STATE OF VERMONT

SUPERIOR COURT
Franklin Unit

CIVIL DIVISION
Docket Nos. 22-CV-00547;
22-CV-04537

ERIC J. NYE II,
Plaintiff,

v.

BOISSONNEAULT FAMILY FARM, INC,
Defendant.

In these consolidated cases, Plaintiff Eric Nye seeks to evict Defendant Boissonneault Family Farm, Inc. (BFFI) from property located in Georgia, Vermont. BFFI counterclaims, seeking a declaration that it has a right of first refusal on the property. Mr. Nye moves for summary judgment on the counterclaim. The court denies the motion.

Under Rule 56, the initial burden falls on the moving party to show an absence of dispute of material fact. *E.g.*, *Couture v. Trainer*, 2017 VT 73, ¶ 9, 205 Vt. 319 (citing V.R.C.P. 56(a)). When the moving party has made that showing, the burden shifts to the non-moving party; that party may not rest on mere allegations, but must come forward with evidence that raises a dispute as to the facts in issue. *E.g.*, *Clayton v. Unsworth*, 2010 VT 84, ¶ 16, 188 Vt. 432 (citing *Alpstetten Ass'n, Inc. v. Kelly*, 137 Vt. 508, 514 (1979)). Where that party bears the burden of proof on an issue, if fairly challenged by the motion papers, it must come forward with evidence sufficient to meet its burden of proof on that issue. *E.g.*, *Burgess v. Lamoille Housing P'Ship*, 2016 VT 31, ¶ 17, 201 Vt. 450 (citing *Poplaski v. Lamphere*, 152 Vt. 251, 254–55 (1989)). The evidence, on either side, must be admissible. *See* V.R.C.P. 56(c)(6); *Gross v. Turner*, 2018 VT 80, ¶ 8, 208 Vt. 112 ("Once a claim is challenged by a properly supported motion for summary judgment, the nonmoving party may not rest upon the allegations in the pleadings, but must come forward with admissible evidence to raise a dispute regarding the facts."). The court must give the non-moving party the benefit of all reasonable doubts and inferences. *Carr v. Peerless Ins. Co.*, 168 Vt. 465, 476 (1998). Thus, "[i]n determining the existence of genuine issues of

material fact, courts must accept as true the allegations made in opposition to the motion for summary judgment, so long as they are supported by affidavits or other evidentiary material." *Gates v. Mack Molding Co.*, 2022 VT 24, ¶ 13, 279 A.3d 656 (quotation omitted).

Viewed through this lens, the parties' motion papers establish that were this case to proceed to trial, BFFI has admissible evidence sufficient to prove the following narrative. In 2007 BFFI and Mr. Nye's mother entered into a written lease with respect to the property at issue here. Mr. Nye acted as his mother's agent with respect to the lease. The lease was for a one-year term; thereafter, BFFI continued to occupy and farm the property pursuant to an oral lease.

In late August 2010, the parties had a meeting at the property concerning BFFI's request to discuss the cost of repairing broken concrete floors of the corn bunk and haylage bunk on the property; evidently, Mr. Nye participated as his mother's agent. BFFI did not want to incur the expense of repairing feed bunks on a rented farm. It offered to pay for the repair if Mr. Nye would agree to give a right of first refusal to purchase the property once he had inherited it after his mother's death. Mr. Nye agreed. In reliance on this agreement, BFFI then made substantial investments to improve the farm property. After applying government grant funds, BFFI's net investment exceeded $100,000. The agreement, however, was never reduced to writing.

It bears noting that Mr. Nye does not admit many of these facts; most remain the subject of genuine dispute. Instead, Mr. Nye argues that even were these facts proven, they would not support BFFI's claim to a right of first refusal. While he is correct as a matter of law, he is wrong as a matter of equity.

At law, it is clear that a right of first refusal must be in writing to be enforceable. "In general, a contract for the sale of lands is controlled by the Statute of Frauds and must be in writing to be enforceable." *In re Estate of Gorton*, 167 Vt. 357, 361 (1997). The requirement of a writing is set forth in 12 V.S.A. § 181:

> An action at law shall not be brought in the following cases unless the promise, contract, or agreement upon which such action is brought or some memorandum or note thereof is in writing, signed by the party to be charged therewith or by some person thereunto by him or her lawfully authorized: . . .
>
> (5) A contract for the sale of lands, tenements, or hereditaments, or of an interest in or concerning them. . . .

Similarly, under 27 V.S.A. § 302,

> [e]states or interests in lands, created or conveyed without an instrument in writing shall have the effect of estates at will only. An estate or interest in lands shall not be assigned, granted, or surrendered unless by operation of law or by a writing signed by the grantor or his or her attorney.

The Supreme Court has extended the reach of these provisions beyond simple purchase and sale contracts. For example, in *McGuirk v. Ward*, the Supreme Court held that an option to purchase real estate involves an "interest in" property, is a contract that falls within the Statute of Frauds, and therefore must be in writing. 115 Vt. 221, 224 (1947). Likewise, in *Rappaport v. Banfield*, the Supreme Court indicated that a right of first refusal deeded with respect to one lot did not extend to an alleged oral right to purchase adjacent parcels because the asserted oral agreement was barred by the Statute of Frauds. 2007 VT 25, ¶ 13, 181 Vt. 447. Thus, the absence of any writing indicating the existence of a right of first refusal appears presumptively fatal to Boissonneault Farm's counterclaim. *Cf.* Lease § 15.3 (appended to Complaint as Exhibit A) ("This Lease may be modified in writing only, signed by the parties in interests at the time of modification.").

Equity, however, recognizes an exception to the statute of frauds "where a party demonstrates that he or she is equitably entitled to the claimed interest in land." *Rappaport*, 2007 VT 25, ¶ 13. "An oral agreement may be removed from the Statute of Frauds contained in 12 V.S.A. § 181 if the proponent can show that, in reliance on the agreement, he or she suffered a substantial and irretrievable change in position." *Quenneville v. Buttolph*, 2003 VT 82, ¶ 18, 175 Vt. 444 (citation and quotation marks omitted). "In such cases, enforcement is justified on the ground that repudiation by one party after the other has fully performed amounts to virtual fraud." *Rappaport*, 2007 VT 25, ¶ 13 (editing and quotation marks omitted).

To fall within this exception, a party must show:

> (1) there was an oral agreement (2) upon which he reasonably relied (3) by changing his position so that he cannot be returned to his former position, and (4) the other party knew of such reliance.

Id. ¶ 14. Put another way, the party seeking enforcement of an oral agreement must demonstrate a "substantial and irretrievable change in position in reliance on the agreement." *In re Estate of Gorton*, 167 Vt. 357, 362. "[F]ull performance by one party in reliance on the agreement may support equitable enforcement where the parties cannot be returned to their former position." *Id*

Here, the parties dispute the threshold question: whether there was an oral agreement. This is clearly a genuine dispute; indeed, Mr. Nye effectively concedes that this question cannot be resolved on summary judgment. Instead, he asserted at argument on this motion that BFFI cannot prove that it reasonably relied on any such agreement in making expenditures it was already obligated to make under the lease. The second part of this argument—that BFFI was obligated to make various capital expenditures—is easily debunked. Under the lease, BFFI was obligated only to maintain structural portions of the farm property in their current condition. Moreover, while it allowed BFFI to make capital improvements, the lease provided that at the termination of the lease, any such improvements would remain the property of the owner. Before investing substantial sums in such improvements, therefore, BFFI might reasonably have sought some assurance in the form of a right of first refusal. Given the parties' long-term relationship and BFFI's substantial expenditures, it remains for the trier of fact to determine whether the circumstances in this case show that these parties entered into the alleged oral agreement. *See Island Industrial, LLC v. Town of Grand Isle*, 2021 VT 49, ¶ 39, 215 Vt. 162 (discussing promissory estoppel and reliance damages); *cf. Gorton*, 167 Vt. at 363-64 (specific performance and transfer of land allowed where, *inter alia,* appellants (1) left their jobs and changed their lifestyle, and (2) fully performed oral agreement that they would receive farmland if they cared for deceased until her death).

The Supreme Court's decision in *Quenneville v. Buttolph* is instructive in this regard. There, the Court outlined facts similar to those asserted (and supported by admissible evidence) here:

> In the case at bar, the Quennevilles had possession of the land. They moved their herd of 400 cows from New York to the Buttolphs farm in Shoreham. The trial court found that the Quennevilles made improvements and repairs to the farm property in reliance on the oral agreement for purchase of the farm . . . .These improvements included: installing a new furnace in the house for the farmhands; upgrading the milking parlor substantially by changing motors, installing automatic takeoffs on the milking system and fixing the air compressor, water leaks, and crowd gate rails; removing debris, wood, and dead animals; and repairing the overflowing manure pit and the drainage to the fields. The trial court found that the Quennevilles undertook these repairs with the understanding that they would be purchasing the property.

2003 VT 82 ¶ 19. Accordingly, the Supreme Court affirmed the conclusion that "the Quennevilles, in reliance on the agreement to purchase, suffered a substantial and irretrievable change in position," and so upheld the trial court's award of specific performance. *Id.* ¶ 21.

Here, BFFI made improvements similar to those noted in *Quenneville*. It performed the work and incurred the attendant expenses in asserted reliance on the oral agreement to grant a right of first refusal. While BFFI took possession of the property several years before the alleged agreement, its evidence would suggest that it then made substantial capital improvements, incurring significant expense, in reliance on the agreement. Such facts, if proven, ultimately may support BFFI's claim for equitable relief. *Cf. Howrigan v. Paradis*, 2018 WL 722594, * 2 (Vt. Feb. 2, 2018) (unpublished mem.) (noting trial court found oral option to purchase enforceable where "plaintiffs had made substantial changes in their family agriculture business in reliance on the oral option").

While these observations suffice to defeat Mr. Nye's motion, in the interest of focusing the parties' efforts going forward, the court addresses two issues suggested by comments of Mr. Nye's counsel at oral argument but not briefed by either party. At the hearing on the motion, counsel suggested that any reliance by BFFI on Mr. Nye's alleged promise could not be reasonable because at the time he had at best an expectancy interest in the farm property. The facts surrounding that interest, beyond the obvious reality that it would become choate only upon his mother's death, appear nowhere in the parties' papers; equally, the papers are completely silent on BFFI's knowledge and understanding in that regard. Relatedly, the parties' briefing does not address the impact of Mr. Nye's role—when making the alleged promise—as agent for his mother in lease negotiations on the subsequent enforcement of the promise against him in an individual capacity. These issues therefore remain for later resolution.

ORDER

The court denies Mr. Nye's motion for summary judgment. The parties shall submit a stipulated discovery/ADR schedule and order within 30 days.

Electronically signed pursuant to V.R.E.F. 9(d): 5/2/2023 1:01 PM

Samuel Hoar, Jr.
Superior Court Judge