NO. COA09-1612

NORTH CAROLINA COURT OF APPEALS

Filed: 3 August 2010

GIDCO, INC.,

Plaintiff,

v. Johnston County
No. 08 CVS 03771

COUNTRY LANE, LLC,

Defendant.

Appeal by defendant from order entered 16 June 2009 by Judge Thomas H. Lock in Johnston County Superior Court. Heard in the Court of Appeals 29 April 2010.

Thomas S. Berkau, P.A., by Thomas S. Berkau, for plaintiff.

Safran Law Offices, by M. Riana Smith and Stephen P. Safran, for defendant.

ELMORE, Judge.

Country Lane, LLC (defendant), appeals an order granting a motion for summary judgment by Gidco, Inc. (plaintiff). In the order, the trial court also ordered defendant to pay plaintiff $54,500.00, interest accrued since the filing of the complaint, and costs.

Defendant was the developer of a subdivision in Clayton. Plaintiff contracted to buy lots from defendant so that it could build houses in that subdivision. On 25 June 2007, the parties

entered into a purchase and sales agreement under which plaintiff agreed to buy 109 lots for a total of $4,318,860.00. Plaintiff made a down payment of $54,500.00 on 4 June 2007. The agreement does not include a closing date, but instead references "Addendum A." According to Addendum A, the "First Takedown" was to occur "30 days after recorded plat," with an "[e]stimated completion Oct/Nov 2007." The first takedown involved 50 lots and a price of $39,000.00 per lot. The "Second Takedown" was to occur "1 year from 1rst [*sic*]" takedown, and involved 30 lots at a price of $39,000.00 per lot. The "Third Takedown" was to occur "9 months from 2nd," and involved 29 lots at a price of $41,340.00 per lot. Addendum A also included the following:

> 1. It is agreed that the project shall have 83 patio homes and 26 townhomes/duplex[.]
>
> 2. It is agreed that the first takedown shall commence within 30 days of the final recording of the final plat and all dates used in this contract are estimated.
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> 3. Takedowns can be of mixed lots between patio and townhomes/duplex based on the completion of lots and availability.
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> 4. Lots costs may vary but shall not exceed to [*sic*] original total amount of $4,318,860. The average lot cost may vary but not exceed to [*sic*] project total.
>
> 5. There shall be no penalty for acceleration of the takedown process.
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> 6. All lot numbers are preliminary and both parties agree that changes may occur prior to the recording of the final plat, total price shall remain @ $4,318,860 with revisions to townhomes.
>
> 7. From the execution of this contract, Sellers agree to allow Buyers to help

> determine square footage, architecture control and any and all changes that may occur to the preliminary map.
>
> 8. All amenities are to be installed according to the preliminary plat and shall be complete prior to the second takedown of lots.
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> 9. All lots shall be provided water and sewer by the developer and the developer agrees to pay all development fees.
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> 10. Both sides of the street shall have curb, gutter and [*sic*] provided by the developer.
>
> 11. The entrance to said project will be acceptable to both buyer and seller and shall be a stately and sufficient entrance to the project.

On 15 October 2008, plaintiff filed a complaint for breach of contract, alleging that defendant "materially breached the contract by failing to prepare the property and record a final plat from which lots can be conveyed or takendown [*sic*] within a reasonable period of time from the execution of said contract." Plaintiff sought rescission of the contract and return of its earnest money. Plaintiff made the following relevant allegations in its complaint:

> 5. Under paragraph 13 of the contract, an Addendum A was attached which sets forth the scheduled takedown of the lots that Plaintiff was to purchase from the Defendant. The first takedown was for fifty (50) lots and was to occur thirty (30) days after the recording of the final plat from which lots could be conveyed and the estimated completion time for the [*sic*] recording the final plat was October/November of 2007. The second takedown for an additional thirty (30) lots was one year from the date of the first takedown. Paragraph 2 of the Addendum stated that the first takedown shall commence thirty (30) days of the final recording of the final plat and all dates used in this contract are estimated.

> 6. As of the date of this complaint, the final plat has not been recorded from which lots can be conveyed or taken down in accordance with the terms of the contract.
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> 7. As of the date of this complaint, a visual inspection of the property shows that no work has been done to the property to prepare it for a final plat to be recorded from which lots can be conveyed or taken down as shown on the photographs attached hereto as Exhibit C.
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> 8. At the time Plaintiff and Defendant entered into this contract, it was anticipated that the final plat would be recorded in October or November of 2007 in order that lots could be taken down thirty (30) days thereafter. It is now a year later and no final plat has been recorded and the likelihood of the final plat being recorded in the near future is not possible due to the fact that no work has been performed on the property as of the date of the filing of this complaint.

In its answer, defendant expressly denied the allegations in paragraph 7, and it stated that paragraph 6 contained legal conclusions that did not require a response. Plaintiff submitted interrogatories to defendant. Plaintiff asked defendant, "Admit or deny that you have recorded a plat at the Registry of Johnston County from which lots can be sold to the Plaintiff in accordance with the Contract." Defendant denied having recorded the plat, but offered a lengthy explanation for the delay, namely that two co-owners' other businesses were in bankruptcy, and banks would not extend credit to defendant so long as those co-owners were members of the company. At the end of July 2008, the third co-owner, Bobby Thompson, "received notice from First Charter Bank that they would terminate the funding for the ongoing project and demand payment of the promissory note should Country Lane fail to remove [the

bankrupt co-owners] as members." The bankrupt co-owners were eventually removed from managerial positions pursuant to a settlement agreement, and defendant stated that the settlement agreement "prompted First Charter Bank to continue the financing of the project without further interruption. However, these events resulted in a substantial delay in the timing of the project as Country Lane was unable to progress with any aspect of the Subdivision development until financing was secured."

Plaintiff also asked defendant, "Admit or deny that you have a source of funds to complete the development of Ridgeway Hills Subdivision referred to in the Contract in order to install the streets, water, sewer, and electricity to said real property." Defendant denied having the funds to complete the subdivision's development. It explained, "Country Lane was unable to locate a source of funds to complete development of the Ridgewood Hills Subdivision due to the situation regarding the management of Country Lane." Defendant also stated that it had "received notice from another contracted buyer of subdivision lots stating that they would not proceed with the takedown provisions of their agreement with Country Lane," and it had become "apparent that both buyers of lots in the Ridgewood Hills Subdivision did not intend to follow through with the terms and conditions of the Contract."[1]

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[1] This "other" buyer was Southpoint Homes, LLC, dba Scenic Homes, Inc. (Southpoint). According to the contract between Southpoint and defendant, "First closing shall occur within thirty (30) days from Seller providing Purchaser 12 copies of a final recorded plat. It is anticipated that the closing on the first lots will be on or before April 15, 2008. The Purchaser and the Seller concur that time is of the essence and agree to make every

On 2 June 2009, plaintiff moved for summary judgment. The trial court found no genuine issue as to any material fact and entered judgment in favor of plaintiff by order entered 16 June 2009. The order also decreed that plaintiff have and recover from defendant "the sum of $54,500.00 plus interest at the legal rate from the time of filing the complaint together with the costs of this action." Defendant now appeals. The clerk of court entered a stay pending the outcome of defendant's appeal after requiring defendant to enter a surety bond in the amount of $68,125.00.

Defendant argues that the trial court erred by granting plaintiff's motion for summary judgment because genuine issues of material fact exist as to whether a reasonable time for performance had elapsed under the terms of the contract.

> As a general rule, the language of a contract should be interpreted as written; however, there is a well-settled exception, the "reasonable time to perform rule," that applies to contracts for the sale of real property. With respect to these realty sales contracts, it has long been held that in the absence of a "time is of the essence" provision, time is not of the essence, 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) (citations omitted). "[W]hen time is not of the essence, the date selected for closing can be viewed as an approximation of what the parties regard as a reasonable time under the circumstance of the sale. [T]he parties may waive or excuse non-occurrence of

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practical effort to assure that this planned closing date is met."

or delay in the performance of a contractual duty." *Ball v. Maynard*, 184 N.C. App. 99, 102, 645 S.E.2d 890, 893 (2007) (quotations omitted; alterations in original; citations omitted).

"What is a 'reasonable time' in which delivery must be made is generally a mixed question of law and fact, and, therefore, for the jury, but when the facts are simple and admitted, and only one inference can be drawn, it is a question of law." *Wolfe v. Villines*, 169 N.C. App. 483, 489, 610 S.E.2d 754, 759 (2005) (quoting *Colt v. Kimball*, 190 N.C. 169, 174, 129 S.E. 406, 409 (1925)). When determining whether summary judgment is appropriate, this Court has historically asked whether the plaintiff "tarried or delayed" or whether he "stood ready, willing and able to complete the terms and conditions of said contract." *Id.* (quotations and citation omitted). In *Litvak v. Castle Ventures, LLC*, this Court held that the trial court had erred by denying the defendant's motion for summary judgment when the plaintiffs sought to keep a sales contract "open pending resolution of [the] plaintiffs' uncertain and indefinite litigation[.]" 180 N.C. App. 202, 209, 636 S.E.2d 327, 331-32 (2006). In *Litvak*, we explained that there was no evidence that the plaintiffs "stood ready . . . and able to complete the terms and conditions" of the contract; instead, "the delay was indefinite, and neither party to the contract could predict with any certainty as to when the condition precedent could be completed." *Id.* at 208, 636 S.E.2d at 331.

Here, it seems that the delay was not only indefinite, but possibly interminable. Defendant admitted that it did not have the

funding to complete the work necessary to obtain a final plat, and defendant also admitted that the second buyer had pulled out of the project. The other cases addressing "reasonable time" suggest that the actual elapsed time between the original closing date and the suit or repudiation is far less important than whether the seller "stood ready . . . and able to complete terms and conditions" of the contract. Plaintiff waited six months past the original estimated closing date before filing suit, but plaintiff never came close to being able to complete the terms and conditions of the sales contract.

Accordingly, we conclude that no genuine issues of material fact exist as to whether a reasonable time for performance had elapsed under the terms of the contract. We hold that the trial court properly granted plaintiff's motion for summary judgment, and we affirm the order of the trial court.

Affirmed.

Judges BRYANT and ERVIN concur.

Report per Rule 30(e).