

DIVISION I

CA07-1336

June 4, 2008

BRIAN BELK and  
TONYA BELK

APPELLANTS

AN APPEAL FROM LAFAYETTE  
COUNTY CIRCUIT COURT  
[No. CV 2006-82-2]

v.

LONNIE TEAGUE, JR., NICK  
HOLLAND, NATALIE GRIFFIN,  
and BODCAW BANK

APPELLEES

HONORABLE JAMES SCOTT  
HUDSON, Jr., JUDGE

AFFIRMED

This appeal arises from an alleged oral agreement to convey real property. Appellants Tonya and Brian Belk filed suit seeking specific performance of the agreement and damages for interference with a business expectancy. The Lafayette County Circuit Court granted separate motions to dismiss and for judgment on the pleadings filed by appellee Lonnie Teague, Jr., and by appellees Nick Holland, Natalie Griffin, and Bodcaw Bank. The court also awarded attorney's fees. Appellants argue three points for reversal, asserting that the circuit court erred in finding that they did not state facts upon which relief can be granted under Ark. R. Civ. P. 12(b)(6) and in awarding attorney's fees to the appellees. We affirm.

The complaint, as amended, alleged that appellants made two oral agreements with Teague to purchase forty acres of real property for \$40,000. The first oral agreement, made in July 2006, called for Teague to carry a promissory note for \$18,000. A written contract was

drawn up reflecting the terms of the sale but was never signed by either party. The second oral agreement was made on August 23, 2006, after appellants obtained financing for the full purchase price. Again, a written contract was drawn up reflecting the terms of the sale but was never signed by Teague. Appellants alleged that they obtained a \$5000 cashier's check representing the earnest-money funds for payment to Teague on September 26, 2006.

Appellants further alleged that, after they obtained financing for the purchase, they were told by Teague that the sale was off and that he had made an agreement to sell the real property to Holland and Griffin. Bodcaw Bank financed the purchase of the property by Holland and Griffin and took a mortgage to secure payment. Appellants also alleged that they informed Teague that they had relied to their detriment upon the agreement to purchase the real property and had performed certain acts pursuant to their agreement which included drafting written contracts for the sale of the property and arranging financing for the purchase price, including a cashier's check for \$5000. Appellants further alleged that they had a conversation with Holland and Griffin during which Holland and Griffin said that they were aware of appellants' agreement with Teague but that they would pursue the purchase from Teague because they could complete the purchase before appellants.

Appellants filed suit on September 29, 2006, against Teague, Holland, and Griffin, asserting causes of action against Teague for specific performance of the agreement and against Holland and Griffin for tortious interference with appellants' agreement with Teague. The

complaint sought an unspecified amount of compensatory and punitive damages. Appellants amended their complaint to add the bank as a defendant.<sup>1</sup>

Holland, Griffin, and the bank filed a motion to dismiss and for judgment on the pleadings, as did Teague. The motions each raised the statute of frauds as a defense and asserted that the complaint failed to state facts upon which relief could be granted. The defendants also filed answers denying the material allegations of the complaint and asserting the statute of frauds and lack of consideration as affirmative defenses. The answers included counterclaims for declaratory relief, contending that appellants had clouded their title to the real property by filing a *lis pendens*. In response to the motions, appellants alleged that they had taken certain actions in reliance upon their agreement with Teague, including drafting two contracts for the sale of the property and obtaining financing through their bank.

Without explanation, the circuit court granted the defendants' motions, dismissed the complaint without prejudice, and denied all other relief requested. The court's order also recited that it was final for purposes of appeal. Thereafter, counsel for Holland, Griffin, and the bank filed an affidavit seeking attorney's fees. The affidavit sought a fee of \$2445. The circuit court awarded Holland, Griffin, and the bank an attorney's fee of \$2445. Teague's attorney was awarded a fee of \$2010. This appeal followed.

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<sup>1</sup>In their response to the motions, appellants stated that the bank was made a party simply in order to allow the bank to protect its interest as a holder of a mortgage on the property. Appellants further stated that they were not making any claim that the bank was guilty of fraud or other wrongdoing.

### *Standard of Review*

In considering a motion to dismiss under Arkansas Rule of Civil Procedure 12(b)(6), the facts alleged in the complaint are treated as true and are viewed in the light most favorable to the plaintiff. *Perry v. Baptist Health*, 358 Ark. 238, 189 S.W.3d 54 (2004). In testing the sufficiency of the complaint on a motion to dismiss, all reasonable inferences must be resolved in favor of the complaint, and the pleadings are to be liberally construed. *Id.* However, a complaint must state facts, not mere conclusions, in order to entitle the pleader to relief. *Id.* The court will look to the underlying facts supporting an alleged cause of action to determine whether the matter has been sufficiently pled. *Id.*

### *Arguments on Appeal*

Appellants first argue that their complaint stated sufficient facts to support a cause of action for specific performance. One seeking specific performance of a contract must prove the essentials of a valid and binding contract. *Myers v. Snider*, 226 Ark. 849, 294 S.W.2d 495 (1956); *Lacey v. Bennett*, 210 Ark. 277, 195 S.W.2d 341 (1946). A contract for the sale of land comes within the statute of frauds and must be in writing to be enforceable. Ark. Code Ann. § 4-59-101 (Repl. 2001). Appellants argue that they stated sufficient facts to take the oral agreements out of the statute of frauds because they alleged that an agreement was reached with Teague and that they partially performed that agreement with Teague's knowledge and acquiescence by arranging financing and drafting written agreements for the purchase. These actions are ineffective and do not state facts sufficient to take the oral agreements out of the purview of the statute of frauds.

Appellants have failed to distinguish between acts undertaken in contemplation of eventual performance and acts which truly constitute part performance of a contract. We have previously recognized that an oral agreement may be removed from the statute of frauds, when there is proof of the payment of at least a part of the purchase price and possession of the property. *Smith v. Malone*, 83 Ark. App. 99, 117 S.W.3d 643 (2003). Appellants do not assert either circumstance. Instead, they allege only that they obtained financing, drafted an agreement, and had a cashier's check drawn up. Thus, the court ruled properly.

In their second point, appellants argue that they state facts supporting a cause of action for tortious interference with a contract. The elements of tortious interference have been well developed by the Arkansas Supreme Court and include (1) the existence of a valid contractual relationship or a business expectancy; (2) the defendant's knowledge of the relationship or expectancy; (3) intentional interference by the defendant that induces or causes a breach or termination of the relationship or expectancy; (4) resultant damage to the party whose relationship or expectancy has been disrupted; and (5) improper conduct on the part of the defendant. *Vowell v. Fairfield Bay Cmty. Club, Inc.*, 346 Ark. 270, 58 S.W.3d 324, 329 (2001).<sup>2</sup>

From our discussion of appellants' first point, it is clear that they failed to state an element of a claim for tortious interference—namely, the existence of a valid contract. Appellants counter by arguing that the first element may be proved by demonstrating either a valid contractual relationship or a business expectancy. See *Cross v. Arkansas Livestock &*

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<sup>2</sup>We first note that Teague cannot held liable under this theory because he was a party to the alleged contract. See *Faulkner v. Arkansas Children's Hosp.*, 347 Ark. 941, 69 S.W.3d 393 (2002).

*Poultry Comm'n*, 328 Ark. 255, 943 S.W.2d 230 (1997). We do not believe that appellants can merely plead the existence of an expectancy to purchase real property and then claim they have stated a cause of action for tortious interference with that expectancy and thereby circumvent statute of frauds. Without a written contract or part performance taking the oral agreement out of the statute of frauds, appellants have only a business expectancy subject to a contingency, *i.e.*, entering a valid contract. Without an enforceable contract, another party may purchase the property. Because appellant's expectancy is subject to a contingency, *i.e.*, obtaining a valid contract, appellee's purchase of the real estate is not tortious interference with a business expectancy. See *Deck House, Inc. v. Link*, 98 Ark. App. 17, 249 S.W.3d 817 (2007). Accordingly, the court's ruling was proper.

Further, appellants have failed to set forth any facts to show that Holland and Griffin acted "improperly" in buying the property from Teague. Here, the only allegation of wrongdoing is that Teague sold the property to Holland and Griffin. This is not enough. See *K.C. Props. of N.W. Ark., Inc. v. Lowell Inv. Partners, LLC*, \_\_\_ Ark. \_\_\_, \_\_\_ S.W.3d \_\_\_ (Mar. 13, 2008); *Alvarado v. St. Mary-Rogers Mem'l Hosp., Inc.*, 99 Ark. App. 104, \_\_\_ S.W.3d \_\_\_ (2007); *Hayes v. Advanced Towing Servs., Inc.*, 73 Ark. App. 36, 40 S.W.3d 800 (2001).

In their third point, appellants argue that the circuit erred in awarding attorney's fees to appellees because they did not specify the statutory basis for the award and the circuit court specifically found that there was no valid contract. Arkansas Code Annotated section 16-22-308 has been held to authorize an award of attorney's fees to a party who successfully defends against a contract claim, even on the basis that no valid contract exists. *Cumberland*

*Fin. Group, Ltd. v. Brown Chem. Co.*, 34 Ark. App. 269, 810 S.W.2d 49 (1991). Therefore, the award of attorney's fees was proper.<sup>3</sup>

Affirmed.

GLADWIN and MARSHALL, JJ., agree.

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<sup>3</sup>Teague did not file a motion seeking fees. However, Teague requested attorney's fees in his answer and counterclaim. Appellants do not challenge the award on the basis that no motion was filed.