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NO. COA14-421
NORTH CAROLINA COURT OF APPEALS

Filed: 4 November 2014

BULENT BEDIZ,
Plaintiff,

v.

Guilford County
No. 13 CVS 10111

CAPITAL FACILITIES
FOUNDATION, INC.,
Defendant.

Appeal by plaintiff from order entered 10 January 2014 by Judge Susan E. Bray in Guilford County Superior Court. Heard in the Court of Appeals 24 September 2014.

Smith, James, Rowlett & Cohen, LLP, by Norman B. Smith, for plaintiff-appellant.

Parker Poe Adams & Bernstein LLP, by Michael G. Adams and Morgan H. Rogers, for defendant-appellee.

McCULLOUGH, Judge.

Bulent Bediz ("plaintiff") appeals from order granting Capital Facilities Foundation, Inc.'s ("defendant") motion to dismiss and motion for partial summary judgment on counter claims. For the following reasons, we affirm.

I. Background

Plaintiff initiated this suit against defendant with the filing of a complaint, notice of lis pendens, and summons on 20 November 2013. In the complaint, plaintiff sought specific performance of an option contract based on the following alleged facts:

3. Plaintiff and defendant entered into an agreement dated February 9, 2011, and an amendment one thereto entered into by them on October 4 and 5, 2012.

4. By the agreement and its amendment, plaintiff is given the right to purchase from defendant properties at 803 Lexington Avenue, 1019 Union Street, 1017 Union Street, 1015 Union Street, and 1013 Union Street, Greensboro, North Carolina, for a total of \$244,000. The agreement as amended further provided that upon purchasing the above described properties, plaintiff would have the additional option to acquire properties by July 1, 2014, at 1011 Union Street, 17-24 Piedmont Court, and 1009 Union Street from defendant in Greensboro, North Carolina.

5. By its terms the right to purchase by plaintiff was exercisable through July 1, 2013. However, neither the agreement nor the amendment states or implies that time is of the essence, nor was there any material change of position on the part of the parties between July 1, 2013, and August 15, 2013.

6. The prior contractual history of plaintiff and defendant made it clear that when these parties wanted agreements or options for purchase of real estate to be exercised on the dates specified therein,

they knew how to, and always did, provide in bold letters that "TIME IS OF THE ESSENCE." There is no such provision in the agreement and amendment that are the subject of this action.

7. At all times material hereto Michael T. Byers has been an officer, agent and servant of defendant, and has acted within the course and scope of his agency and authority in all matters alleged herein.

8. In April, 2013, plaintiff spoke with Michael T. Byers, stating that he needed an extension of time to exercise the option in order to get his money together. Michael T. Byers told plaintiff he would be glad to discuss that point again after plaintiff returned from Turkey, which was expected to be in mid-June, 2013. Plaintiff did communicate with Michael T. Byers again in mid-June, as expected, and at that time, Michael T. Byers told plaintiff that he would consult with his superiors and then get back with plaintiff. G. Stevenson Crihfield, an attorney acting on behalf of plaintiff, met with Michael T. Byers on July 1, 2013. At that time, Michael T. Byers told G. Stevenson Crihfield that he would prepare a new agreement and have it ready in a couple of weeks. At this time Michael T. Byers said nothing about time being of the essence or time running out on the very day of the meeting. G. Stevenson Crihfield got back with Michael T. Byers around July 15, and at that time Michael T. Byers suggested to G. Stevenson Crihfield that plaintiff prepare a new draft agreement on terms acceptable to him. Again, Michael T. Byers said nothing about time having run out.

9. By email from another of plaintiff's attorneys, Alan Ferguson, dated August 15, 2013, plaintiff offered to tender the

\$244,000 required to purchase the properties enumerated above.

10. Defendant refused, and continues to refuse, to close on the purchase of the real properties described above by plaintiff from defendant.

On 27 November 2013, defendant responded to the complaint by filing a motion to dismiss pursuant to Rule 12(b)(6). In the motion, defendant asserted defendant failed to timely exercise the option to purchase the real property at issue by 1 July 2013, the date specified in the contract. Also on 27 November 2013, defendant filed an answer and counterclaims seeking ejectment of plaintiff and immediate possession of the properties. On 20 December 2013, defendant filed a motion for partial summary judgment on its counter claims with supporting materials. Plaintiff responded to defendant's motions on 30 December 2013 by filing a motion to add a second cause of action to his complaint and a reply to defendant's counterclaims.

Defendant's motion to dismiss and motion for partial summary judgment and plaintiff's motion to add a cause of action came on to be heard together in Guilford County Superior Court before the Honorable Susan E. Bray on 8 January 2014.

On 10 January 2014, the trial court entered an order granting defendant's motion to dismiss and motion for partial summary judgment. Specifically, the trial court concluded "that

the [c]omplaint fails to state a claim upon which relief can be granted" and "that there is no genuine issue of any material fact and that [d]efendant is entitled to judgment as a matter of law on [d]efendant's [c]ounterclaims against [p]laintiff." Additionally, having entered partial summary judgment in favor of defendant on the counter claims, the trial court denied plaintiff's motion to add a second cause of action as moot. Plaintiff appealed.

II. Discussion

In the sole issue on appeal, plaintiff argues the superior court erred by granting defendant's motion to dismiss because the complaint raised viable claims of equitable estoppel and waiver resulting from defendant's continuing negotiations with plaintiff during the time defendant later claimed the option had expired.

"The motion to dismiss under N.C. R. Civ. P. 12(b)(6) tests the legal sufficiency of the complaint. In ruling on the motion the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted." *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (citations omitted). "This Court must conduct a

de novo review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd. per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003).

On appeal, plaintiff admits that by the terms of the agreement, as amended, his option to purchase the properties was exercisable through 1 July 2013. Plaintiff further acknowledges that he did not exercise the option by the date specified. As this Court has explained,

[o]ptions, being unilateral in their inception, are construed strictly in favor of the maker, because the other party is not bound to performance, and is under no obligation to buy. It is generally held that time is of the essence in such contract, and the conditions imposed must be performed in order to convert the right to buy into a contract for sale. To render an option to purchase enforceable there must be an acceptance by the optionee which is in accord with all of the terms specified in the option.

Catawba Athletics, Inc. v. Newton Car Wash, Inc., 53 N.C. App. 708, 712, 281 S.E.2d 676, 679 (1981) (quotation marks and citations omitted).

For the purposes of his argument on appeal, plaintiff accepts the above authority for the proposition that time is of the essence as a matter of course in option contracts under

North Carolina law. Nevertheless, plaintiff argues the exercise date should not be enforced in the present case under the doctrines of waiver and estoppel. Specifically, plaintiff argues defendant waived the exercise date by continuing to negotiate after 1 July 2013 and should now be estopped from enforcing the exercise date.

In support of his argument, plaintiff contends that the principles of waiver and estoppel applicable to other contracts are also applicable to option contracts. Plaintiff, however, has not cited any relevant North Carolina cases involving option contracts. The only North Carolina case cited by plaintiff involving an option contract is *Alston v. Connell*, 140 N.C. 485, 53 S.E. 292 (1906). Yet in *Alston*, the Court did not hold the defendant was estopped from enforcing the exercise date; instead the Court held the defendant was estopped from claiming an option agreement was unenforceable under the statute of frauds after the defendant requested that the plaintiff postpone performance. *Id.* at 491, 53 S.E. at 294. The Court reasoned that by requesting the postponement of plaintiff's performance, defendant recognized the validity of the contract and could not now rely on the statute of frauds to avoid his obligation when plaintiff was willing and able to tender performance. *Id.*

Plaintiff also cites cases from other jurisdictions in support of his argument that defendant waived strict compliance with the exercise date. We are not persuaded by these cases.

Moreover, assuming strict compliance with the terms of an option contract could be waived, the allegations in the complaint in this case are insufficient to support waiver or estoppel.

Here, the complaint alleges that plaintiff first requested an extension of the exercise date in April 2013. At that time, defendant's representative indicated that they could discuss the matter at a later date. At a subsequent meeting in mid-June 2013, defendant's representative indicated that he would consult with his superiors and get back with plaintiff. Plaintiff's allegations further provide that at subsequent meetings in July 2013, defendant's representative indicated that a "new agreement" could be reached. However, no new agreement was ever reached and when plaintiff, through his attorneys, later sought to tender performance on 15 August 2013, defendant refused.

Where the language and circumstances alleged in the complaint do not show an agreement for an extension of the exercise date, but instead indicate that a "new agreement" may be reached, we hold the complaint insufficient to assert viable

claims for waiver or estoppel when seeking specific performance of the original agreement.

III. Conclusion

It is evident from the complaint that plaintiff failed to exercise the option to purchase by the date specified in the agreement. Without viable claims of waiver of equitable estoppel, plaintiff has no claim for specific performance. Thus, the trial court did not err.

Affirmed.

Judges CALABRIA and STEELMAN concur.

Report per Rule 30(e).