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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-619

No. COA22-91

Filed 6 September 2022

Moore County, No. 21-CVS-82

BRIAN T. STROHM and wife, JULIE A. STROHM, Plaintiffs,

v.

ELEANOR H. MORGAN, TRUSTEE OF THE ELEANOR H. MORGAN REVOCABLE TRUST DATED SEPTEMBER 7, 2017, Defendant.

Appeal by plaintiffs from judgment entered 15 September 2021 by Judge James M. Webb in Moore County Superior Court. Heard in the Court of Appeals 7 June 2022.

Van Camp & Van O'Linda, PLLC, by William M. Van O'Linda, Jr., for plaintiffs-appellants.

Van Camp, Meacham & Newman, PLLC, by Thomas M. Van Camp, for defendant-appellee.

GORE, Judge.

¶ 1 Plaintiffs Brian T. Strohm and wife Julie A. Strohm appeal from judgment entered 15 September 2021 granting summary judgment in favor of defendant Eleanor H. Morgan, trustee of the Eleanor H. Morgan revocable trust dated 7 September 2017, on plaintiffs' claim for breach of contract for the sale of real property.

On appeal, plaintiffs argue the trial court erred in granting summary judgment because there are genuine issues of fact relating to the "materiality" of their breach. We affirm the trial court's judgment.

I. Background

¶ 2 Defendant listed the subject property for sale in the summer of 2020. Plaintiffs submitted multiple offers prior to defendant accepting. Defendant rejected the first and second offers because it was important to defendant that plaintiffs pay additional earnest money to offset the low due diligence fee. The final offer, ultimately accepted by defendant, contained a purchase price of $750,000, a due diligence fee of $1,000, an initial $5,000 earnest money deposit, and an additional earnest money deposit of $15,000 to be paid in two incremental payments. Accordingly, the parties executed an Offer to Purchase and Contract (the "Contract") effective on 14 September 2020.

¶ 3 Per the written terms of the Contract, the due diligence fee and the initial earnest money deposit were due by the "effective date" and within five days of the "effective date of [the] Contract." These payments are governed by a "notice and cure" provision, which allows defendant to terminate the Contract if plaintiffs failed to deliver the due diligence fee or the initial earnest money deposit and failed to cure such default within one day after notice by defendant. Additional earnest money deposits are governed by a separate clause, which states: "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 5 p.m. on [sic] $5,000 on Oct 6, 2020, additional $10,000 on November 1, 2020 ***TIME BEING OF THE ESSENCE.***" This paragraph required the initials of both parties directly underneath the $15,000 payment line and additional initials by both parties to the right side of the "time being of the essence" clause, which was connected by a line to the statement.

¶ 4 Further, the Contract's stated due diligence period began on the "[e]ffective date and extend[ed] through 5:00 p.m. on October 5, 2020 ***TIME BEING OF THE ESSENCE***," with a settlement date of 15 December 2020. At the end of the Contract the final paragraph above the signature lines stated:

> This offer shall become a binding contract on the Effective Date. Unless specifically provided otherwise, Buyer's failure to timely deliver any fee, deposit or other payment provided for herein shall not prevent this offer from becoming a binding contract, provided that any such failure shall give Seller certain rights to terminate the contract as described herein or as otherwise permitted by law.

¶ 5 According to the "Acknowledgement of Receipt of Monies," the $1,000 due diligence fee was received by Lin Hutaff, the listing agent for seller, on 16 September 2020, and the initial earnest money deposit was received the same day by the escrow agent, William Van O'Linda. The first additional earnest money deposit was sent on 5 October 2020, via two-day FedEx to plaintiffs' agent, Mike Sullivan, who received

the check on 7 October 2020. According to the "Acknowledgement of Receipt of Monies" the check was not delivered to the escrow agent until 12 October 2020. The date of receipt was six days after the deadline of 5 p.m. on 6 October 2020. On 26 October 2020, plaintiffs paid and delivered the second additional earnest money deposit to the escrow agent.

¶ 6 According to plaintiffs, there was a discussion with their agent, Mike Sullivan, prior to the deadline for the additional earnest money deposit in which they asked about the meaning of "time being of the essence." Plaintiffs testified their agent stated the clause meant payment was due "around" the date and not "on" the specified date.

¶ 7 Defendant and her husband were out of the country in St. Lucia during the week the first additional earnest money was due. Defendant's husband experienced a medical issue, which caused defendant to no longer want to sell the Property. Defendant contacted her real estate agent, Lin Hutaff, on 11 October 2020 to inform her that defendant no longer wanted to sell the property. On 29 October 2020, defendant became aware that the first additional earnest money deposit was delivered on 12 October 2020 rather than the 6 October 2020 deadline. Accordingly, notice was sent to plaintiffs' attorney on 29 October 2020 that defendant was immediately terminating the Contract for breach due to plaintiffs' failure to act within the time required to deliver the additional earnest money deposit.

¶ 8 On 19 January 2021, plaintiffs filed a Complaint and an Amended Complaint on 28 January 2021 seeking specific performance or alternatively damages for breach of Contract. The parties engaged in discovery and defendant filed a Motion for Summary Judgment on 24 August 2021. The trial court granted defendant's Motion for Summary Judgment on 15 September 2021. Plaintiffs timely filed notice of appeal.

II. Standard of Review

¶ 9 The proper standard of review for summary judgment is *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citations and quotation omitted). "[Summary] 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.'" *Id.* (internal quotations and citations omitted). This Court will "consider the evidence in the light most favorable to the non-movant, drawing all inferences in the non-movant's favor." *Morrell v. Hardin Creek, Inc.*, 371 N.C. 672, 680, 821 S.E.2d 360, 366 (2018) (citations omitted). The party seeking summary judgment carries the burden of showing "there is no triable issue of material fact." *Creech v. Melnik*, 347 N.C. 520, 526, 495 S.E.2d 907, 911 (1998). Likewise, upon this showing, the non-moving party must overcome the showing by "produc[ing] a forecast of evidence demonstrating that the [nonmoving party] will be able to make out at least a *prima facie* case at trial." *Id.* (citation omitted).

III. Discussion

¶ 10 Foundational to the laws of North Carolina and the United States is the freedom of parties to contract as they see fit so long as the terms are neither "contrary to law [n]or public policy." *Midulla v. Howard A. Cain Co.*, 133 N.C. App. 306, 308, 515 S.E.2d 244, 246 (1999). Consequently, the parties will be bound to the terms within an enforceable contract. *Id.* Terms that are "plain and unambiguous" are to be interpreted and enforced as written. *State v. Philip Morris USA Inc.*, 363 N.C. 623, 632, 685 S.E.2d 85, 91 (2009).

A. "Time Being of the Essence" Clause

¶ 11 Plaintiffs' main argument is that the "time being of the essence" clause at issue is not an essential term of the contract. Thus, it is plaintiffs' contention that summary judgment was improper because they forecast sufficient evidence showing a genuine issue of fact as to whether the late payment of additional earnest money was a material breach. We disagree.

¶ 12 This Court will enforce the unambiguous terms of an enforceable contract. "[A] contract must be construed as a whole, considering each clause and word with reference to all other provisions and giving effect to each whenever possible." *Marcoin, Inc. v. McDaniel*, 70 N.C. App. 498, 504, 320 S.E.2d 892, 897 (1984). Courts must interpret contracts to give effect to the intention of the parties based upon the language in the contract; this intention is drawn from the "four corners of the

instrument." *Fairview Developers, Inc. v. Miller*, 187 N.C. App. 168, 171, 652 S.E.2d 365, 367 (2007). "[I]f only one reasonable interpretation exists, the courts must enforce the contract as written; they may not, under the guise of construing an ambiguous term, rewrite the contract . . . ." *Id.* (citation omitted).

¶ 13 A "time is of the essence" clause carries legal significance when used in contracts. Its basic meaning is that performance is due by the time specified in the contract, and such time is "an essential component of the contract, which gives one party the right to hold the other party in default for failure to tender performance in strict compliance with the time constraints of the agreement." 61 Am. Jur. 3d *Proof of Facts* 325 § 2 (2001). Although applied often to closing dates in real estate contracts, the "time is of the essence" clause has not been limited to only closing dates. Instead, our courts have previously determined such a clause also applies to pre-closing conditions or conditions precedent. The following footnote from our Supreme Court's decision in *Fletcher v. Jones* is instructive:

> If the condition precedent were of crucial import to either or both parties and needed to be fulfilled by a certain date, other than that set for closing, a separate date should have been explicitly included to govern the condition precedent, along with a separate time-is-of-the-essence provision if necessary. It would then have been clear that this particular condition, separate from the act of closing, must be strictly performed by a different date.

314 N.C. 389, 393 n.1, 333 S.E.2d 731, 734 n.1 (1985). Along these lines, if either party to a contract breaches the contract, the non-breaching party is excused from their "obligation to perform." *Ball v. Maynard*, 184 N.C. App. 99, 108, 645 S.E.2d 890, 897 (2007).

¶ 14 In the present case, there are multiple pre-closing conditions listed in Section 1(d) of the Contract. One of these conditions, set apart in its own paragraph, is that plaintiffs deliver to the escrow agent the sum of $5,000, representing the first additional earnest money deposit. The specific date for this condition is unambiguously set forth in the Contract as 5:00 p.m. on 6 October 2020 with yet another earnest deposit due on 1 November 2020. Accompanied within this provision is the "time being of the essence" clause unambiguously referenced in Section 1(d) of the Contract. Because the clause is the final sentence of the additional earnest money deposit paragraph, it applies specifically to the payment of the additional earnest deposits. The parties were required to separately initial by the additional earnest money paragraph and by the "time being of the essence" clause.

¶ 15 Despite the deadline of 5:00 p.m. on 6 October 2020 for the additional earnest deposit, plaintiffs delivered this deposit to the escrow agent on 12 October 2020. The first additional earnest deposit payment was delivered to the escrow agent six days after its mandatory due date. Plaintiffs argue for a standard of reasonableness rather than a strict application of the "time being of the essence" provision. However, the

record shows that the additional earnest deposit must be with the escrow agent by the set date. As suggested in *Fletcher*, the separate date explicitly providing for the additional earnest money deposit suggests the condition precedent was "a crucial import to either or both of the parties." 314 N.C. at 393 n.1, 333 S.E.2d at 734 n.1.

¶ 16 Although plaintiffs argue for applying a reasonableness standard to the deadline, such a standard is generally applicable when there is no "time is of the essence" clause or when its application is vague. When a contract for the purchase of land does not include a "time is of the essence" clause, parties are permitted a "reasonable time after the date set . . . to complete performance." *Phoenix Ltd. P'ship of Raleigh v. Simpson*, 201 N.C. App. 493, 502, 688 S.E.2d 717, 723 (2009) (internal quotation marks and citations omitted). Thus, when there is no "time is of the essence" clause, "the dates stated in an offer to purchase and contract agreement serve only as guidelines, and such dates are not binding on the parties." *Harris v. Stewart*, 193 N.C. App. 142, 146, 666 S.E.2d 804, 807 (2008). In the present case, the reasonable time standard is not applicable to the additional earnest money deposit obligation, since the Contract included a "time being of the essence" clause with a set date.

¶ 17 In *Gaskill v. Jeanette Enterprises, Inc.*, the plaintiff challenged whether a "time is of the essence" clause was truly an enforceable provision in the sales contract. 147 N.C. App. 138, 140, 554 S.E.2d 10, 12 (2001). This Court determined the clause was

an enforceable provision of the contract. *Id.* at 141, 554 S.E.2d at 12. In determining this, this Court reasoned the provision was acknowledged by the parties, the defendant added the provision into the contract, the "defendant did not waive or attempt to change the provision," the plaintiff executed the contract after the inclusion of the provision, and the plaintiff placed importance on the closing date of 10 September 1999. *Id.* This Court was prepared to enforce such a provision, but due to ambiguity in the placement of the provision, which raised questions about whether it applied to the closing date, the loan commitment, or both, this case was remanded to determine its proper application. *Id.* at 142, 554 S.E.2d at 13.

¶ 18 Similar to *Gaskill*, in the present case the "time being of the essence" clause is an enforceable provision of the contract. As previously stated, the parties acknowledged the additional earnest deposit provision and separately acknowledged the "time being of the essence" clause. The clause was set apart within this paragraph in bold letters and was related to the additional earnest money deposit. Defendant denied the first couple offers seeking a higher earnest money deposit to offset the low due diligence fee. Additionally, defendant testified in her deposition that it was important to her that the additional earnest money deposit have a deadline of 6 October 2020. Interpreting the terms of the Contract in the light most favorable to plaintiffs, the "time being of the essence" clause was included within the Contract to enforce timely delivery of the additional earnest money deposit.

¶ 19 Because there was a "time being of the essence" clause, the failure to meet the additional earnest deposit deadline was a breach of the Contract by which defendant could terminate the Contract. This Court has stated many times that it is a "vital and essential term to the contract" when parties include a "time is of the essence" clause. *Fairview Developers, Inc.*, 187 N.C. App. at 173, 652 S.E.2d at 369; *see 42 East, LLC v. D.R. Horton, Inc.*, 218 N.C. App. 503, 509, 722 S.E.2d 1, 5 (2012); *S.N.R. Management Corp. v. Danube Partners 141, LLC*, 189 N.C. App. 601, 620, 659 S.E.2d 442, 455 (2008) ("Since the contract contained a '[t]ime is of the essence' provision and [buyer] did not close within the required time frame, [buyer's] claim for breach of contract must fail."). Given the essential nature of the clause, when such a clause is placed in the Contract, this Court must give effect to such clause. *See generally Harris*, 193 N.C. App. at 146, 666 S.E.2d at 807 ("[I]n the absence of a 'time is of the essence' provision, . . . dates stated in an offer to purchase and contract agreement serve only as guidelines . . . ."); *Wolfe v. Villines*, 169 N.C. App. 483, 489, 610 S.E.2d 754, 759 (2005) (explaining a failure to complete a requirement within a contract by a certain date will not "vitiate a contract" when "time [is] not of the essence in the contract").

¶ 20 Essentially, plaintiffs challenge the legal significance of the "time being of the essence" clause. This is a question of law and not a question of fact. Both parties acknowledge the following facts: the inclusion of the "time being of the essence"

clause, the deadline of 5:00 p.m. 6 October 2020, the relation of this clause to the additional earnest money deposit, and the date plaintiffs delivered the additional earnest money deposit to the escrow agent. Applying these facts to the applicable law, the "time being of the essence" clause was a "vital and essential term of the contract," included in a condition precedent (the deposit of additional earnest money), and plaintiffs failed to timely deliver such deposit. *Fletcher*, 314 N.C. at 393 n.1, 333 S.E.2d at 734 n.1. Therefore, the trial court did not err in determining as a matter of law there is no genuine issue of material fact as to the interpretation and application of the "time being of the essence" clause.

B. Waiver

¶ 21 In the alternative, plaintiffs argue defendant waived the "time being of the essence" clause by her conduct. Specifically, plaintiffs claim defendant's lack of inquiry into the timely delivery of the additional earnest money deposit before 29 October 2020, and defendant's real estate agent's acknowledgment of the late delivery by 12 October 2020 amounted to waiver. We disagree.

¶ 22 Waiver is well defined in North Carolina case law. "[I]t is always based upon an express or implied agreement. There must always be an intention to relinquish a right, advantage, or benefit." *Klein v. Avemco Ins.*, 289 N.C. 63, 68, 220 S.E.2d 595, 598–99 (1975). Waiver may occur through either express or implied actions or conduct that "naturally lead the other party to believe that the right has been

intentionally given up." *Id.* at 68, 220 S.E.2d at 599. Stated another way, there is no waiver unless one party has intentionally waived a term and this was understood by the other party, "or unless one party has acted so as to mislead the other." *Id.* (citation omitted).

¶ 23 The present case differs from *Phoenix Ltd. P'ship of Raleigh v. Simpson*, 201 N.C. App. 493, 688 S.E.2d 717 (2009). In *Simpson*, the "time is of the essence" clause was for the closing date, and the seller attempted to use the clause to avoid conveying the property. *Id.* at 499, 688 S.E.2d at 722. However, the seller tendered a "non-recordable 'copy' of a deed" after the closing date, testified at deposition as to the expectation of a two-month delay in closing, held a meeting with the buyer to discuss the status of the transaction after the set closing date, and retained an environmental company to conduct an investigation on the property after the contractual closing date. *Id.* at 497, 500, 501, 688 S.E.2d at 720, 722, 723.

¶ 24 This Court held these undisputed facts taken together manifested an intent to close on a date later than the original closing date, which amounted to an implied waiver of the "time is of the essence" clause. *Id.* at 501, 688 S.E.2d at 723. We reasoned the seller's conduct would naturally lead the buyer to infer the seller "had dispensed with their right to insist that time was of the essence with respect to the closing on the property." *Id. But see Fairview Developers, Inc.*, 187 N.C. App. at 173, 652 S.E.2d at 368–69 (holding the agreement by the parties to extend the closing date

by two days did not amount to a waiver of the "time is of the essence" clause because the seller "neither intentionally nor implicitly waived the . . . clause in the contract").

¶ 25 Yet in the present case, plaintiffs claim defendant impliedly waived the clause because she did not raise the alleged breach until seventeen days after the additional earnest money was deposited with the escrow agent. Plaintiffs also claim the receipt of the money to the escrow agent was "imputed knowledge" to defendant as of 12 October 2020, suggesting defendant had knowledge of the breach and delayed in terminating the Contract. However, plaintiffs offer no evidence of any actions taken by defendant that would qualify as a manifested intent of waiver. Unlike *Simpson*, in which the sellers through multiple intentional actions lead a reasonable party to believe the transaction would proceed, plaintiffs fail to show defendant's inaction over a short time implies waiver.

¶ 26 Plaintiffs fail to present evidence that defendant waived the "time being of the essence" clause. Therefore, as a matter of law, the trial court did not err in granting defendant's Motion for Summary Judgment.

C. Concurrent Performance and Unilateral Termination of the Contract

¶ 27 Finally, plaintiffs argue the "time being of the essence" clause is immaterial because defendant did not have a concurrent obligation under the Contract at the time plaintiffs were required to pay the additional earnest money deposit. Plaintiffs

cite no legal authority to support this theory and ignore the contractual obligations the parties agreed to under the plain language of the Contract. As previously stated, a "time being of the essence" clause may be part of a contractual condition. Plaintiffs untimely delivered the additional earnest money deposit, thereby failing to meet an essential condition in the Contract. Plaintiffs' failure to comply with this deadline was a breach of the contract, therefore, defendant was within her right to unilaterally terminate the contract.

IV. Conclusion

¶ 28 The trial court properly granted defendant's Motion for Summary Judgment on all claims. The "time being of the essence" clause was properly applied to the required deposit of additional earnest money by 5:00 p.m., 6 October 2020. Defendant did not implicitly waive the "time being of the essence" clause. Therefore, the trial court properly determined there was no genuine issue of material fact and defendant was entitled to judgment as a matter of law. The trial court's order is affirmed.

AFFIRMED.

Judges ARROWOOD and COLLINS concur.

Report per Rule 30(e).