TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-19-00380-CV

Dewayne Naumann and Equity Liaison Company, LLC, Appellants

v.

Karl Johnson, Dependent Administrator of the Estate of Damon D. Naumann; Rebecca Stacks; Christopher Stacks; and Flora Dian Naumann, Appellees

FROM THE PROBATE COURT NO. 1 OF TRAVIS COUNTY
NO. C-1-PB-14-000185, THE HONORABLE GUY S. HERMAN, JUDGE PRESIDING

MEMORANDUM OPINION

This appeal concerns the enforceability of a written contract to purchase certain real property (the Property) from the estate of Damon D. Naumann (the Estate). The probate court concluded that the contract did not constitute an enforceable contract because the essential element of price could not be determined from the written agreement. We agree and affirm.

BACKGROUND

In January 2014, Damon passed away. Appellant Dewayne Naumann and appellee Rebecca Stacks are Damon's children, and appellee Christopher Stacks is Damon's grandson.[1] Appellee Flora Dian Naumann (Dian) is Damon's sister and initially was the

[1] For convenience, we will refer to these parties by their first names.

independent executor of his Estate. Dewayne is the principal owner of appellant Equity Liaison Company, LLC (the Company).

In February, Dian filed an application for probate of will and issuance of letters testamentary. The next month, Dian, as the Estate's independent executor, and the Company executed the original contract for the sale of the Property from the Estate to the Company. The original contract set a sales price of $424,892 in paragraph 3, titled "Sales Price"; listed a closing date in paragraph 11, titled "Special Provisions"; and included another provision in paragraph 11 that stated, "Sales price shall be adjusted based on the appraisal of the property."

In November, Dian and the Company amended the contract to revise the sales price in paragraph 3 to $210,000; to revise the closing date in paragraph 11 to a later date; and to state that "all other provisions in Section 11, Special Provisions, shall remain in full force and effect." Dian then filed in probate court an inventory, appraisement, and list of claims, which, among other things, listed the appraised value of the Property at $210,000. Rebecca objected to the appraisement, claiming the Property was erroneously valued because "Travis Central Appraisal District's 2014 appraised value for this property is $336,633." Dian and the Company then amended the contract for the second time, revising the sales price in paragraph 3 to be $238,000; again revising the closing date in paragraph 11 to a later date; and again stating that "all other provisions in Section 11, Special Provisions, shall remain in full force and effect." Dian filed in probate court a corrected inventory, appraisement, and list of claims revising the appraised value of the Property to $238,000, which the probate court ordered approved.

In February 2015, Rebecca moved for an appointment of disinterested persons as appraisers of the Property and applied for the removal of Dian as the independent executor, alleging that Dian intended "to favor the Naumann beneficiaries over the Stacks beneficiaries"

and "undervalued certain real property that she intended to transfer to or sell to Dewayne Naumann at below market value." Dian and the Company then amended the contract for the third time, stating, "The closing date shall be extended thirty (30) days after the resolution of all legal issues related to the probate proceedings, and the release of the LIS PENDENS." The probate court granted Rebecca's motion for an appointment of disinterested persons as appraisers.

Three years later, Dian moved for a court appointed appraiser, claiming that she and Rebecca could not agree on a disinterested appraiser. In July 2018, the Property was appraised at $350,000 by a court appointed appraiser. The next month, Dian and the Company amended the contract for the fourth and final time, revising the sales price in paragraph 3 to be $350,000 but making no other amendments to the contract (the Fourth Amendment). That same month, Rebecca and Christopher applied to remove Dian as the independent executor, claiming that Rebecca offered to purchase the property for $25,000 above the appraised value but Dian refused, responding that she was bound by the contract to sell the Property to the Company. Rebecca and Christopher also alleged in the application that "the contract provision indicating that the 'Sales price shall be adjusted based on the appraisal of the property' is the very definition of vague and uncertain and render[s] the document void and wholly ineffective"; it "is the verbal equivalent of a blank line; there is simply no definitive written agreement as to price, and without a written price, there cannot be a valid sales contract"; and "even if the contract were amended to reflect the full appraised value of $350,000, this sale would still harm the beneficiaries, since the Independent Executor is in receipt of a legitimate cash offer to buy the property at $375,000."

In November, the probate court denied the application to remove the independent executor but ordered that the Property should be sold for the highest price available within thirty days. After the thirty days had passed, Rebecca and Christopher again applied to remove Dian as the independent executor for failing to sell the property after they presented Dian with a cash offer following the order. The probate court entered an order removing Dian as the independent executor and appointing Karl Johnson as the dependent administrator.

In February 2019, Johnson filed an application with the probate court to sell the Property. The application noted that the dispute leading to his appointment "was alleged favoritism for one over the other of decedent's children" in the sale of the Property from the Estate and proposed "that the sale be made to the higher bidder over the appraised value of the two children, for a cash sale only." Rebecca then moved the probate court to enforce the November 2018 order requiring the sale of the Property for the highest price available within thirty days and alleged that she had submitted the highest bid within thirty days of the November 2018 order. Dewayne and the Company countered with their own motion for enforcement of the contract to purchase the Property, alleging that the Fourth Amendment is an enforceable contract "binding on the Administrator" for the sale of the Property for $350,000.

After a hearing on the two motions, the probate court denied both motions in its "Order Denying Motions" and expressly found that neither Rebecca nor Dewayne and the Company have an enforceable contract to purchase the Property. The probate court instead ordered Johnson, as the dependent administrator, to sell the Property "through a listing with a licensed real estate broker for the best offer" and that the sale shall be open to the general public, including Rebecca, Dewayne, and the Company. The probate court also ordered that Rebecca, Dewayne, and the Company release any lis pendens to the Property they had filed.

Dewayne and the Company requested findings of fact and conclusions of law and submitted their "Motion for Reconsideration (in Nature of Motion for New Trial)." The probate court issued findings of fact and conclusions of law, concluding, as relevant here:

2. To be enforceable, a written agreement for the purchase of real estate "must contain the essential terms of a contract, expressed with such certainty and clarity that it may be understood without recourse to parol evidence." *Rus–Ann Dev., Inc. v. ECGC, Inc.*, 222 S.W.3d 921, 927 (Tex. App.—Tyler 2007, no pet.) (citing *Wilson v. Fisher*, 188 S.W.2d 150, 152 (Tex. 1945)).[2]

3. Because the writing originally offered by [the Company] included a special provision indicating that the stated price was subject to change, and because this provision remained in effect through its various offers, the purchase price was, and remains, subject to change.

4. The final purchase price, as offered by [the Company], cannot be determined from the written offers themselves, without recourse to parol evidence.

5. The purchase price offered by [the Company] is vague and indefinite and not stated with reasonable certainty.

6. The writings offered by [the Company] for the purchase of the [Property] do not constitute an enforceable contract.

Dewayne and the Company now appeal from the probate court's Order Denying Motions.

DISCUSSION

A contract for the sale of real estate must comply with the statute of frauds. *See* Tex. Bus. & Com. Code § 26.01(a), (b)(4); *Cohen v. McCutchin*, 565 S.W.2d 230, 232 (Tex. 1978); *SDN, Ltd. v. JV Rd., L.P.*, No. 03-08-00230-CV, 2010 WL 1170230, at *3 (Tex. App.—Austin Mar. 24, 2010, no pet.) (mem. op.). To satisfy the statute of frauds, "there must be a written memorandum which is complete within itself in every material detail, and

[2] The style of this citation has been modified.

which contains all of the essential elements of the agreement, so that the contract can be ascertained from the writings without resorting to oral testimony." *Cohen*, 565 S.W.2d at 232; *SDN*, 2010 WL 1170230, at *3; *see Texas Builders v. Keller*, 928 S.W.2d 479, 481–82 (Tex. 1996) ("Parol evidence may be used to explain or clarify the written agreement, but not to supply the essential terms."). Agreeing with our sister courts, we have noted, "In the sale of real property the essential elements required, in writing, are the price, the property description, and the seller's signature." *Hill v. Choate*, No. 03-16-00265-CV, 2017 WL 4348165, at *2 (Tex. App.—Austin Sept. 29, 2017, no pet.) (mem. op.) (citing *Rus–Ann Dev.*, 222 S.W.3d at 927; *Lynx Expl. & Prod. Co. v. 4–Sight Operating Co.*, 891 S.W.2d 785, 788 (Tex. App.—Texarkana 1995, writ denied)); *see Ward v. Ladner*, 322 S.W.3d 692, 697 (Tex. App.—Tyler 2010, pet. denied) ("Price is an essential term required for the sale of real property."). "To be enforceable, a contract must address all of its essential and material terms with 'a reasonable degree of certainty and definiteness.'" *Fischer v. CTMI, L.L.C.*, 479 S.W.3d 231, 237 (Tex. 2016) (quoting *Pace Corp. v. Jackson*, 284 S.W.2d 340, 345 (Tex. 1955)).

"The question of whether a contract contains all the essential terms for it to be enforceable is a question of law." *Parker Drilling Co. v. Romfor Supply Co.*, 316 S.W.3d 68, 74 (Tex. App.—Houston [14th Dist.] 2010, pet. denied) (citing *Beal Bank, S.S.B. v. Schleider*, 124 S.W.3d 640, 653 n.8 (Tex. App.—Houston [14th Dist.] 2003, pet. denied)); *see Pearson v. Fullingim*, No. 03-03-00524-CV, 2006 WL 358230, at *3 (Tex. App.—Austin Feb. 17, 2006, no pet.) (mem. op.) ("[W]hether a contract is enforceable is a question of law."). In determining whether the contract includes all the essential terms, we look to the language of the parties' agreement. *See Barrow-Shaver Res. Co. v. Carrizo Oil & Gas, Inc.*, 590 S.W.3d 471, 479 (Tex. 2019) ("In construing a contract, we must look to the language of the parties' agreement.").

We construe contracts under a de novo standard of review, looking to the language of the parties' agreement and "giving the language its plain, grammatical meaning unless it 'would clearly defeat the parties' intentions.'" *Id.* (quoting *Anadarko Petroleum Corp. v. Thompson*, 94 S.W.3d 550, 554 (Tex. 2002)).

In their sole issue on appeal, Dewayne and the Company challenge the trial court's conclusion that the contract lacked the essential element of price. The trial court relied on the special provision in the original contract that was neither amended nor removed and that stated, "Sales price shall be adjusted based on the appraisal of the property." Dewayne and the Company nevertheless argue that the Fourth Amendment made the essential element of price unambiguous:

> Even assuming for the sake of argument that the original contract and Amendment Nos. 1-3 were unclear as to the purchase price because they stated that the purchase price may change based on an appraisal that had not yet occurred, Amendment No. 4 eliminated any such lack of clarity. Amendment No. 4 increased the purchase price based on an appraisal – not just any appraisal, *but the appraisal performed by the very appraiser designated by the trial court to appraise the Property*. Once Amendment No. 4 was executed to reflect the appraised value, it was no longer necessary to resort to parol evidence to determine the sales price – it was unambiguously stated in the contract.

(Emphasis in original.) We disagree.

The Fourth Amendment did not "eliminate[] any such lack of clarity," as Dewayne and the Company argue: it neither removed nor amended the provision requiring that the "[s]ales price shall be adjusted based on the appraisal of the property." And this contract, as amended by the Fourth Amendment, does not identify which appraisal constitutes "the appraisal" that the price shall be based on—e.g., is "the appraisal" one of the appraisals Dian obtained at $210,000 or $238,000; the appraisal at $350,000 ordered by the probate court; or an appraisal

that may occur after the execution of the Fourth Amendment? Because the undisputed facts show multiple appraisals in the past and, more importantly, do not foreclose possible appraisals after the execution of the Fourth Amendment, the writing is insufficient to establish with reasonable certainty the final sales price after it "shall be adjusted based on the appraisal of the property." *Cf. Keller*, 928 S.W.2d at 481–82 (noting that contract that provides for sale of "my ranch of 2200 acres" is sufficient where extrinsic evidence shows grantor owned *one* ranch of 2200 acres but that contract providing for sale of unidentified portion of larger, identifiable tract is not sufficient).

Moreover, the provision's language in the future tense that the sales price "shall be adjusted" suggests that the Property's sales price would be adjusted based on an appraisal occurring after the contract, not an appraisal that had already occurred and was already incorporated into the contract's stated sales price. *See In re Davenport*, 522 S.W.3d 452, 456–57 (Tex. 2017) (orig. proceeding) (noting that contract terms are typically given plain and ordinary meaning and courts look to dictionaries to discern meaning of commonly used term that contract does not define); *Webster's Third New Int'l Dictionary* 27 (2002) (defining "adjusted" as "accommodated, altered, or revised to suit a particular set of circumstances or requirements"). Thus, even if the stated sales price in the Fourth Amendment was based on an earlier appraisal ordered by the probate court, Dewayne and the Company have not explained how the stated price in the Fourth Amendment would not be subject to adjustment by an appraisal of the property that occurred after the execution of the Fourth Amendment.

Finally, the contract, as amended by the Fourth Amendment, uses the phrase "based on" instead of "equal to" without agreement as to the method to determine how the price would be adjusted such that it is "based on" the appraisal. In other words, how far would the

price need to be adjusted towards the appraised value for the adjustment to be "based on" the appraisal? Thus, the contract does not furnish the data to identify the sales price with "a reasonable degree of certainty and definiteness." *See Fischer*, 479 S.W.3d at 237 (quoting *Jackson*, 284 S.W.2d at 345); *cf. Keller*, 928 S.W.2d at 481 ("A writing need not contain a metes and bounds property description to be enforceable; however, it must furnish the data to identify the property with reasonable certainty.").

For all these reasons, the essential term of the sales price is not addressed with a reasonable degree of certainty and definiteness in this contract. In sum, the sales price is effectively open for future negotiation—i.e., which appraisal constitutes "the appraisal of the property" and how the sales price stated in the Fourth Amendment "shall be adjusted" such that it is "based on" that appraisal. *See T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 221 (Tex. 1992) ("Where an essential term is open for future negotiation, there is no binding contract."); *cf. Fisher*, 479 S.W.3d at 237 ("It is well settled law that when an agreement leaves material matters open for future adjustment and agreement that never occur, it is not binding upon the parties and merely constitutes an agreement to agree." (quoting *Fort Worth Indep. Sch. Dist. v. City of Fort Worth*, 22 S.W.3d 831, 846 (Tex. 2000))). We therefore conclude that given the language of this contract, as amended by the Fourth Amendment, the writing is not binding and enforceable. We overrule Dewayne and the Company's sole issue on appeal.

CONCLUSION

Having overruled Dewayne and the Company's sole issue on appeal, we affirm the probate court's Order Denying Motions.

Melissa Goodwin, Justice

Before Justices Goodwin, Kelly, and Smith

Affirmed

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