financing or by simply using the [buyer’s] own funds.

James A. Webster, Jr., *Webster’s Real Estate Law in North Carolina* § 9.05 (Patrick K. Hetrick & James B. McLaughlin, Jr. eds., 6th ed. 2020). The Majority’s characterization of the Agreement as evidence of indebtedness is overbroad by its terms and I further dissent from its use of N.C.G.S. § 6-21.2 in this context.

### **3. The Agreement Does Not Fall Within the Purpose of N.C.G.S. § 6-21.2**

Further, on the basis of the intended purpose and function of the statute, the Agreement does not fall within the acknowledgment of debt nor the evidence of indebtedness definition. The general purpose of N.C.G.S. § 6-21.2 is to “validate a debt collection remedy expressly agreed upon by contracting parties.” *Stillwell Enters.*, 300 N.C. at 294, 266 S.E.2d at 817-18. A contract to purchase residential real estate for personal use does not achieve this purpose. According to the drafter of

the boilerplate agreement, when the form was revised in 2010, the purpose of adding the attorney's fees sentence to paragraph 1(e) was "the threat of additional costs will help dissuade persons who clearly are not entitled to the earnest money deposit from refusing to consent to its release to the other party." 2010-2011 Update Course, *Revised Offer to Purchase and Contract, Attorney Fees*, NORTH CAROLINA REAL ESTATE COMMISSION, <https://www.ncrec.gov/Pdfs/bicar/RevisedOfferToPurchaseAndContract.pdf> (last visited Oct. 27, 2020). Incentivizing parties to not withhold a deposit they are not legally entitled to is not of the same caliber as a debt collection remedy. Therefore, the use of N.C.G.S. § 6-21.2 in the present case is inappropriate.

Even if the Agreement fell under the definition of evidence of indebtedness, N.C.G.S. § 6-21.2 still would not apply. The use of the word "upon" in the statute indicates there must be an explicit obligation to pay attorney's fees in the contract itself. In the Agreement, the obligation for attorney's fees only relates to the specific term "earnest money deposit." Therefore, even under N.C.G.S. § 6-21.2, the Agreement does not allow for recovery of attorney's fees in any context other than the recovery of the earnest money deposit.

### **C. Amount of Attorney's Fees**

Even assuming, *arguendo*, N.C.G.S. § 6-21.2 applies to the due diligence portion of the Agreement, attorney's fees would be capped at 15% of the due diligence

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fee. Here, the due diligence fee was \$2,000.00, 15% of which totals only \$300.00. Therefore, Plaintiff's attorney's fees award would be limited to \$300.00. The trial court's award was unlawfully in excess of what would be statutorily authorized.

**CONCLUSION**

The trial court erred in awarding Plaintiff attorney's fees. The attorney's fees award should be reversed and vacated because there is no language in the Agreement to authorize the award, as well as no statutory authority to justify an award. Further, even assuming, *arguendo*, the award was authorized, attorney's fees would be capped at \$300.00. I respectfully dissent in part.