NO. COA07-1333

NORTH CAROLINA COURT OF APPEALS

Filed: 3 March 2009

PHOENIX LIMITED PARTNERSHIP
OF RALEIGH,
Plaintiff,

v.

Wake County
No. 05 CVS 1524

SARAH W. SIMPSON, ROBERT T. SIMPSON, EDNA JACQUELYN STEED WRAY, Individually and as Executrix of the Estate of Charles W. Wray, and SHW, LLC,
Defendants.

Appeal by defendants from order entered 6 June 2007 by Judge Howard E. Manning, Jr. in Wake County Superior Court. Heard in the Court of Appeals 29 April 2008.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Peter J. Marino and Scott A. Miskimon, for plaintiff-appellee.

Thomas W. Steed, Jr. for defendants-appellants.

GEER, Judge.

This litigation arises out of defendants' exercise of an option to sell certain property to plaintiff. The parties did not close on the property by 13 March 2001, the date specified in the contract for closing. Plaintiff subsequently brought suit when defendants declined to close in the fall of 2004. Defendants have appealed from the trial court's order granting partial summary

judgment to plaintiff on plaintiff's breach of contract claim and ordering that defendants specifically perform the contract by executing and delivering a general warranty deed transferring the property at issue to plaintiff.

While defendants correctly point out that the contract containing the option included a "time is of the essence" provision applicable to the contract's specified closing date of 13 March 2001, we agree with plaintiff that the undisputed facts establish that defendants waived that provision and, therefore, plaintiff was not required to close on the property by the date specified in the contract. That conclusion does not, however, finally resolve plaintiff's breach of contract claim since, in the absence of a "time is of the essence" provision, a party must perform a contract to purchase real property within a reasonable time. Our review of the record reveals that a genuine issue of material fact exists as to whether, after waiting until the fall of 2004 to seek a closing on the property, plaintiff sought to perform the contract for the purchase of the property within a reasonable time. We, therefore, reverse the trial court's grant of partial summary judgment as to the breach of contract claim and its order of specific performance and remand for further proceedings.

Facts

The undisputed facts are as follows. On 1 October 1995, plaintiff and defendants entered into a five-year lease agreement ("the contract"), pursuant to which defendants leased to plaintiff property located at 417 and 419 South McDowell Street in Raleigh

("the McDowell Street property"). Plaintiff owned an office building nearby and used the McDowell Street property as a surface parking lot for its tenants.

The contract contained a call option that granted plaintiff an option to purchase the McDowell Street property and a put option that granted defendants an option to require plaintiff to purchase the McDowell Street property. The contract also stated that upon exercise of either option, the purchase price would be the greater of $853,781.60 or the fair market value of the McDowell Street property as of the date the option was exercised. Absent an agreement by the parties, the fair market value was to be determined based on the opinions of three appraisers. Plaintiff and defendants would each select one appraiser and those two appraisers would then select the third appraiser. The fair market value would be the average of the two closest appraisals from the three appraisers.

The contract required that the closing take place on the date 180 days following the date the option was exercised. The contract contained a "time is of the essence" provision that stated: "With respect to the performance of the obligations and duties in this Section [relating to the options], time is of the essence." At closing, defendants were required to deliver a general warranty deed conveying the McDowell Street property to plaintiff, an affidavit stating that defendants were not foreign persons within the meaning of the Internal Revenue Code, a title insurance policy,

a closing statement, and possession of the McDowell Street property.

On 13 September 2000, defendants provided plaintiff with written notice that they were exercising the put option. Pursuant to the terms of the contract, the deadline for the closing was 13 March 2001. The parties followed the appraisal process for selection of the appraisers. On 6 December 2000, at the request of two of the appraisers, the parties agreed to allow an additional 30 days for completion of the appraisals. On 8 December 2000, a Phase I Environmental Site Assessment reported the existence of multiple environmental problems, and, as a result, plaintiff requested a Limited Phase II Environmental Site Assessment.

In the meantime, the appraisers issued a report estimating the fair market value of the McDowell Street property at $947,500.00. The report also stated, "We are aware that a Phase II environmental analysis is being conducted. As such, the foregoing value may require a downward adjustment in the event contaminants are found in, on, or near the subject site."

No closing occurred on or before 13 March 2001. On 26 March 2001, however, defendants executed a general warranty deed. That deed was delivered to Stephen D. Lowry, plaintiff's attorney. The deed was stamped "copy" and did not contain a notary seal or stamp.

The Limited Phase II Environmental Site Assessment dated 17 April 2001 reported that the groundwater contained traces of "VOCs exceeding the laboratory quantitation limits." Soil gas samples were also submitted for testing, and the laboratory analysis

indicated "the presence of chlorinated VOCs and BTEX compounds." The environmental company that conducted the tests recommended that defendants, as the McDowell Street property owners, contact the North Carolina Department of Environment and Natural Resources ("NCDENR") to inform them of the site conditions. The company also stated that remedial measures might be necessary in order to be able to use the McDowell Street property depending on "the specific regulatory requirements applied."

On 26 April 2001, plaintiff and defendants met to discuss the status of the transaction. The parties talked about the purchase price, the effect of the environmental problems on the McDowell Street property's value, the ability to develop the McDowell Street property and obtain financing, and the need to clean up the McDowell Street property. The parties disagree regarding what precisely was said during the meeting and what the outcome of the meeting was.

On 12 July 2001, defendants' realtor notified plaintiff that defendants had retained their own company to conduct further environmental tests to determine the source of the contamination. The letter specified that the company was in the process of gathering information and would prepare a reply to the environmental report obtained by plaintiff. In his letter, the realtor stated, "We will communicate with you as time goes by."

In a letter dated 21 December 2001, defendants' realtor informed plaintiff that the investigation conducted by their environmental company indicated that "former dry cleaning

activities conducted at the property are in part a likely source of the detected ground water contamination." The letter also notified plaintiff that "there is sufficient information to enter the property into the North Carolina Dry-Cleaning Solvent Act [] program to provide financial assistance and limited third party liability protection." The realtor stated that defendants intended to enter the McDowell Street property into the North Carolina Dry-Cleaning Solvent Act program ("the dry cleaning program").

There was no further communication between the parties until 18 August 2004 when plaintiff's attorney sent a letter to defendants inquiring about the status of the McDowell Street property. In defendants' response on 23 September 2004, they informed plaintiff that the McDowell Street property had been listed for sale at a price of $40.00 per square foot and advised plaintiff to contact them if plaintiff was interested in learning more about the McDowell Street property. On 21 January 2005, defendants entered into an agreement to sell the McDowell Street property to the Persimmon Group, LLC for $1,352,560.00.

Plaintiff filed this action on 3 February 2005 seeking specific performance of the contract. Defendants filed their answer along with motions to dismiss. In their answer, defendants asserted the affirmative defenses of repudiation, nonperformance, waiver, abandonment/rescission, unclean hands/estoppel, and laches. Defendants also included counterclaims for intentional interference with contract and breach of contract.

On 23 September 2005, plaintiff filed a motion for partial summary judgment with respect to defendants' affirmative defenses and their counterclaim for breach of contract. On 19 December 2005, the trial court entered an order ruling that plaintiff was entitled to partial summary judgment on the affirmative defenses of abandonment, waiver, rescission, and anticipatory repudiation. The court further ruled:

> Because there has been no "closing" and no final adjustment of the contract purchase price according to the terms of the contract, summary judgment on Phoenix's claim for specific performance and the Defendants' claim for breach of contract and issues related to the performance of both parties under the contract is not ripe for disposition at this point in the case.

The trial court ordered that those issues would "remain to be determined at a later time in the event this matter is not closed according to the terms of the contract." At the request of all parties, the court conducted a hearing on 13 September 2007 to clarify its order. The court ultimately filed an amended order on 21 September 2006, explaining that it had viewed the defense of laches as subsumed under the dismissal of the abandonment affirmative defense, and, therefore, defendants' affirmative defense of laches should also be dismissed.

On 29 March 2007, plaintiff moved for partial summary judgment on defendant's liability for breach of contract, defendants' defense of unclean hands/estoppel, and plaintiff's entitlement to specific performance. On 6 June 2007, the trial court entered an order concluding that there were no genuine issues

of material fact and that plaintiff was entitled to judgment as a matter of law on each issue. The court also incorporated by reference its prior rulings into the order. It then concluded that defendants were jointly and severally liable for breach of the contract to convey the McDowell Street property to plaintiff. The trial court "in its discretion" also determined that plaintiff was "entitled to specific performance of the contract to convey the Property" and ordered defendants to execute and deliver to plaintiff a general warranty deed conveying the McDowell Street property to plaintiff within 30 days of the date of the filing of the order. The order specified that the purchase price was $947,500.00 with that amount "not subject to any claimed offset for the Property's diminished value due to the Property's environmental condition or the cost to clean up or remediate the Property." Defendants timely appealed to this Court from the trial court's grant of partial summary judgment.

Discussion

As a preliminary matter, we note that defendants' appeal is from an interlocutory order. Nevertheless, we agree with defendants that the order of the trial court granting specific performance to plaintiff and requiring defendants to convey the McDowell Street property to plaintiff affects a substantial right. *See Watson v. Millers Creek Lumber Co.*, 178 N.C. App. 552, 554, 631 S.E.2d 839, 840-41 (2006) (acknowledging that appeal from order granting partial summary judgment in a case involving a land purchase installment contract was interlocutory, but holding that

order affected a substantial right as it implicated title rights to the disputed property). We, therefore, turn to the merits of defendants' appeal.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show 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." N.C.R. Civ. P. 56(c). The party moving for summary judgment has the burden of establishing the lack of any triable issues. *Collingwood v. Gen. Elec. Real Estate Equities, Inc.*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). Once the moving party meets its burden, then the non-moving party must "produce a forecast of evidence demonstrating that [it] will be able to make out at least a prima facie case at trial." *Id.* In opposing a motion for summary judgment, the non-moving party "may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." N.C.R. Civ. P. 56(e). This Court reviews de novo a trial court's decision to grant summary judgment. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004).

I

Defendants first point to the "time is of the essence" provision contained in the contract as supporting their claim that they were not required to convey the McDowell Street property to plaintiff in the fall of 2004. Defendants acknowledge that

plaintiff contends that this provision was waived, but argue that issues of fact exist regarding waiver.

As this Court recently reiterated: "'Waiver is always based upon an express or implied agreement. There must always be an intention to relinquish a right, advantage or benefit. The intention to waive may be expressed or implied from acts or conduct that naturally leads the other party to believe that the right has been intentionally given up.'" *Fairview Developers, Inc. v. Miller*, 187 N.C. App. 168, 172, 652 S.E.2d 365, 368 (2007) (quoting *Patterson v. Patterson*, 137 N.C. App. 653, 667, 529 S.E.2d 484, 492, *disc. review denied*, 352 N.C. 591, 544 S.E.2d 783 (2000)), *disc. review denied*, 362 N.C. 176, 658 S.E.2d 484 (2008). While, as *Fairview Developers* acknowledges, a waiver may be express or implied, there is no contention in this case that there was an express waiver of the "time is of the essence" clause. The issue before this Court is, therefore, whether the undisputed facts establish an implied waiver. "Although '[w]aiver is a mixed question of law and fact[, w]hen the facts are determined, it becomes a question of law.'" *Cullen v. Valley Forge Life Ins. Co.*, 161 N.C. App. 570, 575, 589 S.E.2d 423, 428 (2003) (quoting *Hicks v. Home Sec. Life Ins. Co.*, 226 N.C. 614, 619, 39 S.E.2d 914, 918 (1946)), *disc. review denied sub nom. Santomassimo v. Valley Forge Life Ins. Co.*, 358 N.C. 377, 598 S.E.2d 138 (2004).

It is undisputed that defendants did not insist on closing on the date specified in the contract notwithstanding the contract's "time is of the essence" clause. Defendants, however, point to the

fact that they tendered a signed warranty deed within a short period of time after the closing date. They note that in *Fairview Developers*, 187 N.C. App. at 173, 652 S.E.2d at 368, this Court held that a defendant did not waive a "time is of the essence" clause when the defendant expressed it was ready, willing, and able to close two days after the original closing date. The defendant in *Fairview Developers*, however, expressly "agreed to close" two days after the original closing date, *id.*, while, in this case, defendants only delivered a non-recordable "copy" of a deed and did not tender the remaining documents required under the contract for the closing.

Defendants also point to their evidence of what occurred at the April meeting — more than a month after the closing date — and defendants' and their attorney's belief, based on that meeting, that plaintiff had no intention of purchasing the property and that the deal was dead. Defendants, however, cite to no evidence that they ever told plaintiff that they were insisting on the closing date specified in the contract or that, prior to the fall of 2004, they advised plaintiff that they deemed the contract terminated for failure to close. *See Danville Lumber & Mfg. Co. v. Gallivan Bldg. Co.*, 177 N.C. 104, 107, 97 S.E.2d 715, 720 (1919) ("The secret understanding or intent of the parties is immaterial on the question of waiver."). To the contrary, defendant Sarah Simpson testified that, prior to the April meeting, she expected the closing to occur a month or two later — long after the contract's specified closing date.

Moreover, following that meeting, defendants sought permission for their environmental consultant to contact plaintiff's consultant to discuss the condition of the McDowell Street property, and defendants' consultant performed its own tests on the property. On 12 July 2001, defendants' realtor wrote plaintiff "[w]ith regards to the sale and purchase of the [McDowell Street] property" in order to provide plaintiff with information about defendants' environmental consultant. After indicating that the consultant "has started the process of gathering information," he promised that "[w]e will communicate with you as time goes by." On 21 December 2001, the realtor forwarded another letter to plaintiff "[w]ith regards to the sale and purchase of the [McDowell Street] property" that described the results of defendants' environmental consultant's investigation, promised a copy of the report "shortly after the holidays," and expressed defendants' intention to enter the property into the State's dry cleaning program.

These undisputed facts demonstrating that defendants not only never insisted on closing on the specified closing date, but made statements and took actions manifesting an intent that closing should occur at some unspecified later date establish that defendants waived the "time is of the essence" clause. *See Harris & Harris Const. Co. v. Crain & Denbo, Inc.*, 256 N.C. 110, 119, 123 S.E.2d 590, 596 (1962) (holding that waiver "is a question of intent, which may be inferred from a party's conduct"). The undisputed facts establish conduct that naturally would lead plaintiff to believe that defendants had dispensed with their right

to insist that time was of the essence with respect to closing on the property. *See Medearis v. Trustees of Meyers Park Baptist Church*, 148 N.C. App. 1, 12, 558 S.E.2d 199, 206-07 (2001) ("A waiver is implied when a person dispenses with a right by conduct which naturally and justly leads the other party to believe that he has so dispensed with the right." (internal quotation marks omitted)), *disc. review denied*, 355 N.C. 493, 563 S.E.2d 190 (2002). Accordingly, the trial court did not err in concluding that defendants had, as a matter of law, waived the "time is of the essence" clause. *Id.* at 14, 558 S.E.2d at 208 (affirming grant of summary judgment on issue of waiver when "Petitioners, by their conduct and statements, impliedly led respondents to believe that petitioners dispensed with their right" to enforce restrictive covenants).

Defendants argue, however, that even if waiver of the "time is of the essence" clause is established, that waiver does not mandate judgment in plaintiff's favor. As defendants argue, it is well settled in North Carolina that, absent a "time is of the essence" clause, the parties to a real property purchase agreement are allowed a "'reasonable time after the date set for closing to complete performance.'" *Ball v. Maynard*, 184 N.C. App. 99, 102, 645 S.E.2d 890, 893 (quoting *Dishner Developers, Inc. v. Brown*, 145 N.C. App. 375, 378, 549 S.E.2d 904, 906, *aff'd per curiam*, 354 N.C. 569, 557 S.E.2d 528 (2001)), *disc. review denied*, 362 N.C. 86, 656 S.E.2d 591 (2007). Defendants contend that there are issues of fact regarding whether the time that elapsed before plaintiff

sought to close was a reasonable period of time in which to complete performance. We agree.

Plaintiff does not specifically address this issue, but rather argues that it was entitled to summary judgment because defendants anticipatorily breached the contract in fall of 2004. That contention, however, presumes that the delay from March 2001 to August 2004 was a reasonable time in which to complete performance. If the record reveals an issue of fact as to the reasonableness of that delay, then a jury must decide that issue prior to any determination whether defendants breached the contract in 2004.

Although plaintiff does not include a section of its brief specifically acknowledging this argument by defendants, it does argue in another section that the undisputed facts show that any delay in the closing was due to defendants' need to comply with their "environmental indemnity obligations" and the "expansive time frame for remediation." In making this argument, which presumes that the original contract imposed an obligation on defendants to remediate any environmental conditions, plaintiff relies solely upon the following provision of the contract:

> Indemnifications. Tenant shall indemnify, defend, and hold Landlord harmless from and against any and all claims, judgments, suits, causes of action, damages, penalties, fines, liabilities, losses, and expenses that arise during or after the term of this Lease as a result of the breach by Tenant of any of Tenant's obligations and covenants set forth in this Section 39; provided, however, *Tenant shall not be responsible for any costs or expenses relating to the remediation or cleanup of Hazardous Materials which were located on, under, or about the Property prior to the date of this Lease* or which are placed

> or discharged on or about the Property unless caused by Tenant or Tenant's employees, contractors, or agents (collectively, the "Non-Tenant Conditions"). *Landlord agrees to indemnify, defend, and hold Tenant harmless from any and all claims, damages, fines, judgments, penalties, costs, liabilities, or losses arising during or after the term of this Lease from or in connection with any Non-Tenant Conditions* or the breach by Landlord of any of Landlord's obligations, duties, covenants, and representations in this Section 39.

(Emphasis added.)

Nothing in this provision specifically requires defendants to remediate or cleanup the McDowell Street property. *See E-B Trucking Co. v. Everette Truck Line, Inc.*, 87 N.C. App. 497, 499, 361 S.E.2d 413, 414 (1987) (holding that when language of indemnification provision "is plain and unambiguous, it must be enforced as written"). This paragraph is only an indemnity provision, as the plain language indicates. *See Candid Camera Video World, Inc. v. Mathews*, 76 N.C. App. 634, 636, 334 S.E.2d 94, 96 (1985) ("The 'hold harmless' language of clause 17(a) indicates that this is an indemnification clause."), *disc. review denied*, 315 N.C. 390, 338 S.E.2d 879 (1986). As this Court has previously held, "[t]he legal effect of indemnity clauses is well-established: 'Indemnity contracts are entered into to save one party harmless from some loss or obligation which it has incurred or may incur *to a third party*.'" *Atl. Contracting & Material Co. v. Adcock*, 161 N.C. App. 273, 280, 588 S.E.2d 36, 41 (2003) (quoting *Kirkpatrick & Assocs., Inc. v. Wickes Corp.*, 53 N.C. App. 306, 308, 280 S.E.2d 632, 634 (1981)).

Thus, the plain language of the indemnification provision upon which plaintiff relies would allow plaintiff to recover from defendants for losses or damages incurred by plaintiff as a result of environmental hazards on the McDowell Street property. While defendants might be able to mitigate their potential liability by undertaking remediation — such as by enrolling the property in the State's dry cleaning program — this indemnification provision does not require that defendants do so. Defendants could, under this provision, choose simply to reimburse plaintiff for the costs or expenses incurred for any cleanup. Consequently, we cannot say that plaintiff was, as a matter of law, entitled to wait until defendants cleaned up the environmental hazards before closing.

Plaintiff also points to the desire of defendants to avoid a downward price adjustment as justifying the delay in closing until 2004. We fail to understand plaintiff's logic in light of the contract's terms. The fair market value of the McDowell Street property was required to be determined as of the date of the exercise of the option. Delay in closing — and remediation — would not affect the price of the property, although it might limit damages that would be incurred under the indemnification provision.

Defendants, on the other hand, have pointed to evidence that plaintiff ceased all communication for three years and four months — from the date of the April meeting until the 18 August 2004 letter from plaintiff's counsel to defendants' realtor. Plaintiff never responded to the letters from defendants' realtor, sought additional information, or followed up on the contamination issue

until shortly after the City of Raleigh chose to locate its new Civic Center a block away from the McDowell Street property, significantly enhancing the value of the property.

"Though the determination of reasonable time is generally a mixed question of law and fact and thus for the jury, it becomes a question of law when the facts are simple and admitted and only one inference can be drawn." *Furr v. Carmichael*, 82 N.C. App. 634, 638, 347 S.E.2d 481, 484 (1986). We cannot conclude that the facts in this case "are simple" or that "only one inference can be drawn" from those facts. On the one hand, since defendants were not required to correct the problem, but were required to pay any damages or losses suffered by plaintiff as a result of the environmental conditions, a jury could find that plaintiff's delay of three years was unreasonable. On the other hand, because defendants could minimize the losses by entering the McDowell Street property into the dry cleaning program, a jury could also find that plaintiff reasonably allowed defendants the time they wished to address the environmental issues. While defendants argue that they cannot be required to wait forever, plaintiff pointed to evidence that the cleanup could take years.

The question whether the delay in this case was unreasonable is for the jury. Plaintiff's argument regarding the environmental condition of the property is sufficient to raise an issue of fact regarding the issue, but not sufficient to warrant summary judgment in plaintiff's favor. Since plaintiff could not prevail on its breach of contract claim and its claim for specific performance if

more than a reasonable time had elapsed for performance of the contract, we hold the trial court erred in granting summary judgment for the plaintiff on its breach of contract claim and erred in ordering specific performance of that contract.

II

Defendants also contend the trial court erred in dismissing their affirmative defense of laches. Defendants argue that plaintiff's claim is barred by laches because of plaintiff's three-year delay in asserting its claim. "Laches is an affirmative defense that requires proof of three elements: (1) the delay must result in some change in the property condition or relations of the parties, (2) the delay must be unreasonable and harmful, and (3) the claimant must not know of the existence of the grounds for the claim." *N.C. State Bar v. Gilbert*, __ N.C. App. __, __, 663 S.E.2d 1, 7, *disc. review denied*, 362 N.C. 682, 670 S.E.2d 234 (2008). It is well established that "the mere passage of time is insufficient to support a finding of laches . . . ." *MMR Holdings, LLC v. City of Charlotte*, 148 N.C. App. 208, 209, 558 S.E.2d 197, 198 (2001).

Here, we need not address the second two elements of laches because defendants failed to show that the delay resulted in a change in the McDowell Street property's condition or the relations of the parties. *See Teachey v. Gurley*, 214 N.C. 288, 294, 199 S.E. 83, 88 (1938) ("In equity, where lapse of time has resulted in some change in the condition of the property or in the relations of the parties which would make it unjust to permit the prosecution of the claim, the doctrine of laches will be applied."). The sole

prejudice from the delay identified by defendants is (1) the increase in value of the McDowell Street property as a result of the siting of the Raleigh Civic Center and (2) the loss of a significant witness due to illness.

With respect to the increase in value, that increase was fortuitous and not due to any action taken by defendants during the delay that increased the value of the property. *Compare Farley v. Holler*, 185 N.C. App. 130, 133, 647 S.E.2d 675, 678 (2007) (concluding that plaintiff's claims were barred by laches when "the delay of time has resulted in both a change in the condition of the property through the $100,000 in repairs to the street and a change in the relations of the parties through the changing of the owners of the lots in the subdivision"). Any prejudice suffered by defendants did not arise out of the delay in plaintiff's bringing suit, but rather arose out of the contract's provision that the property would be valued as of the exercise date of the option. This prejudice cannot support defendants' claim of laches.

With respect to the availability of defendants' witness, Steven Kenney, defendants cite to no evidence in the record supporting their assertions. We have found none. The record reveals that Mr. Kenney was deposed, and he also submitted an affidavit on defendants' behalf. We, therefore, affirm the trial court's dismissal of defendants' laches defense.

Reversed and remanded in part; affirmed in part.

Judges WYNN and CALABRIA concur.

Report per Rule 30(e).