SUPERIOR COURT
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CIVIL DIVISION
Case No. 21-CV-03725

Mike Kinahan v. Dominick Gulli et al

Corrected Opinion and Order on Cross Motions for Summary Judgment

The instant matter comes before the Court on cross-motions for summary judgment concerning the sale of real property. In the complaint, Plaintiff Mike Kinahan seeks specific performance of a purchase and sale agreement with Defendants Dominick and Melissa Gulli. Defendants move for summary judgment arguing that the purchase and sale agreement is void. They also maintain that Plaintiff was required to engage in mediation prior to bringing suit. Plaintiff opposes the motion and argues that he is entitled to summary judgment under the terms of the purchase and sale agreement and requests specific performance thereof.

On April 27, 2023, the Court heard argument on the motions. Plaintiff appeared through Attorney Melvin Fink; Defendants appeared through Attorneys Joel Iannuzzi and Thomas Aicher. The Court afforded the parties an opportunity to submit post-hearing memoranda regarding the application of a Vermont Supreme Court case. Based on the submissions and arguments of the parties, the Court makes the following determinations.

Legal Standard

"Summary judgment is appropriate when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law." *In re Hemingway*, 2014 VT 42, ¶ 7, 196 Vt. 384, 388; Vt. R. Civ. P. 56(a). The Court derives the undisputed facts from the parties' statements of facts submitted pursuant to Rule 56, and the supporting documents. *Boulton v. CLD Consulting Engineers, Inc.*, 2003 VT 72, ¶ 29, 175 Vt. 413. The movant has the burden of proof, and the opposing party must be given the benefit of all reasonable doubts and inferences in determining whether a genuine issue of material fact exists. *Price v. Leland*, 149 Vt. 518 (1988). Where, as here, there are cross-motions for summary judgment, "both parties are entitled to the benefit of all reasonable doubts and inferences." *Montgomery v. Devoid*, 2006 VT 127, ¶ 9, 181 Vt. 154, 156.

Undisputed Material Facts

The parties do not dispute the relevant material facts. On or about November 21, 2000, Defendants' parents, Nicholas and Barbara Gulli, executed Quit Claim Deeds granting title to parcels of contiguous land (collectively "the Property"). Nicholas and Barbara deeded an undivided one-half interest to themselves as tenants-by-the-entirety. Dominick received an undivided one-quarter interest; Melissa received the remaining undivided quarter interest. On February 14, 2005, Nicholas died. By operation of law, his ownership rights to the Property transferred to Barbara.

On October 19, 2020, Barbara, Dominick, and Melissa executed an Exclusive Right to Market Agreement with a realty company to list the Property. In May 2021, Barbara passed, and her property interest transferred to her estate ("the Estate"). Prior to September 24, 2021, the Estate had not issued any authorization for the right to market, negotiate, offer, accept, or facilitate a sale of its interest in the Property.

On or about September 24, 2021, Plaintiff entered a Purchase and Sale Contract ("PSA") with Dominick and Melissa to purchase the Property in total. At issue is the following clause:

> **Purchaser's Examination of Title:** Purchaser, at his or her sole cost and expense, shall cause the title to the Property be examined and shall notify Seller in Writing, prior to the date set for Closing, of the existence of any encumbrances or defects which are not excepted in this Contract which render title unmarketable as defined by Vermont law. In such event, Seller shall have thirty (30) calendar days from the time Seller receives such notice to remove the specified encumbrances or defects. Promptly following receipt of such notice, Seller shall exercise reasonable efforts and diligence to remove or cure the specified encumbrances or defects. If, at the expiration of thirty (30) calendar days from the receipt of such notice, or on the date set for Closing, whichever is later, Seller is unable to convey marketable title free and clear of such encumbrances or defects, Purchaser may terminate this Contract, and, if so, shall receive all Contract Deposits and, in addition, may pursue all legal and equitable remedies provided by law, including damages incurred after the thirty (30) day period referred to above.

Pl.'s Exh. 1, ¶ 19 (filed Nov. 22, 2021). Later that week, Defendants asked Plaintiff to increase the price to meet a higher offer they had received. Plaintiff declined and advised that he intended to proceed with the sale at the PSA price.

On October 6, 2021, Plaintiff first raised the issue of ownership and the need for the sale to include action on behalf of the Estate. On October 19, 2021, Defendants advised the realty company they would not be selling the Property to Plaintiff. On October 23, 2021, Plaintiff notified Defendants that it would bring suit if the transaction was not completed.

The PSA also contains a mandatory Mediation of Disputes clause which states, in relevant part:

> In the event of any dispute or claim arising out of or relating to this Contract, to the Property, or to the services provided to Seller or Purchaser by any real estate agent who brought about this Contract, it is agreed that such dispute or claim shall be submitted to mediation prior to the initiation of any lawsuit. The party seeking to mediate such dispute or claim shall provide notice to the other party and/or to the real estate agent(s) with whom mediation is sought and thereafter the parties and/or real estate broker(s) with whom mediation is sought shall reasonably cooperate and agree on the selection of a mediator…. This provision shall be in addition to, and not in replacement of, any mediation or alternative dispute resolution system required by an order or rule of court in the event the dispute results in a lawsuit. In the event a lawsuit is initiated without first resorting to mediation as required by this Section, any party or real estate agent named in Section 31 of this Contract shall be entitled to reimbursement of the reasonable cost of attorney's fees or other expenses arising out of such lawsuit until the mediation required by this Section occurs.

Pl.'s Exh. 1, ¶ 23.

At the time of notice, Plaintiff did not demand mediation. On November 15, 2021, Plaintiff, again, notified Defendants of his intent to enforce the PSA through a lawsuit. Defendants returned Plaintiff's deposit and ceased communications. On November 22, 2021, Plaintiff brought this action seeking specific performance and did not demand mediation prior to commencing litigation.

On December 13, 2021, Defendants petitioned the Probate Division to open Barbara's Estate. On December 16, 2021, the Probate Division appointed Melissa as Executor to Barbara's Estate, pursuant to Barbara's will. The relevant portion of the will gives Melissa authority to "sell real estate as well as personal property as he in his sole discretion deems to be appropriate." Dominick and Melissa are the sole beneficiaries to the Estate.

Analysis

On summary judgment, Defendants argue that the PSA is unenforceable for failure to include a necessary party. Defendants further contend that the ownership issue here is not a title defect within the meaning of the PSA's Purchaser's Examination of Title clause. Alternatively, Defendants assert that, if the contract is enforceable, they are entitled to attorney's fees under the PSA for Plaintiff's failure to pursue mediation as required by the PSA's mandatory mediation provision.

Plaintiff argues that he is entitled to specific performance because the PSA expressly requires Defendants to cure title defects under the Purchaser's Examination of Title clause. Further, Plaintiff maintains that the ownership interest issue constitutes a title defect under that clause. As such, the PSA obligates Defendants, as legal and equitable owners of the Property, to perform under the contract. Plaintiff opposes Defendants' alternative argument for attorney's fees by arguing mediation was futile. The Court addresses each argument in turn.

1. The Purchase and Sale Agreement

Defendants argue that the PSA is unenforceable. According to Defendants, the failure to include the Estate is fatal to enforcing the PSA because Defendants lacked the necessary control over the Estate's interest when the parties entered the PSA.[1] The Court is unpersuaded for two reasons.

First, the plain language of the Purchaser's Examination of Title clause demonstrates the parties' intent to contract even if present control over the Property is not fully determined. "A contract must be interpreted according to the parties' intent as expressed in the writing." *Sutton v. Purzycki*, 20222 VT 56, ¶ 37 (quoting *Lussier v. Lussier*, 174 Vt. 454, 455 (2002) (mem.) (internal quotations omitted)). "The court must accept the plain meaning of the language and not look to construction aids if the language is not ambiguous." *City of Newport v. Village of Derby Ctr.*, 2014 VT 108, ¶ 14, 197 Vt. 560, 569 (quotation and brackets omitted).

The relevant portion of the PSA contemplates the possibility that title could be unmarketable in a manner not presently known to the parties by requiring Plaintiff to examine and notify Defendants of defects "which render title unmarketable as defined by Vermont law." Pl.'s Exh. 1. "Marketable title is defined as title that will enable the purchaser to hold the land purchased free from

[1] Defendants have characterized this argument as challenging their "capacity" to form a valid contract over the Property's disposition. Capacity, as used in contract law, typically refers to the requisite mental capability to enter a contract under the circumstances. *See* Restatement (Second) of Contracts § 12 (1981). Defendants' argument is better characterized as a challenge to whether a contract is void when one of the parties cannot exercise control over the contracted property at formation. *See* Defs' Mot. for Summ J, at 3–4 (filed Sep. 14, 2022).

the probable claim by another, a title which, if he wished to sell, would be reasonably free from doubt." *Trinder v. Connecticut Attorneys Title Ins. Co.*, 2011 VT 46, ¶ 16, 189 Vt. 492, 499 (quoting *First Nat'l Bank of St. Johnsbury v. Laperle*, 117 Vt. 144, 157 (1952) (internal quotations omitted).

The clause provides an avenue for Defendants to cure if a challenge to title becomes present during the life of the agreement, and the other party elects to proceed with the deal. *Id.* ("In such event, Seller shall have thirty (30) calendar days from the time Seller receives such notice to remove the specified encumbrances or defects"). The language agreed to by the parties in forming this contract contemplated the possibility of then-unknown challenges to marketability and obliges the sellers, Defendants, to remove those defects. "[W]e take the words to represent the parties' intent, and the plain meaning of the language governs our interpretation of the contract." *Southwick v. City of Rutland*, 2011 VT 105, ¶ 5, 190 Vt. 324, 327 (citation omitted). Thus, the parties intended to contract for the purchase and sale of the Property and provided a process to cure marketability if challenged by another interest. Such is the case here.

Second, although the parties joust about passage of legal and equitable title, the Court concludes that, at Barbara Gulli's death, Defendants immediately held legal title to the property even though the Estate exercises selling authority through Melissa pursuant to Barbara's Will. "Under our law, the legal title of real estate owned by a person at the time of death passes *immediately to his heirs or devisees*, subject to the lien of the administrator or executor thereon for the payment

of debts[.]" *In re Callahan*, 115 Vt. 128, 134 (1947) (emphasis added). Indeed, "immediate passage occurs when the devisees and their real estate are identified but cannot apply when either is yet unknown." *In re Fitzsimmons*, 2013 VT 95, ¶ 28, 195 Vt. 94, 108. "At the time of death, the heir has a possibility coupled with a vested interest, *a property right which the heir can sell or assign*." *Lysak v. Grull*, 174 Vt. 523, 525 (2002) (emphasis added). "However, until such time as the estate is probated, and the debts of the estate are settled, the heir cannot demand either title to or possession of the property." *Id*.

Under this case's unusual posture, Defendants hold legal title as the only defined beneficiaries of the Estate.[2] But, Defendants cannot demand immediate possession until debts of the Estate are settled. In no fashion does this limit Defendants' ability to contract over property to which they hold legal title, however. Nor do Defendants advance any persuasive authority to support that notion. Under these facts, Defendants have the obligation to take steps to cure under the PSA's curing clause and the authority under Barbara's Last Will and Testament to take such steps. The need to engage in such actions does not present a bar to entering a valid enforceable contract. *See Villeneuve v. Bovat*, 128 Vt. 345, 348 (1970) "handicaps to performance, not amounting to impossibilities, do not bar [specific performance] sought here.").

[2] Defendants argue that Barbara's Will fails to identify either Defendant as an heir entitled to the proceeds of the property sale. Defendants concede, however, that they are the sole heirs and beneficiaries of Barbara's Will. Defs' Response to Pl's Additional SUMF, ¶ 4 (filed Oct. 12, 2022).

2. Title Defect

Defendants next argue that even if the PSA is enforceable, the Estate's interest in the Property is not a "defect." For authority, Defendants cite to the Wisconsin Supreme Court, which identified four types of title defects: (1) defects in the chain of title; (2) lack of record title because the seller claims ownership through adverse possession; (3) lack of title in the seller because a third-party claims adverse possession against the seller; and (4) encumbrances. *First Am. Title Ins. Co. v. Dahlmann*, 2006 WI 65, ¶ 14, 291 Wis. 2d 156 (citing 14 Michael Allan Wolf, *Powell on Real Property* § 81.03[6][d], at 81–126 to 81–127 (2000). Defendants contend that the Estate's interest does not fit within any of these categories and, therefore, the PSA does not require Defendants to cure. This argument is unavailing.

Dahlmann defined title defect as "a claim or interest that is inconsistent with the title purportedly transferred." *Id.* The Estate's interest, as characterized by Defendants, is exactly that—the Estate exercises a fifty percent interest in the Property. Moreover, *Dahlmann* identifies "defects in the chain of title" as a title defect. *Id.* The Estate's interest is inconsistent with the marketable title Defendants contracted to sell. This conclusion is further supported by the language of the agreement. The PSA identifies defects as those "which render title unmarketable as defined by Vermont law." Pl.'s Exh. 1, ¶ 19. As discussed previously, the Estate's interest frustrates the Property's marketability under Vermont law. In the Court's view, the PSA contemplates the type of defect alleged

by Plaintiff since marketability is reasonably challenged by a nonparty to the contract.

3. Mediation

Finally, Defendants argue that if the PSA is enforceable and if the Estate's interest is a defect under the agreement, they are entitled to reasonable attorney's fees under the PSA for Plaintiff's failure to mediate prior to commencing litigation. Plaintiff does not dispute that he was required to mediate under the PSA, nor does he dispute that he did not comply with the mediation clause. Instead, Plaintiff responds that when he commenced litigation, mediation was futile.

The Vermont Supreme Court has held that a party is not required "to do an act which had been rendered futile by the conduct of the defendant." *Deno v. Thomas*, 64 Vt. 358 (1892); s*ee State v. Tribble*, 2012 VT 105, ¶ 30, 193 Vt. 194, 211 (quoting *Ohio v. Roberts*, 448 U.S. 56, 74–75 (1980) (overruled on other grounds by *Crawford v. Washington*, 541 U.S. 36 (2004)). Vermont public policy, however, also strongly favors mediation and arbitration. *See LaFrance Architect v. Point Five Development South Burlington, LLC*, 2013 VT 115, ¶ 23, 195 Vt. 543, 554 (2013).

In this case, the PSA contains the full intent and agreement of the parties. The PSA's plain language requires mediation in "the event of any dispute or claim arising out of or relating to this Contract, to the Property, or to the services provided to Seller[.]" Pl.'s Exh. 1, ¶ 23. Plaintiff's argument that Defendants acted inconsistently with the PSA and that demonstrates the futility of demanding mediation is unpersuasive. Defendants disputed whether the contract had been

formed and, on that basis, indicated their unwillingness to proceed with the sale, but such a dispute can still be mediated. *See Wark v. Zucker*, 2021 VT 37, ¶ 18, 214 Vt. 605, 612 ("A mediation clause certainly *may* require parties to mediate a dispute relating to the validity of a contract." (emphasis in original)).

Here, the mediation clause required the parties to submit *any* dispute arising or relating to the contract to mediation. That clause would include a dispute as to whether the contract was valid. *See Wark*, 2021 VT 37, ¶ 16, 214 Vt. 605, 611 (discussing cases where arbitration clauses survive termination of contracts); *see also Margolis v. Daily Direct LLC,* 2023 VT 20, ¶ 9 (Vt. Apr. 14, 2023) (contract clause addressing how disputes are to be litigated is binding despite allegations of anticipatory repudiation by other party). That conclusion is especially true where, as here, the person seeking to avoid mediation contract term is also the person seeking to enforce the contract.

The Court simply cannot conclude that demanding mediation under the PSA would have been futile because: (a) it would be in direct derogation of the terms of the PSA, and (b) it would require the Court to engage in speculation. Neither party can say whether Defendants would have agreed to mediation if asked, but the PSA required Plaintiff to ask, and he did not. Further, excusing compliance with such a clause on grounds of futility disregards an entire alternative dispute process that may have terminated the need for this litigation before it began. Mediation is designed to allow a neutral third party to provide guidance, thoughts, and advice to the parties. That may have impacted how one side or the other saw the case. Or, a

mediator may have suggested some alternative proposals that might have resolved the matter along lines not considered by the parties or their counsel. In any event, the Court is unwilling to endorse Plaintiff's *post-hoc* view that such a process did not need to be requested and had absolutely no possibility of success.

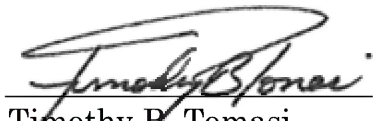
Accordingly, under the PSA agreed to by the parties, Defendants are entitled to reasonable attorney's fees.

Conclusion

For the foregoing reasons, Defendants' Motion for Summary Judgment is denied, in part, and granted, in part. Plaintiff's Cross-Motion for Summary Judgment for specific performance of the PSA is granted. Defendants are required to take reasonable and diligent steps to cure the defect noted above. The Court understands those steps will require action by them in the Probate Court. The Court expresses no view on that process.

The Court encourages the parties to confer regarding possible resolutions and next steps in light of the impacts to both sides of the Court's ruling. To the extent that process is not fruitful and the claim for attorney's fees remains applicable, Defendants shall submit an adequately supported request for fees within 30 days.

Electronically signed on July 26, 2023, pursuant to V.R.E.F. 9(d).



Timothy B. Tomasi
Superior Court Judge