1st Choice Housing, Inc. v. Buller River Development Partners

2023 | Cited 0 times | W.D. North Carolina | October 12, 2023

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA

STATESVILLE DIVISION CIVIL ACTION NO. 5:23-CV-00112-KDB-SCR

MEMORANDUM AND RECOMMENDATION THIS MATTER is before the Court on Defendant s Motion to Dismiss (Doc. No. 4) and the parties briefs and exhibits. (Doc. Nos. 4-1, 10 & 11). The Motion has been referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1) and is ripe for disposition.

Having fully considered the arguments, the record, and the applicable authority, the undersigned respectfully recommends that Defendant s Motion be denied as discussed below.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY Accepting the facts alleged in the Complaint as true, the parties entered into an Offer to Purchase and Contract for four lots in Stones Edge located in Iredell County. (Doc. No. 1-2 at ¶ 3). The Contract included an Exhibit A that identified the lots as 131 and 135 Zircon Drive and 122 and 145 Gemstone Drive. (Id. at 18). Exhibit A also included the following provision, which is the subject of this lawsuit: 1ST CHOICE HOUSING, INC.,)

Plaintiff,) v.)

BULLER RIVER DEVELOPMENT PARTNERS,

Defendant.) After completion of the purchase of the above lots, 1st Choice will have the option to purchase any of the remaining lots at $23,750 each, as they may be available for sale within the next 24 months. Those lots are 119 Stones Edge Rd, 149 & 153 Gemstone Drive, 126, 130 & 138 Zircon, 106, 124, 159, 189, 147, 193 & 205 Titanium, 144 & 11 Peridot . Id.

The parties closed on the four lots and the sale was recorded on November 9, 2022, in Deed Book 2958, Page 1014 of the Iredell County Registry. (Id. at ¶ 4).

On or about April 24, 2023, Plaintiff, through its President Russell Fox, informed Defendant by calling its real estate agent, Tyler diPretoro, that Plaintiff was prepared to exercise its option to

purchase $23,750. (Id. at ¶¶ 3, 5).

The next day, Plaintiff received an email from diPretoro stating:

Hello Mr. Russell: To follow up on our phone conversation yesterday, we are unfortunately not able to sell the lots at $23,750 due to grading that was done without our knowledge. Because of this, we now have plans to build on these lots in order to hopefully break even or better. With the holding costs and grading that was done, we have about $50,000 invested per lot.

Again, we plan to build on these going forward to try and dig our way out of this hole. (Id. at ¶ 6). Since then, Plaintiff maintains it was ready to purchase the lots at the agreed price (Id. at ¶ 7), but Defendant 24[-]month option period. . . . Id. at ¶ 8).

On June 14, 2023, Plaintiff filed this action in Iredell County Superior Court alleging breach of contract and seeking specific performance of the Contract, that is, transfer of the 15 lots an injunction relief. (Id. at ¶ 9). On July 13, 2023, Defendant removed the state court action to the United States District Court for the Western District of North Carolina. (Doc. No. 1). Defendant asserts the existence of diversity of citizenship subject matter jurisdiction, which has not been challenged and appears proper. Plaintiff is a North Carolina corporation. (Doc. No. 1-2 at 2). Defendant is a general partnership whose partners are citizens of South Carolina or Auckland, New Zealand. (Id. at 2- 3). 1

breach of its contractual obligations involving the 15 lots at a contract price of $23,750 each, which

would total $356,250, easily satisfying the $75,000 jurisdictional threshold. (Id. at 4).

II. DISCUSSION 1. Standard of Review In reviewing a -pleaded allegations and should vi Mylan Labs., Inc. v. Matkari, 7 F.3d 1130, 1134 (4th Cir. 1993). A plaintiff Bell Atl. Corp. v. Twombly, 550 U.S.

Id. at 563. A complaint attacked by

a Rule 12(b)(6) motion to dismiss wi Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550

that allows

1 The citizenship of its individual partners is relevant for the purposes of determining the existence, or not, of diversity jurisdiction. See Carden v. Arkoma Assocs., 494 U.S. 185, 195-96 (1990). Defendant s individual partners are Estero Property Investments, Ltd., the sole owner of which is Vernon Lindsay Jarvis, a New Zealand national who lives in Auckland, New Zealand; PIOTC II, LLC, which is solely owned by Kevin Burrell, who lives in York, South Carolina; C&C Trust, a trust whose sole trustee and beneficiary is Chris Elisa, a New Zealand national who lives in Auckland, New Zealand; and Buller River Developments, LLC, a limited liability company owned solely by Estero Property

Investments, Ltd., and PIOTC II, LLC. None of Defendant s individual partners are citizens or residents of North Carolina. Notice of Removal, (Doc. No. 1 at 2-3). Id.

In Iqbal, the Supreme Court articulated a two-step process for determining whether a complaint meets this plausibility standard. Id. at 678-79. First, the court identifies allegations that, because they are no more than conclusions, are not entitled to the assumption of truth. Id. at 679; see also Anand v. Ocwen Loan Serv., LLC, 754 F.3d 195, 198 (4th Cir. 2014) (recognizing the court d recitals of the elements of a cause of action, supported by mere conclusory statements, do not

Iqbal, 556 U.S. at 678 (citing Twombly, 550 U.S. at 555). Although the pleading departure from the hyper-technical, code-pleading regime of a prior era. . . it does not unlock the

doors of discovery for a plaintiff ar Id. at 678-79.

Second, to the extent there are well-pleaded factual allegations, the court assumes their truth and then determines whether they plausibly give rise to an entitlement to relief. Id. whether a complaint contains sufficient facts to state a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience Id. at 679. -pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged but it has not show[n] that the pleader is entitled to relief, Id. (quoting Fed. R. Civ. P. 8(a)(2)).

Neitzke v. Williams, 490 U.S. 319, 326 (1989).

t no relief could be granted under any set of facts that could be prove[n] Neitzke, 490 U.S. at 327 (quoting Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)).

2. Analysis stated and alleged facts to support a breach of contract claim. Under North Carolina law, 2

a simple breach of contract claim has two elements: (1) the existence of a valid contract; and (2) a breach of the terms of that contract. See McLamb v. T.P. Inc., 173 N.C. App. 586, 588, 619 S.E.2d 577, 580 (2005); Cater v. Barker, 172 N.C. App. 441, 445, 617 S.E.2d 113, 116 (2005), , 360 N.C. 357, 625 S.E.2d 778 (2006); Poor v. Hill, 138 N.C. App. 19, 26, 530 S.E.2d 838, 845 (2000). Here, Plaintiff alleges the existence of a valid contract (Doc. No. 1-2 at ¶ 3), which Defendant does not appear to dispute, and attaches a copy of the Contract to the Complaint. (Id. at 18). Plaintiff also alleges how Defendant breached the following contract term:

After completion of the purchase of the above lots, 1st Choice will have the option to purchase any of the remaining lots at $23,750 each, as they may be available for sale within the next 24 months. Those lots are 119 Stones Edge Rd, 149 & 153 Gemstone Drive, 126, 130 & 138 Zircon, 106, 124, 159, 189, 147, 193 & 205

(Doc. No. 1-2 at ¶ 3). Plaintiff provides details about contacting to exercise (Id. at ¶¶ 3, 5), and that during the 24[-] Id. at ¶¶ 6-8).

Defendant suggests it is more complicated that a simple breach of contract analysis. In its motion to dismiss, Defendant devotes its argument to establishing that the Contract at issue created

2 Both parties agree that North Carolina law applies. (Doc. No. 4-1 and Doc. No. 10). a right of first refusal rather than an option to purchase. 3

(Doc. No. 4-1). Defendant argues that until it made the lots available for sale, Plaintiff had no rights under the Contract or recourse to the Court. as informing Plaintiff that the lots were not for sale. Id. at 2, 5. Plaintiff disputes Contract is an option contract based on the language in the contract 4

(Doc. No. 10).

The essential elements of an option to purchase contract are: (1) a present offer to sell property that is described with reasonable certainty; (2) the offer to sell stipulates a fixed price to be paid for the property; (3) the offer to sell is made irrevocable for a stated period of time; and (4) the offer is a binding promise on the seller because the buyer gave some consideration in return for the promise of irrevocability. Carmon v. Cunningham, 161 N.C. App. 741, 590 S.E. 2d 23 (2003) (citing Kidd v. Early Complaint includes allegations in support by detailing the contract provision describing the properties, noting the

3 Defendant relies on a Maryland decision that does not apply North Carolina law, Paccar, Inc. v. Elliot Wilson Capitol Trucks, LLC nct from an option: an option can compel a sale by the unwilling owner, whereas a right holder only has the right to receive an her th Carolina cases, New Bar P ship v. Martin, 221 N.C. App. 302, 729 S.E. 2d 675 (2012) and Smith v. Mitchell, 301 N.C. 58, 269 S.E. 2d 608 (1980) Mitchell, 301 N.C. at 61, 269 S.E. 2d at 610- 11. While a helpful restatement of the law, the cases address factually different circumstances than the ones presented here. 4 At this early stage, the undersigned makes no ultimate finding on whether the Contract is an option contract or a right of first refusal. Both parties urge the Court that the language is unambiguous, but by the same token take different The undersigned has considered these opposing scenarios, but still finds that Plaintiff has plausibly stated a claim based on allegations in the Complaint construed in a light most favorable to the Plaintiff. This disputed issue would be better suited for decision after additional discovery and further development of the case. See DFA Dairy Brands, LLC v. Primus Builders, Inc., No. 5:21-CV-00026-KDG-DSC, 2021 WL 5826785, at *3 (W.D.N.C. Dec. 8, 2021) (citing Homeland Training Ctr., LLC v. Summit Point Auto. Research Ctr., 594 F.3d 285, 290 (4th Cir. 2010) and IWTMM, Inc. v. Forest Hills Rest Home, 156 N.C. App. 556, 563, 577 S.E.2d 175, 179-80 (2003)). agreed price of $23,750, referencing the 24-month period, and that consideration was given by the closing of the four original properties for $95,000.

Further, it is well- performance of an act in the future renounces its duty under the agreement and declares its

intention not to perform it, the promisee may treat the renunciation as a breach and sue at once for Gupton v. Son-Lan Dev. Co., 205 N.C. App. 133, 139, 695 S.E.2d 763, 768 (2010) (quoting Allen v. Weyerhaeuser, Inc., 95 N.C. App. 205, 209, 381 S.E.2d 824, 827 (1989)). order to maintain [such] a claim for anticipatory [repudiation], the words or conduct evidencing

the renunciation or breach must be a positive, distinct, unequivocal, and absolute refusal to perform the contract when the time fixed for it Id. of the contract . . . even though it takes place long before the time prescribed for the promised

Gupton, 205 N.C. App. at 140, 695 S.E.2d at 769 (quoting 9 Arthur L. Corbin, Corbin on Contracts § 959 (1951, interim ed. renewed 1979)).

Also, when a party, whose obligation it is to fulfill a condition precedent contained in a contract, clearly repudiates his obligation to act in good faith and ensure that reasonable efforts are taken to fulfill the condition, the other party acquires rights under the contract and may sue to enforce those rights. Id. (citing Carson v. Grassmann, 182 N.C. App. 521, 525, 642 S.E.2d 537, disc. review denied, 361 N.C. 426, 648

S.E.2d 207 (2007); Weyerhaeuser Co. v. Godwin Bldg. Supply Co., 40 N.C. App. 743, 746, 253 s obligation [is] condition [ed] upon obtaining reasonable efforts to).

In the instant case, Plaintiff statement in an email that (Doc. No. 1-2 at ¶ 6). Instead, Defendant Id. Id. As pled, this amounted to an anticipatory

5

Gupton, 205 N.C. App. at 139-40, 695 S.E.2d at 768-69; Allen, 95 N.C. App. at 209, 381 S.E.2d at 827. For these reasons, the Court finds that 6

III. RECOMMENDATION FOR THE FOREGOING REASONS, the undersigned respectfully recommends that Defendant s Motion to Dismiss (Doc. No. 4) be DENIED.

IV. TIME FOR OBJECTIONS The parties are hereby advised that, pursuant to 28 U.S.C. § 636(b)(1)(C) and Rule 72 of the Federal Rules of Civil Procedure, written objections to the proposed findings of fact, conclusions of law, and recommendation contained in this Memorandum must be filed within fourteen days after service of same. Failure to file objections to this Memorandum with the Court constitutes a waiver of the right to de novo review by the District Judge. Diamond v. Colonial

5 Also similar to Gupton, anticipatory repudiation was not expressly pled (i.e., the words were not used), but instead centered on a breach of contract claim. The court noted this was not fatal where the complaint alleged facts sufficient to support anticipatory repudiation, as is the case here. Gupton, 205 N.C. App. at 139, n.1, 695 S.E.2d at 768, n.1 (citations omitted). 6 Plaintiff also attaches documents to its brief, including a warranty deed noting a conveyance of one of the properties at issue and Zillow listings, indicating that Defendant has sold one of the lots and is in the process of selling others. Plaintiff urges the Court to take judicial notice, but Defendant opposes. The undersigned has found ample factual information. Life & Acc. Ins. Co., 416 F.3d 310, 315-16 (4th Cir. 2005). Moreover, failure to file timely objections will preclude the parties from raising such objections on appeal. Id. to preserve for appeal an issue in a magistrate judge s report, a party must object to the finding or recommendation on that issue with sufficient specificity so as reasonably to alert the district court of the true ground for the objection. Martin v. Duffy, 858 F.3d 239, 245 (4th Cir. 2017) (quoting United States v. Midgette, 478 F.3d 616, 622 (4th Cir. 2007)). The Clerk is directed to send copies of this Memorandum and Recommendation to the parties counsel and to the Honorable Kenneth D. Bell.

SO RECOMMENDED.

Signed: October 11, 2023