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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001799-MR

GLOBAL DATA CORPORATION APPELLANT

v.

APPEAL FROM CARTER CIRCUIT COURT
HONORABLE REBECCA K. PHILLIPS, JUDGE
ACTION NO. 07-CI-00392

CONSUMMATION TECHNOLOGIES,
INC. AND WOOLPERT, INC. APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, MOORE, AND NICKELL, JUDGES.

NICKELL, JUDGE: Global Data Corporation (Global Data) appeals from the Carter Circuit Court's entry of summary judgment in favor of Woolpert, Inc. (Woolpert) and Consummation Technologies, Inc. (Consummation). Global Data also appeals from the circuit court's order denying its motion to enforce an alleged

settlement agreement between Global Data and Consummation. After careful review, we affirm.

Facts and Procedural Background

On September 18, 2007, Woolpert filed a civil complaint against Global Data. In that complaint, Woolpert asserted that pursuant to the terms of a "Master Professional Service Agreement" (MPSA) between the parties, Woolpert had agreed to provide engineering, surveying, and mapping services to Global Data for the development of a data storage facility on property owned by Global Data.[1] Woolpert alleged that Global Data had breached the MPSA by failing to pay for any of the invoiced work that had been performed to date, and sought damages in the amount of $232,688.22 plus interest and attorneys' fees.

Consummation subsequently filed a cross-claim against Global Data seeking judgment on a note and mortgage. On May 8, 2006, Global Data executed a promissory note payable to Consummation in the amount of $995,000.00 in exchange for a loan in that amount. Global Data also agreed to pay interest at certain specified rates for certain periods of time. As security for the note, Global Data granted a mortgage to Consummation encumbering the same property described in Woolpert's complaint. Consummation alleged that as a consequence of Woolpert's action against Global Data, Global Data had breached the terms of the note and was in default on its obligation to Consummation. As a result, its

[1] Woolpert and Global Data later supplemented the MPSA with three addenda dated February 26, 2007; March 30, 2007; and July 27, 2007.

entire indebtedness under the note was now due and payable. Consummation sought judgment for the entire amount covered by the note – via a sale of the property if necessary – plus interest, attorneys' fees, and arrears in the amount of $43,862.52.

On February 11, 2009, Woolpert moved for summary judgment as to all of its claims against Global Data. In response to Woolpert's motion, Global Data argued that Woolpert had failed to meet the requisite standard of care in performing the services set forth in the MPSA and that its work was consequently incomplete and insufficient. Because of this, Global Data disputed the amount alleged to be owed. In support of its position, Global Data attached an affidavit from William Hazelip, an engineering manager with Stone Mountain Development Company, which was directly affiliated with Global Data and the subject project. Hazelip indicated that while Woolpert had provided Global Data with "weekly status reports" during the course of its work, "no work was ever made available to Global Data for review." Hazelip further indicated that he had met with Woolpert personnel on September 29, 2008 – after suit was filed – and "was able to view various items of work product prepared by Woolpert" in relation to the project. However, Hazelip noted that "[o]f the numerous items of work product required under the contract, the only items that I was provided to review [were] related to aerial photography, topographical mapping and boundary survey mapping." Global Data also argued that Woolpert's motion was premature because discovery had not yet been completed.

On April 6, 2009, Consummation filed its own motion for summary judgment against Global Data as well as a motion for an order of sale directing the master commissioner to sell the subject property. In response to Consummation's motion, Global Data acknowledged that it had not tendered all of the owed payments to Consummation as contemplated under the parties' promissory note. However, Global Data contended that the terms and conditions of the note with respect to payment of the outstanding balance had been mutually modified by the parties in March 2008, and that Consummation had agreed to forbear its right to payment under the note in exchange for Global Data agreeing to purchase all shares of Consummation stock at an unspecified time. Thus, Global Data was not in default and Consummation was not entitled to a summary judgment declaring such. In support of its position, Global Data attached an affidavit from Liam Russell, the corporation's managing member, as well as a number of documents purporting to evidence the agreement. Notably, none of the documents had been executed by each party.

On July 24, 2009, the trial court denied Woolpert's motion for summary judgment, but only to allow Global Data an additional sixty days to conduct further discovery. In reaching this decision, the court questioned why no discovery had been conducted by Global Data regarding its claims in the two years the case had been pending and noted its belief that Global Data had provided no "valid reason why discovery efforts have not been commenced and pursued[.]" Nonetheless, the court granted Global Data the additional sixty days to conduct

discovery because of its desire "to afford all parties a full and fair opportunity to litigate this action" and "so that any questions the Defendant had as to the veracity or the validity of the invoices could be resolved." However, the court warned Global Data that its "failure to conduct discovery cannot be relied upon perpetually as a bar to Summary Judgment." The court also explicitly indicated that it was expressing no opinion at that point regarding the merits of Woolpert's motion,[2] and it invited Woolpert to renew the motion for a ruling on the merits after the sixty-day period had expired.

Woolpert subsequently renewed its motion for summary judgment on October 28, 2009. In its renewed motion, Woolpert recounted extensive correspondence between the parties prior to litigation reflecting that Global Data had not questioned the legitimacy or validity of any of the invoices submitted by Woolpert or the quality of work performed. This correspondence also included repeated assurances by Global Data that any unpaid invoices would be satisfied once all financing issues were resolved. Woolpert contended that any "issues" regarding its work only arose once suit was filed because of "a continuing ruse to avoid payment of invoices that Global Data has previously acknowledged that it owed." In response, Global Data raised the same claims originally asserted in response to Woolpert's original motion, arguing that Woolpert had "failed to meet

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[2] The court did note that Global Data had received verification of the performance of certain services covered within the scope of the invoices issued and had acknowledged such during oral argument. Despite this fact, Global Data had failed to issue even a partial payment for those services. Because of this, the court suggested that Global Data's arguments were "specious."

the requisite standard of care in the completion of the agreement." No new evidence supporting this argument was attached or referenced.

On August 26, 2009, Consummation renewed its motion for summary judgment against Global Data. Global Data objected to the motion and also filed its own motion asking the trial court to enforce the alleged agreement between the parties under which Consummation had agreed to forbear its right to payment under the note in exchange for Global Data agreeing to purchase Consummation stock. Global Data now characterized this as a "settlement agreement" and argued that dismissal of Consummation's cross-claim was merited. In reply, Consummation argued this alleged agreement had never been reduced to an executed writing and was, therefore, unenforceable under the Statute of Frauds.

On June 2, 2010, the trial court entered an Opinion and Order Addressing All Pending Motions. In that Opinion and Order, the court granted Woolpert's motion for summary judgment and Consummation's motion for summary judgment. The court also denied Global Data's motion to enforce its alleged settlement agreement with Consummation. Global Data subsequently filed a motion asking the circuit court to alter, amend, or vacate its Opinion and Order, but that motion was denied. This appeal followed.

Analysis

1. Woolpert's Motion for Summary Judgment

Global Data first argues that the trial court erred in granting Woolpert's motion for summary judgment because genuine issues of material fact

existed as to the amount Global Data actually owed Woolpert for its services. Global Data again argues that Woolpert failed to meet the requisite standard of care set forth in the MPSA in performing those services, that Woolpert's work product was "incomplete," and that the value of the services performed was "substantially less" than the amounts set forth in Woolpert's invoices. Global Data contends these arguments present factual issues that can only be resolved at trial. We disagree.

The standards for reviewing a trial court's entry of summary judgment on appeal are well-established and were concisely summarized by this Court in *Lewis v. B & R Corporation*, 56 S.W.3d 432 (Ky. App. 2001):

> The standard of review on appeal when a trial court grants a motion for summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." The trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present "at least some affirmative evidence showing that there is a genuine issue of material fact for trial."

Id. at 436 (Internal footnotes and citations omitted). Because summary judgments involve no fact finding, we review the trial court's decision *de novo*. *3D Enters. Contr. Corp. v. Louisville & Jefferson County Metro. Sewer Dist.*, 174 S.W.3d 440, 445 (Ky. 2005); *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000).

After reviewing the trial court's Opinion and Order and the reasoning behind its resolution of this issue in favor of Woolpert, we conclude that the court's decision to grant summary judgment was sound. Indeed, we do not believe we can improve upon the court's explanation of that reasoning to a significant extent. Therefore, we adopt that portion of the trial court's Opinion and Order as our own and incorporate it herein:

> As the record reflects, the Court previously overruled the Motion for Summary Judgment filed by the Plaintiff, Woolpert, Inc. (Woolpert), against the Defendant, Global Data Corporation (Global Data). Such Motion was not denied on the merits, but rather was denied in order to allow Global Data additional time in which to conduct discovery. With such time having passed, Woolpert has renewed the Motion for Summary Judgment, and this matter is properly before the Court. Prior to addressing the merits of the Motion, however, a review of the basic facts is necessary.
>
> Pursuant to the agreement of the parties, Woolpert was to provide to Global Data various services associated with the preparation of and development of a site located in Carter County upon which Global Data wished to erect structures for business purposes. Per the written contract, payment of each invoice issued by Woolpert to Global Data was due upon receipt. If an invoice remained unpaid for thirty (30) days after the date of the invoice, per the terms of the parties' agreement, Woolpert had the right to suspend services, terminate the agreement, and pursue collection remedies, provided that notice was given to Global Data.
>
> As a review of the record reflects, four (4) separate invoices were forwarded to Global Data for payment. Such invoices were dated April 10, 2007; May 10, 2007; May 22, 2007; and May 22, 2007. It is undisputed that no payments have been made towards the invoices issued. Accordingly, Woolpert seeks the entry of

Judgment in the principal amount of $232,688.22 in addition to an award of interest and an award of attorney fees.

At the Hearing conducted with regard to the original Motion, counsel for Global Data asserted that Global Data was under no obligation to blindly pay the invoices without first verifying that the services which were the subject of the invoices were actually provided. Based upon this principle, counsel asserted that Global Data was entitled to conduct additional discovery in order to confirm that all services for which payment was being sought were actually performed. Per counsel, once Global Data was satisfied that the subject services had been performed, Global Data would make the requisite payments.

Of course, as noted previously by the Court both during the initial oral argument and in the prior Order addressing the Motion for Summary Judgment, Global Data had already received verification of the performance of certain services covered within the scope of the invoices issued. This fact was acknowledged during oral arguments. Despite the receipt of verification, however, Global Data failed to even issue a partial payment for the services which had been substantiated. As a result, Global Data's assertion that payment would be made as soon as services were verified is inconsistent and entitled to little credibility.

While the Court granted Global Data additional time to conduct discovery, certainly, Global Data had not been without the opportunity to do so beforehand. Specifically, as noted in the prior Order of the Court, the Complaint in this matter was filed on September 18, 2007. At this time, more than two (2) and one-half (1/2) years have passed since the initiation of the action. Despite this fact, little discovery has been conducted by Global Data, a Defendant which *claims* to only have a desire to review and confirm the existence of the work product before issuing payment. Discovery vehicles would obviously afford Global Data the opportunity to ascertain those facts regarding the work product which

are unknown. Amazingly, however, in the time which has passed since the first Motion for Summary Judgment was heard, the only discovery conducted by Global Data appears to have been the preparation and service of Interrogatories and Requests for Production.

In defending the Motion for Summary Judgment now before the Court, Global Data once again claims that the "standard of care" has not been met, indicating that the "standard of care" requires the performance of services for which a bill is issued. To the extent the term "standard of care" implies the performance of tasks at an acceptable level, there are absolutely no facts of record indicating that the work of Woolpert has fallen below or otherwise does not meet the "standard of care." To the extent the term "standard of care" encompasses the actual performance of services billed for, once again, there are absolutely no facts of record indicating that Woolpert has not performed those tasks which are the subject of the invoices issued in this matter.

The Affidavit of Bill Hazelip indicates a review of certain work product which was deemed valuable to [] Global Data. Such Affidavit also reveals a request to review additional work product which was denied. Of course, the timing of the meeting between the representative of Woolpert and Bill Hazelip must be considered in order to put this denial into context. Specifically, the meeting was conducted on September 29, 2008, which was long after the litigation was initiated. As of the date of the meeting, the invoices had been outstanding for a period of seventeen (17) months or more. Thus, any issues Bill Hazelip or Global Data had with the meeting on September 29, 2008, provided no basis for the failure to pay the invoices when due as required by the contract.

More importantly, the Affidavit of Bill Hazelip (and the meeting memorandum accompanying same) does not even set forth facts indicating that the work in question was not performed by Woolpert. Global Data may not have been granted access to the final survey plat, yet the underlying work for the preparation of such survey plat

(in the form of voluminous field notes) was reviewed by Bill Hazelip at the meeting on September 29, 2008. An e-mail communication between Danny Sparks and Adam Riehl on July 18, 2007, indicated that Woolpert was willing to provide the mapping and assist with locating the surveyed boundaries *once payment was made*. Certainly, common sense indicates why Woolpert would not want to turn over to Global Data the final products when payment had not been made for any work performed. The Affidavit submitted by Global Data does not, in any way, support a contention that the invoices set forth services which were not performed.

This Court must stress again the fact that if Global Data had legitimate questions as to the work performed, an opportunity to answer such questions was presented by discovery. Depositions of engineers, surveyors, project managers, and the like could have been taken in order to inquire as to what was done, yet little inquiry was made. Quite frankly, it appears that Global Data made no significant inquiries, for no true questions as to the work product existed. Throughout the time in which business was being conducted, the correspondence between the agents of Woolpert and the agents of Global Data clearly indicates Global Data's satisfaction with the work of Woolpert. Furthermore, the correspondence between the agents of Woolpert and the agents of Global Data indicates no doubt or concern on the part of Global Data as to the performance of the work for which billing was conducted. No intention to withhold payment until the work product was further reviewed was ever expressed, and no intention to demand a reduction, modification, or offset of any charges was ever expressed.

To the contrary, a communication from Michael Russell to Adam Riehl dated July 12, 2007, indicated that funding discussions for the phase 1 project were in the final stages, and "[t]hat funding will not only be directed at [Global Data's] outstanding invoices with [Woolpert], but will include funding for construction on the plateau (exterior) for seven buildings." Correspondence from Liam Russell to Brian Jansen dated August 27, 2007, indicated payment in full was forthcoming partly from

> the construction financing and partly from escrow funds. This Court finds it curious that only at the litigation stage is a question tenuously being raised as to the validity of the billings or the work performed.
>
> The correspondence reveals that Global Data continually made assurances as to the receipt of payment by Woolpert. Essentially, payment was always just right around the corner – upon the completion of one more meeting, upon the retention of one more investor, or upon the close of one more deal. Perhaps Global Data was actively exploring options to make things work, yet this Court must also consider the possibility that the representations were crafted only to buy Global Data additional time. All of the correspondence tendered and referenced in Woolpert's Motion sets forth no basis to conclude that Global Data questioned the work or the obligation to make full payment.
>
> Payment of each invoice was due, per the agreement, within thirty (30) days of the date of the receipt of such invoice. No conditions precedent existed. Global Data has presented no evidence that the invoices were fraudulent, inflated, or otherwise improper. This Court finds that there are no genuine issues of material fact as to the liability of Global Data for the invoices in question. As such, Woolpert's Motion for Summary Judgment is appropriate.

For the reasons set forth above, we conclude that the trial court did not err in granting Woolpert's motion for summary judgment.

2. Consummation's Motion for Summary Judgment

Global Data next argues that the trial court erred in granting Consummation's motion for summary judgment because genuine issues of material fact existed with respect to whether the payment terms set forth in the parties'

promissory note and mortgage were modified by a subsequent agreement between the parties. Global Data admits that it had not made payments as contemplated under the original terms of the parties' agreement, but it contends that those terms were mutually modified by the parties in a subsequent agreement reached in March 2008. As a result of this alleged modification, Consummation agreed to forbear its right to payments under the note in exchange for Global Data agreeing to purchase Consummation's stock. Because of this modification, Global Data argues, it was no longer in default because it was excused from making payments due under the note until such time as it completed the purchase of Consummation's stock. In the alternative, Global Data argues that at the very least, the evidence presents questions of fact as to whether a modification of the parties' original agreement had occurred, so summary judgment in favor of Consummation was not merited. Consummation disputes the existence of such a modification agreement, contending that while discussions occurred, no actual agreement was reached.

As noted by Consummation and the trial court, this alleged modification agreement was never reduced to an executed writing. As evidence of the agreement, Global Data submitted to the trial court documents that it identified as "Consummation Technologies Seller Release," "Consummation Technologies Stock Purchase Agreement," and "Consummation Technologies Disclosure Letter." However, those documents appear to be only drafts given that they contain several blanks (particularly where dates are concerned) and are otherwise incomplete in spots. Moreover, none of these documents was ever executed by

both parties. Thus, there is no writing signed by the party to be charged – Consummation – evidencing any modification of the terms of the note or mortgage.

The trial court concluded that if a modification agreement had been reached, such an agreement had to be in writing and signed by the parties in order to be valid. We agree. The original agreement between the parties was set forth in a purchase money note and mortgage that required specified installment payments to be made by Global Data to Consummation over the next four years. Such an agreement is required by the Statute of Frauds to be in writing in order to be enforceable. Kentucky Revised Statutes (KRS) 371.010(7)[3] & (9).[4] Because of this, any subsequent modification of that agreement changing its terms must also be written and signed by the party to be charged to be enforceable. *Cox v. Venters*, 887 S.W.2d 563, 566 (Ky. App. 1994). The claimed modification agreement in this case clearly does not meet those requirements and is, therefore, unenforceable.

Global Data challenges this conclusion by arguing an oral modification was sufficient under the circumstances and compliance with the

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[3] KRS 371.010(7) provides: "No action shall be brought to charge any person . . . [u]pon any agreement that is not to be performed within one year from the making thereof" unless the agreement is in writing and signed by the party to be charged.

[4] KRS 371.010(9) provides: "No action shall be brought to charge any person . . . [u]pon any promise, contract, agreement, undertaking, or commitment to loan money, to grant, extend, or renew credit, or make any financial accommodation to establish or assist a business enterprise or an existing business enterprise including, but not limited to the purchase of realty or real property, but this subsection shall not apply to agreements pursuant to which credit is extended by means of a credit card or similar device, or to consumer credit transactions" unless the agreement is in writing and signed by the party to be charged.

Statute of Frauds was not mandatory. Global Data contends an oral modification of a written agreement may be permitted where the only affected terms are the time and form of payment originally contemplated.

Our Supreme Court has recognized that "[t]he statute of frauds does not apply to an oral modification of a written contract with respect to the mode or time of performance where time is not of the essence of the contract." *Farmers Bank and Trust Co. of Georgetown, Kentucky v. Willmott Hardwoods, Inc.*, 171 S.W.3d 4, 8 (Ky. 2005) (citing *Klatch v. Simpson*, 237 Ky. 84, 34 S.W.2d 951, 954-55 (1931)). However, that exception does not apply in this case since the parties' mortgage plainly reflected that time was of the essence in terms of payment. Paragraph 6 of the mortgage provided as follows:

> In the event Mortgagor fails to perform any of the covenants or conditions contained in the said note or in this mortgage in the time and manner specified, *time being of the essence of said note and of this mortgage*, the entire unpaid obligation, at the option of the holder hereof, shall forthwith mature and become due and payable without further demand or notice together with interest and charges as provided for in said note, if any, and court costs and the maximum attorney's fees as allowed by law.

(Emphasis added).

Moreover, the proposed modifications in this case were not minor. Instead, they materially affected the heart of the parties' agreement. As such, they were required to be in writing. *Murray v. Boyd*, 165 Ky. 625, 177 S.W. 468, 471-72 (1915). As noted by the trial court:

> Rather than receive installment payments as required at specified intervals, the payment was to be made at an unspecified time which was dependent upon the sale of Consummation's stock. The original agreement neither addressed nor contemplated the sale and/or purchase of stock. These modifications simply are not equivalent to a change in the address to which payments are to be mailed or a change in the due date from the 15th to the 30th. Rather, the changes are material modifications of the agreement which must be in writing as set forth above.

Consequently, because any modification of the parties' original agreement had to be in writing and executed by Consummation to be effective, Global Data's claim that genuine issues of material fact exist as to whether the parties agreed to modify that agreement is essentially irrelevant.[5]

We also note that while Global Data asserts that the terms of the agreement as to payment were modified, it does not assert there was a modification of the terms providing for escalation of the debt in the event of the foreclosure of another lien. Paragraph 4 of the parties' mortgage provided, that if foreclosure proceedings were instituted as the result of a superior mortgage or junior lien, Consummation could declare the subject note to be due and payable. This, of

[5] With this said, we are nonetheless compelled to address one particular claim made by Global Data in this context. Global Data states in its brief that it "pointed out to the [trial court] that at no point prior to the filing of its Crossclaim against Global Data for alleged default of the note or mortgage agreement, did Consummation ever send demand for payment, notice of delinquency, default or other statements claiming violation of the terms and conditions of the note from Global Data." Global Data alleges the reason this was never done "was quite simply because the terms and conditions of the note had been modified and Global Data was not in default of the note as modified." This argument rings hollow, however, because the affidavit filed by Global Data's managing member, Liam Russell, specifically provides that Global Data and Consummation reached the alleged modification agreement "[i]n March of 2008" – *after* Consummation filed its cross-claim in January 2008. Thus, Global Data's claim is completely inconsistent with its own evidence.

course, is exactly what it did in this case. Moreover, Paragraph 6 of the mortgage allowed Consummation to pursue relief for other breaches even if a breach in payment was overlooked, modified, or waived.

In sum, the trial court did not err in concluding that Consummation was entitled to summary judgment since any modification to its original agreement with Global Data was neither written nor fully executed and Consummation otherwise retained the right to pursue an action for an unrelated breach.

3. Global Data's Motion to Enforce a Settlement Agreement

In a related argument, Global Data contends the modification agreement discussed above can also be viewed, in the alternative, as a settlement agreement between Global Data and Consummation resolving all claims between the parties. Global Data alleges the trial court erred in denying its motion to enforce this alleged settlement agreement after finding any such agreement also had to be reduced to writing to be enforceable.

As discussed above, the alleged agreement was supposedly reached in March 2008 after Consummation filed its foreclosure action against Global Data and involved Consummation agreeing to forbear its owed payments in exchange for Global Data's purchase of Consummation's stock. Global Data argued this proposed arrangement effectively constituted a settlement of the parties' action, but the trial court declined to enforce it on Statute of Frauds grounds since it was never reduced to a writing that could be charged to Consummation.

However, it is well-settled that settlement agreements do not necessarily have to be reduced to writing to be enforceable. *Frear v. P.T.A. Industries, Inc.*, 103 S.W.3d 99, 105 (Ky. 2003); *Motorists Mut. Ins. Co. v. Glass*, 996 S.W.2d 437, 445 (Ky. 1997). Moreover, as a general rule, "if a dispute exists as to whether an oral agreement was reached, the issue is to be resolved by a jury." *Glass*, 996 S.W.2d at 445. Therefore, the reasoning behind the trial court's decision to deny Global Data's motion is not supported by our case law.

We further note that the trial court's Opinion and Order acknowledged "a factual dispute does exist as to whether or not a subsequent agreement was reached." Normally, then, the question of whether Global Data and Consummation reached an agreement to settle would be one for the jury. However, while the parties obviously disagree on this factual issue, we believe the record dispels the notion that the parties ever reached a firm agreement to settle their action. Thus, while we disagree with the trial court's reasoning on this issue, we nonetheless agree with its ultimate conclusion. *Kentucky Farm Bureau Mut. Ins. Co. v. Gray*, 814 S.W. 2d 928, 930 (Ky. App. 1991) (appellate court may affirm trial court for any reason supported by record).

Global Data relies primarily upon the affidavit of Liam Russell for its assertion that the parties agreed to settle their dispute. This affidavit provides that in April and May 2008, the parties' attorneys "negotiated the agreements . . . that would be executed in escrow for the payoff once funding was achieved." We acknowledge that the record supports Global Data's position that the parties were

discussing settlement and, indeed, may have even been on the verge of finalizing such. However, while there is correspondence between the parties in the record indicating that settlement was being contemplated and discussed, the substance of that correspondence plainly reflects any agreement was entirely contingent upon Global Data's securing funding to purchase Consummation's stock – which never occurred.

For example, in an e-mail sent on May 7, 2008, Harlan C. Williams – a principal member of Consummation – discussed the prospect of settlement with Russell, but the e-mail clearly indicates any settlement was conditioned on Global Data's ability to line up financing for the proposed stock purchase:

> Liam,
>
> I called twice last week in the hopes we could figure out a settlement date. As I had advised earlier, I had to know something definite by May 5 but I have heard nothing. May 5th was the time wherein I would have to make application for financing on a business opportunity which must come to conclusion by May 15th. Not a lot of time for me to line up financing!
>
> If I could have absolute assurance that you are ready to settle by then, I would not need to go through the cost of financing process.
>
> Please advise me immediately as to when you will have the ability to finalize a settlement.
>
> Back in March you felt it would be a matter of days because you had a financing commitment. I didn't realize it was still contingent upon state permitting.
>
> In mid-April you and JR both advised that you expected finalization of state permitting, possibly, the next day.

> My question then is what is the holdup at this point?
>
> Inasmuch as my bank is aware of the Kentucky sale, they are starting to get skeptical about final settlement. They have asked me to send them a copy of the mortgage commitment and if you will get that to me pronto, it will be a big help.

An email sent by Williams to Russell on August 21, 2008, expressed continued concern that Global Data had failed to secure financing and warned that foreclosure could ultimately prove necessary:

> Liam,
>
> What's going on in Kentucky?
>
> . . .
>
> I have been under the impression that your financing was in place and momentarily your source was ready to settle as soon as their appraiser completed his appraisal. Is this still accurate? If so, when will they complete <u>everything</u>?
>
> . . .
>
> I need to know IMMEDIATELY exactly where things stand.
>
> It may be necessary for us to initiate foreclosure proceedings to avoid what appears to be a series of legal battles.
>
> We are completely out of <u>patience</u>!!

A letter sent by Williams to Russell on September 18, 2008, again reflected that a settlement agreement had not been finalized because of a continued lack of financing:

> Dear Liam:
>
> We have heard nothing from you about a final mortgage commitment as promised and a settlement date. . . .
>
> The question I have is whether or not you have received an actual firm mortgage commitment from a source ready, willing and able to settle.
>
> We are tired of promises after promises that have not become a reality.
>
> We have decided that unless you can provide us with a fully executed financing commitment on or before, but no later than Friday, September 26, 2008 that reflects a settlement date no later than October 15, 2008, you leave us no alternative other than to immediately commence foreclosure on the Kentucky property.

On November 20, 2008, Williams sent the following e-mail to Russell with the subject heading, "Update":

> Liam,
>
> We talked on Wednesday, 10/29/08 at which time you advised that you would send me copies of your financing commitment for the purchase of the Kentucky property in a "day or two." In lieu of this, you said you would have someone from your source call me. We have heard nothing from you or anyone since that time. We must assume that you do not have any financing commitment.
>
> I see no alternative other than to commence with a foreclosure and put it on the market.
>
> We are sorry things did not work out.

The record does contain a "letter of interest" sent to Russell by a potential lender on April 13, 2009, but the letter explicitly warns that "[i]n no way should this be considered a firm loan commitment." The record contains no

indication that this financing – or any financing at all – was ever extended to Global Data for the proposed stock purchase. Moreover, Williams sent a fax to his attorney on April 30, 2009, discussing the issue of foreclosure, which suggests that the letter of interest did nothing to bring about a firm settlement.

Consequently, while the question of whether a verbal/non-executed settlement agreement has been reached is generally one of fact precluding summary judgment, the documents and correspondence of record, in our view, unambiguously reflect that any such agreement in this case was entirely dependent upon Global Data securing funding for the proposed stock purchase. Since there is no indication this ever occurred, we conclude the trial court did not err in denying Global Data's motion to enforce its purported settlement agreement with Consummation.

Conclusion

For the foregoing reasons, the judgment of the Carter Circuit Court is affirmed.

ALL CONCUR.

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