NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

TOLL BROTHERS, INC., AND ORLEANS HOMEBUILDERS, INC. v. UPPER UWCHLAN TOWNSHIP AND UPPER UWCHLAN AUTHORITY AND PULTE HOME CORPORATION OF THE DELAWARE VALLEY APPEAL OF: TOLL BROTHERS, INC.	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 329 EDA 2013

Appeal from the Order December 20, 2012
in the Court of Common Pleas of Chester County
Civil Division at No.: 2010-05427-CA

TOLL BROTHERS, INC., AND ORLEANS HOMEBUILDERS, INC. v. UPPER UWCHLAN TOWNSHIP AND UPPER UWCHLAN TOWNSHIP MUNICIPAL AUTHORITY AND PULTE HOME CORPORATION APPEAL OF: ORLEANS HOMEBUILDERS, INC.	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 409 EDA 2013

Appeal from the Order December 20, 2012
in the Court of Common Pleas of Chester County
Civil Division at No.: 2010-05427-CA

BEFORE: GANTMAN, J., SHOGAN, J., and PLATT, J.*

---

* Retired Senior Judge assigned to the Superior Court.

MEMORANDUM BY PLATT, J. **FILED DECEMBER 26, 2013**

In this consolidated appeal, Appellants, Toll Brothers, Inc. and Orleans Homebuilders, Inc., appeal from the order of December 20, 2012,[1] granting partial summary judgment in favor of Upper Uwchlan Township and Upper Uwchlan Township Municipal Authority and Pulte Home Corporation of the Delaware Valley (collectively, Appellees). After careful review, we affirm.

The trial court set forth the facts of this case as follows:

> In 2002, all parties to this suit entered into a Sewage Plant Development Agreement ("Sewage Plant Agreement") which contemplated a two-phased construction of a sewage facility that the parties would treat and dispose of sewage generated by planned communities that the parties were developing. Each party had reserve capacity in one, or both, phases of

---

[1] The parties appear confused regarding which order the appeals lie from. Both Toll Brothers and Orleans were plaintiffs in the underlying litigation.

Toll Brothers purported to appeal from the order dated December 19, 2012, although a review of the docket indicates that the order was filed December 20, 2012. Orleans subsequently filed an appeal from the order dated January 15, 2013 (docketed January 16, 2013) certifying the case for interlocutory appeal pursuant to Pa.R.A.P. 341(c) and giving Toll Brothers and Orleans thirty days to file appeals from the partial summary judgment order. ***See*** Pa.R.A.P. 341(c)(2). Toll Brothers' notice of appeal, filed January 28, 2013, and Orleans' notice of appeal, filed February 5, 2013, are therefore both timely.

On February 25, 2013, all parties stipulated to consolidate both appeals pursuant to Pa.R.A.P. 513, incorrectly claiming that "Appellants Toll Brothers, Inc. and Orleans Homebuilders, Inc. appealed from the same Order dated January 15, 2013[.]" (Stipulation to Consolidate Multiple Appeals, 2/25/13, at 1 ¶ 1). However, the appeal properly lies from the order of December 20, 2012, which granted partial summary judgment in favor of Appellees. We have amended the captions accordingly.

construction depending on when their planned community was to be completed and would require sewage treatment. The plant design and construction costs were divided based on how much capacity a party reserved in the phase. By 2004, Phase 1 had been completed and was operated by the Township. In 2005, it became evident to Pulte that it would need to connect its Windsor Ridge Development to the Phase 1 sewage facility. However, Windsor Ridge was slated for Phase 2 connection. In accordance with the Sewage Plant Agreement, Phase 2 developers were permitted to utilize reserved Phase 1 capacity, provided that certain conditions were satisfied which would set into motion the construction of Phase 2. Pulte connected the Windsor Ridge Development to Phase 1, in September 2009[;] however, Phase 2 construction had not commenced.

At some time in late 2009, a Second Amendment to the Sewage Plant Agreement ("Second Amendment") was contemplated and circulated by the parties. The Second Amendment set forth the plan for construction of Phase 2 and provided releases of all claims regarding the use of Phase 1 sewage treatment capacity. The Township signed the Second Amendment, and both Toll and Pulte partially performed by posting into escrow the financial security required by the Second Amendment.

However, in 2009, before signing the Second Amendment, Orleans filed for bankruptcy, thereby placing on hold the Second Amendment. During the course of the bankruptcy proceedings, Toll argued to the Bankruptcy Court that Orleans was required to assume and execute the Second Amendment as both the Sewage Plant Agreement and the Second Amendment were a "single, integrated agreement." On December 1, 201[0], the Bankruptcy Court agreed and directed Orleans to execute the Second Amendment. On March 16, 2011, Orleans did so.

In April of 2010, Toll commenced the current action alleging that [Appellees] improperly misappropriated [Appellants'] sewage treatment and disposal capacities.

On June 29, 2012, [Appellees] filed a joint Motion for Summary Judgment and requested that Oral Argument be conducted. On that same date, Toll filed a Motion for Partial Summary Judgment and requested Oral Argument. . . . After responses were filed by the parties, oral argument was held on all motions on October 4, 2012. . . .

(Order, 12/20/12, at 2 n.1). On December 20, 2012, the court entered summary judgment in favor of the Township and Pulte "in regard to all issues with the exception of the issue of sewage disposal capacity." (***Id.*** at 1). On January 16, 2013, the trial court certified the case for interlocutory appeal pursuant to Rule 341(c). ***See*** Pa.R.A.P. 341(c) ("When more than one claim for relief is presented in an action . . . the trial court or other governmental unit may enter a final order as to one or more but fewer than all of the claims and parties only upon an express determination that an immediate appeal would facilitate resolution of the entire case. Such an order becomes appealable when entered."). Appellants timely appealed.[2]

Toll Brothers raises four questions for our review:

> 1. Whether as a matter of law the judicial-estoppel doctrine precludes all litigation concerning the validity of the proposed Second Amendment despite Toll Brothers' failure to take an inconsistent position before the bankruptcy court, the bankruptcy court's failure to rule that the proposed Second Amendment was a "valid, enforceable contract," and Toll Brothers' assertion of good-faith, consistent arguments before the bankruptcy and trial courts[?]
>
> 2. Whether as a matter of law the proposed Second Amendment, which is unsigned by three parties, is a binding, enforceable contract despite a provision in the Sewer Plant

---

[2] Pursuant to the court's order, Toll Brothers filed a Rule 1925(b) statement on February 20, 2013, and Orleans filed a Rule 1925(b) statement on February 22, 2013. The trial court entered its Rule 1925(a) opinion addressing the issues raised in both statements on April 19, 2013. ***See*** Pa.R.A.P. 1925.

> Agreement, which the proposed Second Amendment purports to modify, requiring all amendments to be signed by all parties[?]
>
> 3. Whether genuine issues of material facts preclude the entry of partial-summary judgment based on the supposed enforceability of the proposed Second Amendment where Pulte expressly rejected three of its material terms, Pulte and K. Hovnanian[3] never signed that document to manifest their acceptance, and the only evidence of Pulte's and K. Hovnanian's supposed willingness to be bound by the alleged agreement is the oral testimony of their own witnesses after the commencement of litigation, which is contrary to other evidence in the record[?]
>
> 4. Whether the trial court properly shifted to [Appellants] the burden to prove that the proposed Second Amendment was not enforceable, where [Appellees] asserted the existence and validity of the Second Amendment as an affirmative defense to [Appellants'] claims[?]

(Toll Brothers' Brief, at 3-4 (footnote omitted)). Orleans raises four similar questions:

> 1. Whether judicial estoppel applies to prevent Orleans from proving or asserting that the Second Amendment to the Sewage Plant Development Agreement ("Second Amendment") was not a valid, enforceable contract and that the release in the Second Amendment was ineffectual, even though Orleans took no position in a prior action and even though Toll Brothers' [sic] did not take an inconsistent position that was successfully maintained in the bankruptcy court[?]
>
> 2. Whether as a matter of law the Second Amendment, which contained a release, was a valid, enforceable contract, despite [Appellees'] failure to present any evidence that a contract was formed, despite the fact that three out of five parties did not execute the draft of the Second Amendment, and despite the fact that no party had performed pursuant to the alleged agreement[?]

---

[3] K. Hovnanian is not a party to the instant litigation.

> 3. Whether effect should be given to the parties' agreement in the Sewage Plant Development Agreement that, to be effective, any amendment to that Agreement had to be in a writing signed by all the parties[?]
>
> 4. Whether the release in the Second Amendment is effective, in spite of the fact that no party to the Second Amendment had performed any of its obligations under the Second Amendment[?]

(Orleans' Brief, at 3). Because the parties' first issues overlap and challenge the trial court's determination of judicial estoppel, we will address them together. A review of their briefs indicates that Toll Brothers' second issue and Orleans' third issue raise the same challenge to performance under the Second Amendment; therefore, we will address these issues together. Toll Brothers' third issue and Orleans' second issue both challenge the enforceability of the Second Amendment where it was not signed, and we will address both issues simultaneously. Finally, for reasons set forth below, the parties' fourth issues are interrelated and we will also address them together.

Our standard of review is well-settled:

> [S]ummary judgment is appropriate only in those cases where the record clearly demonstrates that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. . . . [A]n appellate court may reverse a grant of summary judgment if there has been an error of law or an abuse of discretion. But the issue as to whether there are no genuine issues as to any material fact presents a question of law, and therefore, on that question our standard of review is *de novo*.

Summers v. Certainteed Corp., 997 A.2d 1152, 1159 (Pa. 2010) (citations omitted).

We will address Toll Brothers' and Orleans' first issues together. Appellants argue that "[t]he trial court erred in applying the judicial-estoppel doctrine." (Toll Brothers' Brief, at 19; ***see also*** Orleans' Brief, at 13-18). Specifically, they challenge the court's determination that they took an inconsistent position in Orleans' bankruptcy and successfully maintained that inconsistent position before the Bankruptcy Court, and object to the trial court's characterization that they played "fast and loose." (Toll Brothers' Brief, at 19; ***see id.*** at 19-27). Alternatively, they object to the trial court's application of judicial estoppel as too broad. (***Id.*** at 28-30; ***see also*** Orleans' Brief, at 17-18). We disagree.

> Our Supreme Court has held that [a]s a general rule, a party to an action is estopped from assuming a position inconsistent with his or her assertion in a previous action, if his or her contention was successfully maintained. Accordingly, judicial estoppel is properly applied only if the court concludes the following: (1) that the appellant assumed an inconsistent position in an earlier action; and (2) that the appellant's contention was "successfully maintained" in that action.

Black v. Labor Ready, Inc., 995 A.2d 875, 878 (Pa. Super. 2010) (citations and some quotation marks omitted). "The purpose of this doctrine is to uphold the integrity of the courts by preventing parties from abusing the judicial process by changing positions as the moment requires." ***Bugosh v. Allen Refractories Co.***, 932 A.2d 901, 912 (Pa. Super. 2007) (citation omitted). However, "[o]ur Supreme Court has not definitively established whether the second element (successful maintenance) is strictly necessary to implicate judicial estoppel or is merely a factor favoring the

application." ***Vargo v. Schwartz***, 940 A.2d 459, 470 n.8 (Pa. Super. 2007) (citing ***In re Adoption of S.A.J. (In re S.S.)***, 838 A.2d 616, 620 n.3 (Pa. 2003)); ***see also Ballestrino v. Ballestrino***, 583 A.2d 474, 478 (Pa. Super. 1990) (holding that "it is not improper for the court to refuse to entertain a later claim" which is inconsistent with a previous position that appellant did not successfully maintain but from which she obtained other relief).

Here, the trial court determined that, during Orleans' bankruptcy proceedings, "Toll successfully argued in Bankruptcy Court that the Sewage Plant Agreement and Second Amendment were part of a single, integrated agreement and that Orleans should, accordingly, be required to assume both." (Order, 12/20/12, at 3 n.1).

During Orleans' bankruptcy proceedings in Delaware, Toll Brothers filed an objection to the proposed reorganization plan, arguing:

> . . . Toll files this Objection (i) **to ensure the Debtors assume additional contracts** in connection with the Toll Developments that are a part of the integrated agreement related to the Toll Developments being assumed by the Debtors . . . . More specifically, Toll and Debtors are involved in the development of the following:
>
> * * *
>
> Upper Uwchlan Township—Regional Sewage Plant, Upper Uwchlan Township, Chester, PA, which involves the construction of two phases of a sewage treatment plant pursuant to an agreement among Debtors, Upper Uwchlan Township, Pulte Homes, General Residential Holdings, Inc., Hovnanian Pennsylvania, Inc. and Toll.

* * *

> [T]he Debtors may only assume the contract after demonstrating that the estate is able to meet the Debtor's obligations—by promptly curing any existing defaults and giving adequate assurance of future performance. . . . **[T]he Debtors must either assume or reject all of the contracts that make up a single, integrated agreement; it may not selectively pick and choose among them.** . . . **The Toll Developments are such single integrated agreements from which the Debtors cannot cherry-pick related contracts.** Accordingly, in addition to the contracts that Debtors have already agreed to add to Exhibit 1 to the Plan Supplement, the following contracts must be assumed as well: (i) Second Amendment to the Sewage Plant Development Agreement among Orleans Homebuilders, Inc., Upper Uwchlan Township, Pulte Homes, K. Hovnanian Companies of Pennsylvania, Inc. and Toll Bros., Inc. . . .

(Pulte's Motion for Summary Judgment, 6/29/12, at Exhibit 42 (Objection of Toll Brothers, Inc. to the Debtors' Modified First Amended Joint Plan of Reorganization, 11/17/10, at 2-3, 5-6 (emphases added))).

Thereafter, the Bankruptcy Court granted the objection, and ordered:

> Notwithstanding anything to the contrary in this Order or any exhibits hereto, the Plan, the Disclosure Statement or any exhibits thereto, or the Plan Supplement, **it is hereby ordered that any lease, agreement, or contract by and among any of the Debtors**, Toll PA II, L.P., Toll Bros., Inc. or other Toll Bros. affiliates ("Toll") and Byers Group, LLC, Byers Group II, LLC, Ewing Group, LLC and Byers Commercial, L.P. with regard to the Developments, Byers Station—Upper Uwchlan Township and West Vincent Township, Chester County, PA and Chestnut Ridge—East Fallowfield Township and West Bradford Township, Chester County, PA, **shall be deemed assumed by the Debtors** on the Confirmation Date, subject to the occurrence of the Effective Date, including but not limited to (i) the contracts and agreements between the Debtors and Toll set forth on Exhibit D to the to the Disclosure Statement (as the same has been revised and set forth on Exhibit 3 hereto); (ii) Completion and Payment (Performance) Bond Financial Security Agreement dated February 13, 2006 among Orleans at Upper Uwchlan, LP,

> Toll PA II, LP, K. Hovnanian of Upper Uwchlan LLC and Township of Upper Uwchlan for Ewing Tract Upper Uwchlan, it being understood among the parties that each of the Debtors, the Reorganized Debtors, and Toll reserve all of their respective rights, remedies, and defenses in connection with the cost sharing arrangement, if any, with respect to the Ewing and Upper Uwchlan and Ewing West Vincent portions of the Byers Station project; and (iii) Allan A. Myers Construction contract dated August 17, 2009, and the Higgins, Eastern States Engineering, Pickering Valley Landscape, Riley Riper Hollin & Colagreco, and Beard Miller Consulting agreements. **Within 30 days of the Effective Date, the Debtors shall also enter into the proposed Second Amendment to Sewage Plant Development Agreement among Orleans Homebuilders, Inc., Upper Uwchlan Township, Pulte Homes, K. Hovnanian Companies of Pennsylvania, Inc., and Toll Bros., Inc.** and execute and deliver the Consent with respect to Byers Station—Upper Uwchlan as of the Effective Date and perform their obligations thereunder. . . .

(***Id.*** at Exhibit 44 (Order Confirming Debtors' Second Amended Joint Plan of Reorganization, 12/01/10, at 54-55 (emphases added))).

Appellants now claim that "[i]n asking the bankruptcy court to require Orleans to sign the Second Amendment as a condition to the confirmation of its Reorganization Plan, Toll Brothers in no way represented to the bankruptcy court that the Second Amendment was an enforceable contract. . . . At best, Toll Brothers' Plan Objection constituted a mere invitation for Orleans to make an offer that could then be accepted or rejected by the other unsigned Developers." (Toll Brothers' Brief, at 21-22; ***see also*** Orleans' Brief, at 14-15). We agree with the trial court's observation that this argument is "the height of litigation sophistry." (Trial Court Opinion, 4/19/13, at 1 ¶ 1).

First, Toll Brothers maintained an inconsistent position in the Bankruptcy Court, requiring execution of the Second Amendment that they now seek to subvert. Toll requested that, as a condition of Orleans' reorganization, Orleans not simply sign the Second Amendment, but assume the entire integrated agreement. (***See*** Pulte's Motion for Summary Judgment, 6/29/12, at Exhibit 42 (Objection of Toll Brothers, Inc. to the Debtors' Modified First Amended Joint Plan of Reorganization, 11/17/10, at 5-6)). Citing 11 U.S.C.A. § 365(b)(1), Toll Brothers argued that assumption of Orleans' former contracts included "adequate assurance of future performance" and that the burden was on Orleans to "provide such assurance that it can complete all requirements under the assumed contracts" including "[c]ompletion of the Toll Developments." (***Id.*** at 5, 7). Toll requested that Orleans **assume** and **perform** on the Second Amendment, not that Orleans "make an offer that could then be accepted or rejected by the other unsigned Developers." (Toll Brothers' Brief, at 22; ***see also*** Orleans' Brief, at 15). Thus, Toll Brothers assumed an inconsistent position in Bankruptcy Court than that which Appellants attempt to argue now. ***See Black***, ***supra*** at 878.

Second, Toll Brothers successfully maintained this position before the Bankruptcy Court, which ordered that "the Debtors . . . enter into the proposed Second Amendment to Sewage Plant Development Agreement among Orleans Homebuilders, Inc., Upper Uwchlan Township, Pulte Homes, K. Hovnanian Companies of Pennsylvania, Inc., and Toll Bros., Inc." (Pulte's

Motion for Summary Judgment, 6/29/12, at Exhibit 44 (Order Confirming Debtors' Second Amended Joint Plan of Reorganization, 12/01/10, at 54)); ***see also Black***, ***supra*** at 878. Moreover, to the extent that Orleans argues it "did not take any position, let alone one inconsistent with its position in this litigation," (Orleans' Brief, at 18), the trial court correctly determined that both parties were judicially estopped in the current proceedings because they were granted a form of relief by the Bankruptcy Court when Orleans assumed the Second Amendment. ***See Vargo***, ***supra*** at 470 n.8; ***Ballestrino***, ***supra*** at 478.

Accordingly, the trial court found that Toll Brothers successfully maintained the position before the Bankruptcy Court that Orleans and the other developers must execute and perform the Second Amendment on the grounds that it is an integrated contract. (***See*** Order, 12/20/12, at 3 n.1); ***see also Black***, ***supra*** at 878. Therefore, the trial court properly concluded that Appellants are judicially estopped from changing their position and arguing now that the Second Amendment is neither integrated nor imposes any contractual obligations on them. ***See Black***, ***supra*** at 878; ***see also Bugosh***, ***supra*** at 912. This issue lacks merit.

In Toll Brother's second issue, Appellants challenge the trial court's determination that the Second Amendment was enforceable because it was not signed by all parties. (***See*** Toll Brothers' Brief, at 30). Orleans raises the same challenge in its third issue. (***See*** Orleans' Brief, at 3, 23-26). We disagree.

> [I]t is well established that [a] written contract which is not for the sale of goods may be modified orally, even when the written contract provides that modifications may only be made in writing.
>
> > An agreement that prohibits non-written modification may be modified by subsequent oral agreement if the parties' conduct clearly shows the intent to waive the requirement that the amendments be made in writing. An oral contract modifying a prior written contract, however, must be proved by clear, precise and convincing evidence.

Brinich v. Jencka, 757 A.2d 388, 399 (Pa. Super. 2000), *appeal denied*, 771 A.2d 1276 (Pa. 2001) (citations and quotation marks omitted). "[A]n agreement is binding if the parties come to a meeting of the minds on all essential terms, even if they expect the agreement to be reduced to writing but that formality does not take place." ***Commerce Bank v. First Union Nat'l Bank***, 911 A.2d 133, 147 (Pa. Super. 2006) (citations omitted); ***see also Somerset Cmty. Hosp. v. Allan B. Mitchell & Assocs.***, 685 A.2d 141, 146-47 (Pa. Super. 1996) (holding that "conduct of the parties and their representatives orally modified [an] agreement, effectively waiving the no-written modification clause of the parties' written contract") (footnote omitted).

Here, as previously discussed, Appellants are judicially estopped from contesting the validity of the Second Amendment. Nonetheless, their contentions would lack merit. The trial court noted that the parties performed pursuant to the Second Amendment, interrupted only by Orleans' bankruptcy proceedings, and that "the Second Amendment was already deemed a binding and fully integrated contract that was agreed to by all the

parties." (Order, 12/20/12, at 3 n.1). On February 5, 2010, Pulte posted a bond in the amount of $8,431,170.00 for the sewage treatment plant "as provided for in the Second Agreement to Sewage Plant Development Agreement[.]" (Pulte's Motion for Summary Judgment, 6/29/12, at Exhibit 40 (Performance Bond, 2/05/10, at 1)). In a letter dated July 15, 2010, counsel for the developers stated that Pulte, Toll Brothers, and K. Hovnanian were "prepared to sign" the Second Amendment and that "Toll and Pulte are prepared to move forward with their respective financial obligations if Orleans is in a position to do the same." (***Id.*** at Exhibit 41 (Letter from Louis J. Colagreco, Jr. to Larry Dugan, Esq., 7/15/10, at 1, 2)). Shortly thereafter, on July 27, 2010, Toll Brothers' counsel wrote to Orleans, "to point out that Orleans is obligated to Toll Brothers, K. Hov[nanian], the Township, and/or the other parties to the Sewage Agreement to perform . . . . We sincerely hope that Orleans steps up and continues to perform its obligations." (***Id.*** at Exhibit 57 (Letter from Richard McCormick to Ben Goldman, 7/27/10, at 1)). Furthermore, as conceded by Appellants, (***see*** Toll Brothers' Brief, at 34), Toll Brothers and Orleans executed lines of credit as contemplated by the Second Amendment. (***See*** Pulte's Motion for Summary Judgment, 6/29/12, at Exhibit 46 (Second Amendment, 12/07/09, at 7); ***see id.*** at Exhibit 39 (Letter from Anne Matias, Bank of America, to Toll Brothers, 1/08/10, at 1 (issuing line of credit))). Finally, as ordered by the Bankruptcy Court, Upper Uwchlan Township and Orleans signed the

Second Amendment. (***See id.*** at Exhibit 46 (Second Amendment, 12/07/09, at 15)).

Accordingly, despite the inclusion of a clause requiring that any modifications to the development plan be memorialized in writing, the parties to the Second Amendment waived this requirement when they signed, expressed their intent to sign through counsel, or performed their financial obligations pursuant to the Second Amendment by early 2011. ***See Commerce Bank***, ***supra*** at 147. In fact, Toll Brothers petitioned the Bankruptcy Court to request Orleans to sign and assume the Second Amendment, which they did. (***See*** Pulte's Motion for Summary Judgment, 6/29/12, at Exhibit 42 (Objection of Toll Brothers, Inc. to the Debtors' Modified First Amended Joint Plan of Reorganization, 11/17/10, at 5-6)). Even if they were not judicially estopped from doing so, Appellants cannot now argue that they never intended the Second Amendment to be enforceable. Therefore, the trial court correctly determined that the "parties' conduct clearly shows the intent to waive the requirement that the amendments be made in writing." ***Brinich***, ***supra*** at 399 (citation omitted); ***see also Somerset Cmty. Hosp.***, ***supra*** at 146-47. This issue lacks merit.

In Toll Brothers' third issue, Appellants argue that "[t]he trial court improperly disregarded genuine issues of material fact concerning the enforceability of the proposed Second Amendment." (Toll Brothers' Brief, at 32). Orleans levies the same charge in their second issue. (***See*** Orleans' Brief, at 3, 18-28). Specifically, they argue that the court erred in granting

summary judgment where there remained a "purely factual question of whether the parties intended the partially-unsigned Second Amendment to be a binding, enforceable contract." (Toll Brothers' Brief, at 33). They repeat their previously-discussed assertions that Toll Brothers and Orleans "never considered [the Second Amendment] to be a binding contract unless and until all of the parties executed it[,]" and claim that Pulte actually rejected the Second Amendment, thus raising a question of fact to be submitted to the jury. (***Id.***; ***see id.*** at 33-34). We disagree.

As previously noted, on review of a grant of summary judgment, "whether there are no genuine issues as to any material fact presents a question of law, and therefore, on that question our standard of review is *de novo*." ***Summers***, ***supra*** at 1159 (citations omitted).[4]

> Where the facts are in dispute, the question of whether a contract was formed is for the jury to decide . . . . People do business in a very informal fashion, using abbreviated and elliptical language. A transaction is complete when the parties mean it to be complete. It is a mere matter of interpretation of their expressions to each other, a question of fact.

---

[4] We observe that, to the extent Appellants allege "[t]he weight of the evidence suggests that the parties—most notably, Pulte—neither intended to, nor considered themselves to be, contractually bound by the Second Amendment unless and until they execute it[,]" an argument challenging the weight of the evidence is waived for failure to raise it before the trial court. (Toll Brothers' Brief, at 33); ***see also*** Pa.R.A.P. 302(a) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal."). Moreover, this issue is not preserved for review in their Rule 1925(b) statement, and is waived on this ground as well. (***See*** Toll Brothers' Rule 1925(b) Statement, 2/20/13, at 1-2).

Thomas A. Armbruster, Inc. v. Barron, 491 A.2d 882, 887 (Pa. Super. 1985) (citations and internal quotation marks omitted).

> An offeree's power to accept is terminated by (1) a counter-offer by the offeree; (2) a lapse of time; (3) a revocation by the offeror; or (4) death or incapacity of either party. However, once the offeree has exercised his power to create a contract by accepting the offer, a purported revocation is ineffective as such.

Step Plan Servs. v. Koresko, 12 A.3d 401, 409 (Pa. Super. 2010) (citation omitted).

Appellants rely on an April 2011 email by counsel for Pulte questioning Toll's belated request for interest and Pulte's counsel's deposition testimony to argue that "Pulte rejected the Second Amendment." (Toll Brothers' Brief, at 34). However, as previously discussed, the parties to the Second Amendment had accepted the Second Amendment by signature or performance by March 16, 2011, when Orleans signed the Second Amendment by order of the Bankruptcy Court, and the other parties, including Pulte, had already posted bonds and executed lines of credit. (***See*** Order, 12/20/12, at 3 n.1). Therefore, any alleged revocation by Pulte after the Second Amendment was accepted was "ineffective." ***Step Plan Servs.***, ***supra*** at 409. Thus, there is no factual dispute to submit to the jury to determine whether Pulte attempted to revoke the Second Amendment that

would preclude summary judgment. ***See Thomas A. Armbruster, Inc.***, ***supra*** at 887.[5] Appellants' issue does not merit relief.

Finally, Orleans, in its fourth issue, challenges the provisions of the Second Amendment that contractually release Appellees from Appellants' claims. (***See*** Orleans' Brief, at 3, 27-28). Toll Brothers argues in its fourth issue that "[t]he trial court improperly shifted Pulte's and the Township Defendants' burden to prove their affirmative defenses to Toll Brothers and Orleans." (Toll Brothers' Brief, at 37). They contend that "[t]he trial court allowed [Appellees] to use the judicial estoppel doctrine as a sword to escape their burden to prove that the Second Amendment, which was not fully executed, was a valid, and enforceable contract." (Toll Brothers' Brief, at 38). Because we determine that both parties essentially challenge the

---

[5] We note that Appellees contend that the deposition testimony reflects Pulte's position that the email was sent as a negotiating tactic to prevent Toll from "attempt[ing to] exploit the potential gap in institutional knowledge at Pulte on [the] issue [of interest payment being owed to Toll] by trying to again raise its demand" after the matter had been resolved in earlier negotiations. (Township's Brief, at 31). However, pursuant to the rule established in ***Nanty-Glo v. American Surety Co.***, 163 A. 523 (Pa. 1932), "[t]estimonial affidavits of the moving party or his witnesses, not documentary, even if uncontradicted, will not afford sufficient basis for the entry of summary judgment, since the credibility of the testimony is still a matter for the [fact-finder]." ***DeArmitt v. New York Life Ins. Co.***, 73 A.3d 578, 595 (Pa. Super. 2013) (citations omitted). Nonetheless, the relevant facts demonstrating that the Second Amendment is an enforceable agreement are established by documentary evidence of parties' signatures, letters, and financial performance. Moreover, Appellants are judicially estopped from contesting whether the Second Amendment is valid, enforceable, and integrated into the Sewage Plant Agreement.

application of judicial estoppel by the trial court to require enforcement of the contractual release, we conclude that their arguments are interrelated and will address them together.

"Because the rule is intended to prevent improper use of judicial machinery, judicial estoppel is an equitable doctrine invoked by a court at its discretion[.]" ***New Hampshire v. Maine***, 532 U.S. 742, 750 (2001) (citations and quotation marks omitted); ***see also Thompson v. Anderson***, 632 A.2d 1349, 1351 (Pa. Super. 1993), *appeal denied*, 651 A.2d 541 (Pa. 1994) (affirming determination that judicial estoppel merited summary judgment for defendants against plaintiff's negligence claim after plaintiff successfully maintained in arbitration that defendants' actions were intentional).

Here, the Second Amendment includes a Release of Liability, which provides, in relevant part:

> In consideration of the execution of this Second Amendment, the parties hereto release each other from any and all claims related to or arising out of (a) the alleged improper use of Phase 1 sewage treatment capacity by any party . . . .
>
> . . . Except as specifically set forth in this release, all other rights and obligations of the parties under the Agreement, the First Amendment and this Second Amendment shall continue in full force and effect.

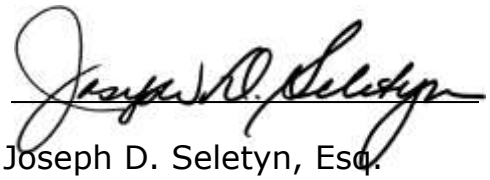
(Pulte's Motion for Summary Judgment, 6/29/12, at Exhibit 46 (Second Amendment, 12/07/09, at 12 ¶ 12)). Appellants' complaint alleges that Appellees "improperly misappropriated [their] sewage treatment and disposal capacities." (Order, 12/20/12, at 2 n.1). Thus, the court found

that Appellees were entitled to partial summary judgment on this claim because they were released pursuant to the terms of the Second Amendment.

As previously discussed, the trial court properly applied the doctrine of judicial estoppel to determine that the Second Amendment was enforceable and fully integrated, as opposed to "not fully executed" as alleged by Appellants. (Toll Brothers' Brief, at 38). Therefore, the terms of the release included in the Second Amendment are equally enforceable. Orleans' challenge to this issue therefore lacks merit. Furthermore, Toll Brothers' claim that Appellees failed to carry the burden of proof of an affirmative defense is irrelevant in light of Appellants' failure to overcome being judicially estopped from circumventing enforcement of the Second Amendment. ***See Thompson***, ***supra*** at 1351. The trial court did not abuse its discretion in applying the doctrine of judicial estoppel. ***See New Hampshire***, ***supra*** at 750. The court did not shift the burden of an affirmative defense onto Appellants; Appellants' claims were simply foreclosed by enforcement of the release provision in the Second Amendment. Accordingly, Appellants' fourth issues lack merit.

Order affirmed. Jurisdiction relinquished.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/26/2013