

No. 1-09-2948

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JEROME W. BISON and EFTYCHIA BISON,)	Appeal from
)	the Circuit Court
Plaintiffs-Appellants,)	of Cook County
)	
v.)	
)	No. 03 CH 8151
INVSCO GROUP, LTD., a/k/a American Invsco;)	
and MILLENNIUM CENTRE, LLC,)	Honorable
)	LeRoy Martin,
Defendants-Appellees.)	Judge Presiding.

JUSTICE CAHILL delivered the judgment of the court.
Presiding Justice Garcia and Justice R.E. Gordon concurred in the judgment.

ORDER

Held: Trial court properly granted defendants' motion for summary judgment on plaintiffs' breach of contract action where plaintiffs could not establish the existence of a written enforceable real estate sales contract to overcome the requirement of the Illinois statute of frauds.

Plaintiffs Jerome and Eftychia Bison (also known as Eftychia Leissos) appeal summary judgment on their breach of contract complaint entered in favor of defendants Invsco Group,

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Ltd., also known as American Invsco (Invsco), and Millennium Centre, LLC (MCLLC). We affirm.

In 1996, Jerome Bison purchased 20 units of a membership interest in Sedgwick House, LLC, from Invsco for an agreed purchase price of \$200,000. Sedgwick House, LLC was an affiliate of Invsco and in charge of developing a real estate project known as Sedgwick House. After that transaction, Jerome was in contact with Nicholas S. Gouletas, an Invsco officer. Gouletas told Jerome about Millennium Centre Tower, a preconstruction condominium development in Chicago that was being developed by MCLLC, an affiliate of Invsco.

On September 21, 2000, Jerome signed two “Reservation and Deposit Receipt[s]” for the purchase of condominium units 26-A and 50-A in Millennium Centre Tower. These documents were prepared by Richard Evans, a sales agent for Invsco. The reservation receipts included the following language:

“NOT AN OFFERING OR A CONTRACT. Purchaser and Seller understand that this Reservation is neither an offer to sell the referenced condominium unit(s), nor a contract for sale of the condominium unit(s). Purchaser and Seller understand and agree that this Reservation is not legally binding and each may only be bound by signing a contract, and may be canceled at any time by either Purchaser or Seller with or without cause and without penalties or damages of any nature.”

Neither Evans, Gouletas nor another of defendants’ agents signed the reservation receipts. On the same date, Jerome signed a “Rider for Assignment of Promissory Note as Earnest Money

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Deposit,” assigning a portion of his \$200,000 investment in Sedgwick House as a deposit for the purchase of the two units in Millennium Centre Tower. The record shows that at the end of the 2000 fiscal year, the value of Jerome’s investment in Sedgwick House was negative \$22,815. In 2001, the value of Jerome’s investment stayed constant at negative \$22,815.

On November 10, 2000, Jerome received a letter from Sharon Rizzo, Invsco’s executive sales manager. In that letter, Rizzo said that the marketing team for the residences at Millennium Centre Tower had moved into its new sales office and Rizzo invited Jerome to visit the office at his earliest convenience. Rizzo also said that “based on [the] sales strength, two price increases have already been put into effect” for the Millennium Centre project and that “we will be making appointments soon for selection of garage spaces, distribution of our federal disclosure report, and signing of the formal purchase agreements.”

Jerome testified in his deposition testimony that in December 2001, he went to the MCLLC sales office. While there he signed a “Condominium Purchase Agreement” for units 26-A and 48-A. There is no explanation in the record why Jerome reserved unit 50-A and signed a purchase agreement for unit 48-A. The purchase price of unit 26-A was \$413,000. The purchase price of unit 48-A was \$554,000. Jerome said he did not receive a copy of the signed purchase agreements because they remained in the MCLLC office “for their signatures.” Jerome acknowledged that no one from MCLLC signed either agreement and that he has never seen a fully executed copy of a purchase agreement for either unit. While there are copies of draft agreements for the two units, there is no purchase agreement signed by either party in the record. Each purchase agreement included the following language:

“Time for acceptance. This Condominium Purchase Agreement, when executed by Purchaser and delivered to Seller together with the aforesaid Earnest Money, shall constitute a firm, irrevocable offer to purchase the Purchased Unit(s) by Purchaser for a period of 15 days after the date of execution hereof by Purchaser. In the event Seller executes this Condominium Purchase Agreement and delivers a copy thereof to Purchaser within said 15 day period, the offer shall be deemed accepted and the Condominium Purchase Agreement made. *** If Seller rejects Purchaser’s offer, *** all deposits made shall be returned by Seller to Purchaser and the offer shall be deemed withdrawn.”

Jerome acknowledged in his deposition testimony that other than the \$200,000 he invested in the Sedgwick House project, he did not invest additional money in Millennium Centre. He said he considered Sedgwick House and Millennium Centre to be one transaction.

Some time after Jerome signed the purchase agreements, he received an undated letter from Evans. In that letter, Evans said that “[y]our properties, for which you paid \$413,000 and \$554,000 are priced today at \$517,800 and \$632,500.” Evans also said that there were still units available for purchase and asked Jerome if he had any interest, or knew someone who did, in purchasing a unit.

On April 25, 2002, Jerome received a letter from Maureen Ryan, director of design services for MCLLC. The letter was a “reminder that the time [was] rapidly approaching to finalize your interior finish selections for your home at Millennium Centre.” Ryan testified in her deposition testimony that the letter was sent out to purchasers who had signed a purchase

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agreement with the sales department. She said the letter was sent out in furtherance of a contract to purchase condominium units. On cross-examination, Ryan said that Invsco did not have a written policy that the letter was only to be sent after a purchase agreement was signed.

On May 1, 2002, Jerome went to the MCLLC sales office and signed an “Upgrade Options Rider to Condominium Purchase Agreement” for both unit 26-A and unit 48-A. Ryan testified in her deposition testimony that these documents would not be signed by persons who did not have a contract to purchase. Ryan’s assistant, Shawn Harrah, signed the rider. Jerome paid \$226.55 for the upgrades to unit 26-A and \$5,185.07 for upgrades to unit 48-A.

On August 5, 2002, Jerome received a letter from Invsco’s attorney, informing him that the Sedgwick House project did not go as planned and that there were insufficient funds to return investors’ initial investments to them. The attorney said “[b]ecause the return of your investment was limited to the performance of the project, my client is unable to grant you an interest in the Millennium project or any other project presently being undertaken by Home By Invsco or any of its subsidiaries or affiliates.” The attorney also said that Invsco would return the money Jerome paid for the upgrades to each unit. Jerome testified in his deposition testimony that he received refund checks for the money he spent on the upgrades. The units were later sold to third parties.

Plaintiffs filed a complaint against defendants on May 9, 2003. Plaintiffs amended the complaint on December 3, 2003, raising three causes of action against defendants: (1) accounting for Sedgwick House (count I); (2) specific performance of the terms of each condominium purchase agreement (count II); and (3) breach of contract of the condominium purchase agreements (count III). Plaintiffs voluntarily dismissed count I on July 13, 2006.

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Defendants filed an answer and raised section 2 of the Illinois Frauds Act (statute of frauds) (740 ILCS 80/2 (West 2006)) as an affirmative defense to counts II and III of plaintiffs' amended complaint. Defendants argued there was no enforceable contract between the parties because defendants never signed a written document for the sale of property as required by the statute of frauds. Plaintiffs moved to strike defendants' affirmative defense. The trial court denied the motion.

Defendants then moved for summary judgment, arguing that the two purchase agreements were not enforceable contracts under the statute of frauds because they were not signed by defendants, the party to be charged with the fraud. See 740 ILCS 80/2 (West 2006). In the alternative, defendants argued that Jerome lacked the consideration necessary to fund the purchase of the two condominium units because his assigned interest in the Sedgwick House project had no value at the time he signed the purchase agreements.

Plaintiffs responded, arguing that the statute of frauds did not bar their action for breach of contract because the signed correspondences they received from defendants' agents referencing the purchase agreements, taken together, established the existence of a contract for the purchase of the two condominium units. Plaintiffs also argued that they provided consideration for the purchase agreements in the form of a pledge of their \$200,000 investment in the Sedgwick House project. Plaintiffs attached the affidavit of their attorney Timothy Okal to their response to defendants' motion for summary judgment. Okal averred that he met with Evans and Rizzo in 2008 and was given an "Escrow Report" dated November 9, 2000, and the "Millennium Centre Tier Guide" dated November 8, 2001. The escrow report showed Jerome as

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the purchaser of units 26-A and 48-A. The tier guide was a graph of all building units and showed units 26-A and 48-A as reserved at the time Jerome alleged the units were under contract. The escrow report and tier guide were attached to the affidavit. Defendants filed a motion to strike Okal's affidavit.

After a hearing on defendants' motion for summary judgment, the trial court found the documents relied on by plaintiffs did not satisfy the statute of frauds and granted defendants' motion for summary judgment. The court noted that it was "troubled" by the lack of consideration or earnest monies to support a contract where the account assigned by Jerome as a deposit for the purchase of the two units was devoid of funds. The court also granted defendants' motion to strike Okal's affidavit. Plaintiffs appeal.

Summary judgment is appropriate if the pleadings, depositions and admissions on file show there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2006). Summary judgment is a drastic measure and should be allowed only when the right of the moving party is clear and free from doubt. *Mydlach v. DaimlerChrysler Corp.*, 226 Ill. 2d 307, 311, 875 N.E.2d 1047 (2007). We review *de novo* a trial court order granting summary judgment. *Mydlach*, 226 Ill. 2d at 311.

On appeal, plaintiffs argue: (1) their inability to produce a signed condominium purchase agreement did not bar their action under the statute of frauds because other documents signed by defendants established the existence of a contract; (2) the trial court erred in its analysis of the issue concerning the consideration plaintiffs paid to support the purchase agreement; (3) defendants' breach damaged them in an amount equal to the difference in sales price defendants

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received from the sale of each unit to third parties and the contract price at which each unit was offered to plaintiffs; and (4) the trial court erred in striking Okal's affidavit. Because we find plaintiffs' action barred by the statute of frauds, we need not consider the other arguments raised by them.

The statute of frauds provides:

“No action shall be brought to charge any person upon any contract for the sale of lands, tenements or hereditaments or any interest in or concerning them, for a longer term than one year, unless such contract or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized in writing, signed by such party.” 740 ILCS 80/2 (West 2006).

"Illinois courts have recognized that, to be enforceable, a real estate sales contract must: (1) be memorialized in a written document or documents; (2) contain a description of the property and the sales terms, including price and manner of payment; and (3) bear the signature of the party to be charged [with the fraud]." *Karris v. U.S. Equities Development, Inc.*, 376 Ill. App. 3d 544, 550, 876 N.E.2d 688 (2007) (citing *Hubble v. O'Connor*, 291 Ill. App. 3d 974, 983, 684 N.E.2d 816 (1997)).

Here, plaintiffs do not dispute that the purchase agreements for each condominium unit were not signed by defendants. Rather, they argue that the “memorandum or note” referred to in the statute of frauds may be composed of more than one document and it is not necessary that all those documents be signed by the party to be charged. Plaintiffs claim that the fact that they

could not produce a purchase agreement signed by defendants is immaterial because the signed correspondences they received from defendants' agents referencing the purchase agreements, taken together, amounted to a real estate sales contract. In support of this argument, plaintiffs rely on: (1) the November 10, 2000, letter from Rizzo, (2) the undated letter from Evans informing plaintiffs the two units they purchased had appreciated in value; (3) the April 25, 2002, letter from Ryan that was sent only to persons who had signed a purchase agreement; and (4) the upgrade options rider.

Before addressing the merits of this appeal, we again note that the record on appeal does not contain a purchase agreement signed by either party. It is the burden of the appellant to provide a record to allow for meaningful appellate review. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92, 459 N.E.2d 958 (1984); *Lewendowski v. Jelenski*, 401 Ill. App. 3d 893, 902, 929 N.E.2d 114 (2010). In the absence of a complete record, we resolve all insufficiencies apparent therein against the appellant and will presume that the trial court's ruling had a sufficient legal and factual basis. *Foutch*, 99 Ill. 2d at 391-92; *Lewendowski*, 401 Ill. App. 3d at 902.

Assuming plaintiffs signed the purchase agreements as they claim, there was no real estate sales contract formed between the parties. The purchase agreements expressly provided that "when executed by Purchaser and delivered to Seller" the purchase agreements "shall constitute a firm, irrevocable offer to purchase" condominium units. By signing the purchase agreements, plaintiffs made an offer to defendants to purchase the two condominium units. The record shows that defendants did not accept plaintiffs' offer. Under each purchase agreement, defendants had 15 days to execute the agreement and deliver it to plaintiffs before "the offer shall

be deemed accepted and the Condominium Purchase Agreement made.” Here, as acknowledged by plaintiffs, defendants did not execute either agreement. No contract is formed until there is an execution and delivery of a formal agreement where the parties’ intention is that they will not be legally bound until such execution and delivery of a formal document. *Karris*, 376 Ill. App. 3d at 551 (citing *Leekha v. Wentcher*, 224 Ill. App. 3d 342, 348, 586 N.E.2d 557 (1991)).

We are unpersuaded by plaintiffs’ argument that the signed correspondences they received from defendants, together with the unsigned purchase agreements, amounted to a real estate sales contract. The November 10, 2000, letter from Rizzo did not amount to an acceptance of plaintiffs’ offer. The letter was sent 13 months before Jerome signed the purchase agreements and said “we will be making appointments soon for *** signing of the formal purchase agreements.” Although Jerome later signed the agreements, as mentioned, defendants did not execute either agreement and did not accept his offer to purchase. Rather, in accordance with the agreements, defendants rejected the offer and ultimately refunded Jerome “all deposits” he made for the upgrades to the two units.

Evans’ undated letter to plaintiffs, referencing the condominium units as “your properties” and informing plaintiffs of the increase in value of each unit and that there were more units available, also does not amount to an acceptance of plaintiffs’ offer to purchase the condominium units. See *Prodromos v. Poulos*, 202 Ill. App. 3d 1024, 1029, 560 N.E.2d 942 (1990) (when several writings are used to satisfy the statute of frauds in support of a contract, each writing must refer expressly to the other writing or be so connected to the other writing as to show by internal evidence that they relate to the same contract). Here, Evans’ letter did not

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reference the purchase agreements nor was it so connected to the agreements that we may conclude a contract was formed.

The April 25, 2002, letter from Ryan reminding plaintiffs that “time [was] rapidly approaching to finalize [their] interior finish selections” and the upgrade options rider itself did not refer, expressly or otherwise, to the purchase agreements. We cannot say that these writings, taken together, amounted to an enforceable real estate sales contract. In the absence of an enforceable contract, plaintiffs’ action for specific performance and breach of contract cannot overcome the requirements of the Illinois statute of frauds. *Karris*, 376 Ill. App. 3d at 551. The trial court did not err in granting summary judgment to defendants.

In reaching this conclusion, we find *Mid-Town Petroleum, Inc. v. Dine*, 72 Ill. App. 3d 296, 390 N.E.2d 428 (1979), cited by plaintiffs in support of their argument, distinguishable. Unlike *Mid-Town*, this case was decided on defendants’ motion for summary judgment rather than a motion to dismiss. Unlike *Mid-Town*, we cannot say that defendants’ signed correspondences here were “so connected” to the unsigned documents, the purchase agreements, that they adopted the agreements and amounted to a real estate sales contract. *Mid-Town*, 72 Ill. App. 3d at 304-05.

The judgment of the circuit court is affirmed.

Affirmed.