NO. COA11-1394
NORTH CAROLINA COURT OF APPEALS

Filed: 21 August 2012

JUDITH VAUGHN HANKINS and
RONALD L. HANKINS, SR.,
Plaintiffs,

v.

Guilford County
No. 11 CVS 3663

JANICE VAUGHN BARTLETT,
Individually and in Her
Official Capacity as
Executrix of the Estate of
Edwin Lee Vaughn, Deceased,
Defendant.

Appeal by plaintiffs from order entered 21 July 2011 by Judge Patrice A. Hinnant in Guilford County Superior Court. Heard in the Court of Appeals 20 March 2012.

Smith, James, Rowlett & Cohen, LLP, by Norman B. Smith, for plaintiffs-appellants.

Sigmon, Clark, Mackie, Hanvey & Ferrell, P.A., by Forrest A. Ferrell and Stephen L. Palmer, for defendant-appellee.

GEER, Judge.

Plaintiffs Judith Vaughn Hankins and Ronald L. Hankins, Sr. appeal from the trial court's order granting defendant's motion for judgment on the pleadings. Plaintiffs, who had sought a

declaratory judgment that they were the owners of certain real property, contend on appeal that the statute of frauds does not void their contract for the purchase of the property. We hold that because plaintiffs' allegations do not demonstrate that the contract was fully executed and because plaintiffs cannot point to any writing that sufficiently describes the property, the statute of frauds does apply. We, therefore, affirm.

Facts

Plaintiffs filed suit against defendant Janice Vaughn Bartlett, Mrs. Hankins' sister and executrix of their father's estate, seeking a declaratory judgment. In their complaint, plaintiffs alleged that in 1970, they purchased a business known as Vaughn Auto Supply from Mrs. Hankins' father, Edwin Lee Vaughn. According to the complaint, this purchase included not only the business inventory, accounts receivable, trade fixtures, supplies, and good will, but also the real estate where the business was located on Spring Street in Greensboro, North Carolina.

The complaint alleged that plaintiffs fully paid the purchase price for the business, due in installments, and requested a declaratory judgment that they are the owners of the real property. The complaint acknowledged, however, that the

parties entered into only an oral contract and that no deed was ever prepared transferring ownership of the real estate.

On 13 April 2011, defendant filed her answer, admitting that Mr. Vaughn sold the business to plaintiffs but denying this sale included the real property. She asserted as affirmative defenses the statute of frauds and estoppel. On 6 May 2011, defendant filed a motion for judgment on the pleadings based on the statute of frauds.

Plaintiffs then moved to amend their complaint. The proposed amended complaint alleged that the purchase agreement between plaintiffs and Mr. Vaughn was formalized in a writing that was "written by, signed by, and dated by Edwin Lee Vaughn, but which may have contained ambiguities that can be resolved by extrinsic evidence." The writing, dated 25 December 1972, was on Vaughn Auto Supply letterhead and read:

> To Whom it May Concern
>
> Vaughn Auto Supply has been sold to Mr & Mrs Ronald Hankins and I have no claim to any assets or not liable [sic] to any claims other than balance of $8057.00 still due me from sale of business.

Plaintiffs' motion to amend was allowed by a consent order filed 6 July 2011, which specified that the 1972 letter "is the only paper writing which plaintiffs claim was the written memorandum of sale, although defendant does not acknowledge that

this document has validity for that purpose or any other purpose . . . ." In an order filed 21 July 2011, the trial court granted defendant's motion for judgment on the pleadings. Plaintiffs timely appealed to this Court.

Discussion

"This Court reviews *de novo* a trial court's ruling on motions for judgment on the pleadings. Under a *de novo* standard of review, this Court considers the matter anew and freely substitutes its own judgment for that of the trial court." *Reese v. Mecklenburg Cnty.*, 200 N.C. App. 491, 497, 685 S.E.2d 34, 38 (2009) (internal citations omitted), *disc. review denied*, 364 N.C. 242, 698 S.E.2d 653 (2010).[1]

The parties agree that the basis for the trial court's order granting judgment on the pleadings was the statute of frauds. North Carolina's statute of frauds provides that "[a]ll contracts to sell or convey any lands, tenements or hereditaments, or any interest in or concerning them . . . shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged

[1]Plaintiffs submitted an affidavit in support of their claims. Because, however, the trial court was considering only a motion for judgment on the pleadings under Rule 12(c) of the Rules of Civil Procedure, the trial court could not consider the affidavit, and we do not consider it on appeal. *See Weaver v. Saint Joseph of the Pines, Inc.*, 187 N.C. App. 198, 204, 652 S.E.2d 701, 707 (2007).

therewith, or by some other person by him thereto lawfully authorized." N.C. Gen. Stat. § 22-2 (2011).

Plaintiffs first argue that the statute of frauds does not apply in this case because the contract of sale was fully executed. Our Supreme Court has held that "[t]he Statute of Frauds, G.S. 22-2, has no application to a fully executed or consummated contract. It may be invoked only to prevent the enforcement of executory contracts." *Dobias v. White*, 240 N.C. 680, 687, 83 S.E.2d 785, 790 (1954) (internal citations omitted). On the other hand, when a contract is partially executed -- and, therefore, partially executory -- it is still governed by the statute of frauds. *Holt v. Holt*, 47 N.C. App. 618, 620, 267 S.E.2d 711, 713 (1980), *rev'd on other grounds*, 304 N.C. 137, 282 S.E.2d 784 (1981).

Plaintiffs argue that once they paid the purchase price in full for the business and entered into possession and ownership of the business and property, the statute of frauds did not apply. Our Supreme Court has, however, specifically "held that the payment of the purchase price, the taking of possession of the premises, and making improvements thereon would not entitle the vendee to specific performance of the parol agreement[.]" *Rochlin v. P. S. West Constr. Co.*, 234 N.C. 443, 445, 67 S.E.2d 464, 465 (1951). *See also Ebert v. Disher*, 216 N.C. 36, 47, 3

S.E.2d 301, 308 (1939) (holding that oral agreement was void and of no effect despite payment of purchase price and improvements, but that "the party who has advanced the purchase price or has made improvements shall be refunded his advances"); *Mauney v. Norvell*, 179 N.C. 628, 630, 103 S.E. 372, 373 (1920) ("In cases where there has been a sale of land without being in writing, if the vendor accepts the whole of the purchase money, or any part thereof, it is not an estoppel on him to recover the land, but he must account for the purchase money received, and betterments."), *overruled in part on other grounds by Kent v. Humphries*, 303 N.C. 675, 281 S.E.2d 43 (1981).

It appears that, under North Carolina law, in order for an oral contract for the purchase of land to be fully executed, and, therefore, not governed by the statute of frauds, a deed must have been delivered by the actual seller to the purchaser. *Dobias*, 240 N.C. at 687, 83 S.E.2d at 790 (holding that if deed was deposited with attorney for delivery to and acceptance by seller, contract was still executory, whereas if delivery of deed to attorney was sufficient for delivery to purchaser, then oral contract was fully executed and statute of frauds did not apply). *See also Sprinkle v. Ponder*, 233 N.C. 312, 316, 64 S.E.2d 171, 175 (1951) (holding that statute of frauds did not apply when plaintiff had delivered deed because "here the

contract, if such there was, had been executed, and the statute of frauds does not apply to executed contracts; it can be invoked only to prevent the enforcement of executory contracts").

Because no deed was ever delivered to plaintiffs, the contract remained executory, and the statute of frauds applies notwithstanding the fact plaintiffs paid the purchase price and took possession of the property. Plaintiffs were, therefore, required to show that the contract had been set out in writing.

Plaintiffs, however, contend that *Herndon v. Durham & S. R.R. Co.*, 161 N.C. 650, 77 S.E. 683 (1913), is identical to this case in that every act under a land purchase contract had been accomplished except for the delivery of the deed. We disagree with plaintiffs' reading of *Herndon*. In *Herndon*, a farmer had sold land to a railroad with the railroad's agreeing, in addition to the purchase price and other stipulations, that the railroad would grant the farmer an easement and construct an underpass for the farmer's cattle. *Id.* at 652, 77 S.E. at 684. The farmer requested that the agreement for the underpass be put in writing, but the railroad's agent said a writing was unnecessary. *Id.* Although the railroad initially built the underpass, it subsequently attempted to close it. When the

farmer sued to enforce the agreement, the railroad asserted the statute of frauds. *Id.* at 653, 77 S.E. at 684.

The Supreme Court first set out the general principles: "A parol contract relating to land is not void, but voidable, and we have held that, when executory, it may be enforced if it is not denied that the statute is not pleaded, and the evidence to prove it is not objected to, and that, when executed, the plea of the statute of frauds is no longer applicable." *Id.* at 653-54, 77 S.E. at 684 (internal citation omitted). The Court concluded, however, that because an easement, such as the farmer claimed, could not "pass except by deed or prescription, and as there is no deed for the cattle-way under the track, and it has not been used long enough to confer the right by prescription, the agreement as to the easement has not been executed." *Id.* at 654, 77 S.E. at 685. The Court, therefore, held that the statute of frauds *did* apply.

Nevertheless, the Court proceeded to conclude that the farmer was not left without a remedy. First, the Court pointed out that although the railroad argued that its agent had acted without authority in promising the underpass, the railroad had substantially performed the agreement, thereby ratifying the agent's acts, including accepting a deed from the farmer. The Court held that given the ratification, "the law will not permit

the defendant to retain the benefit of the contract and repudiate its obligations." *Id.* at 655, 77 S.E. at 685. Alternatively, the Court also concluded that the farmer was entitled to proceed on a theory of fraudulent inducement and that there was evidence of fraud which was "sufficient to justify the court in maintaining the *status quo* until the final determination of the action." *Id.* at 655, 77 S.E. at 685.

Nothing in *Herndon* suggests that the statute of frauds did not apply. Instead, the Court held that the farmer had available theories and remedies other than breach of contract. We believe our holding here is supported by *Herndon*'s holding that the statute of frauds could not be avoided because of the lack of a deed of easement.

We, therefore, turn to plaintiffs' alternative contention that the writing referenced in their amended complaint was sufficient to satisfy the statute of frauds. It is well established that "'[i]n order to constitute an enforceable contract within the statute of frauds, the written memorandum, though it may be informal, must be sufficiently definite to show the essential elements of a valid contract. It must embody the terms of the contract, names of vendor and vendee, and a description of the lands to be conveyed, at least sufficiently definite to be aided by parol.'" *Carr v. Good Shepherd Home,*

Inc., 269 N.C. 241, 243, 152 S.E.2d 85, 88 (1967) (quoting *Smith v. Joyce*, 214 N.C. 602, 604, 200 S.E. 431, 433 (1939)).

Ambiguity in the description of the land being conveyed does not necessarily render the writing insufficient. If the description in the writing is not certain by itself, the writing may still be adequate if the description is "capable of being reduced to certainty by reference to something extrinsic to which the contract refers." *Nw. Bank v. Church*, 43 N.C. App. 538, 540, 259 S.E.2d 313, 315 (1979). Nevertheless, "[i]f the description set forth in the writing is uncertain in itself to locate the property, and refers to nothing extrinsic by which such uncertainty may be resolved, such ambiguity is said to be 'patently' ambiguous. Parol evidence is not admitted to explain the patently ambiguous description." *Brooks v. Hackney*, 329 N.C. 166, 171, 404 S.E.2d 854, 858 (1991) (internal citation omitted). Our courts will not allow parol evidence to remove a patent ambiguity "'since to do so would not be a use of such evidence to fit the description to the land but a use of such evidence to create a description by adding to the words of the instrument.'" *Id.* at 172, 404 S.E.2d at 858 (quoting *Overton v. Boyce*, 289 N.C. 291, 294, 221 S.E.2d 347, 349 (1976)).

Here, the writing merely states that "Vaughn Auto Supply has been sold to Mr & Mrs Ronald Hankins and I have no claim to

any assets . . . ." There is no specific reference to any real estate at all. "Vaughn Auto Supply" refers to a business, and even with the reference to "assets," there is no indication in the writing whether the business owned any real estate. Although the reference to "assets" could suggest that any unidentified real estate owned by Vaughn Auto Supply now belonged to Mr. and Mrs. Hankins, the writing does not specifically refer to any extrinsic evidence that would clarify the ambiguity. Any extrinsic evidence would not be fitting the description in the writing to the land, but rather would be creating a description of property not otherwise mentioned in the writing. Therefore, the writing is insufficient to comply with statute of frauds.

The cases upon which plaintiffs rely differ significantly by virtue of the fact that they specifically reference land. *See Searcy v. Logan*, 226 N.C. 562, 39 S.E.2d 593 (1946) (description referring to "homeplace where he now lives which he has no deed for"); *Gilbert v. Wright*, 195 N.C. 165, 141 S.E. 577 (1928) (description referring to "the vacant lot"); *Sessoms v. Bazemore*, 180 N.C. 102, 104 S.E. 70 (1920) (description referring to "my farm"); *Norton v. Smith*, 179 N.C. 553, 103 S.E. 14 (1920) (description referring to "entire tract or boundary of land consisting of 146 acres"); *Bateman v. Hopkins*, 157 N.C.

470, 73 S.E. 133 (1911) (description referring to "purchase of the farm on which I now live"); *Janney v. Robbins*, 141 N.C. 400, 53 S.E. 863 (1906) (description referring to "all of our land in the state of North Carolina"); *Bradshaw v. McElroy*, 62 N.C. App. 515, 302 S.E.2d 908 (1983) (description referring to "my entire woodland," which "begins where my road and the main road begin and goes according to the survey done by Keith Gibson"); *Hurdle v. White*, 34 N.C. App. 644, 239 S.E.2d 589 (1977) (description referring to "rest of Tuttle tract").

In other cases, our courts have found writings inadequate even when the writing clearly referenced real estate. *See, e.g., Carlton v. Anderson*, 276 N.C. 564, 566, 173 S.E.2d 783, 784 (1970) (holding inadequate description that referred only to "'a certain tract or parcel of land located in ___ Township, Guilford County, North Carolina, and described as follows: About Four Acres situated at the North-East Intersection of Mt. Hope Church Road and Interstate 85'"); *Breaid v. Munger*, 88 N.C. 297, 298 (1883) (holding inadequate writing that provided: "In settlement with A. E. Breaid, Kipp and Munger owed him $316.30, to be applied to his 100 acres of land and the lot where his home is paid for in full."); *Watts v. Ridenhour*, 27 N.C. App. 8, 9, 217 S.E.2d 211, 212 (1975) (holding description was inadequate when it referred to "'additional acreage lying to the

rear of Plot No. 8 . . ., this acreage to lie primarily on the southeast side of a line running along the southeastern side of Plots Nos. 4, 5, 6 and 10 and extending on to the rear property line'").

Given these cases -- which actually mention land -- were found to be inadequate under the statute of frauds, we cannot find that a writing which does not mention land at all is sufficient to satisfy the "description of the land" requirement in N.C. Gen. Stat. § 22-2. *Compare Elec. World, Inc. v. Barefoot*, 153 N.C. App. 387, 392-93, 570 S.E.2d 225, 229 (2002) (finding adequate description in writing that identified property being leased as "'all that certain parcel of land together with improvement presently known as Shortie's Convenient Mart, located on U.S. 74/76 in Whiteville, Columbus County, North Carolina'"). Plaintiffs have cited no cases, and we have found none, in which a writing referencing the sale of a business has been found adequate under the statute of frauds to describe the land on which the business sits.

We hold that the writing in this case is insufficient to comply with the statute of frauds. Consequently, the trial court did not err in granting defendant's motion for judgment on the pleadings.

Affirmed.

Judges McGEE and McCULLOUGH concur.

Report per Rule 30(e).