2011 IL App (1st) 102875-U

SIXTH DIVISION
September 23, 2011

No. 1-10-2875

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

ALYASMEN GROUP, LLC, an Illinois limited liability company, Plaintiff-Appellant, v. MS RIALTO RAINTREE VILLAGE IL, LLC, a Delaware limited liability company, MS RIALTO RAINTREE VILLAGE II IL, LLC, a Delaware limited liability company, RAINTREE VILLAGE, LLC, an Illinois limited liability company, RAINTREE VILLAGE II, LLC, an Illinois limited liability company, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 10 CH 7795 The Honorable Dorothy Kinnaird, Judge Presiding.

JUSTICE GARCIA delivered the judgment of the court.
Presiding Justice R. E. Gordon and Justice Cahill concurred in the judgment.

O R D E R

¶ 1 *Held:* The trial court properly dismissed the plaintiff's complaint for failure to state a cause of action for breach of contract, with an alternative remedy of specific performance, where the parties appeared to have reached an agreement by exchange of emails as to the price of the sale and purchase of real property, but left other issues to be addressed in a formal, written contract as contemplated by the parties, which never occurred.

¶ 2 The plaintiff appeals the trial court's dismissal of its complaint for failure to plead a cause of action for breach of contract where the purported agreement for the sale and purchase of real estate, memorialized in the parties' exchange of emails, unambiguously showed the parties' intent to reduce their agreement to a formal, written contract, which was never done. Because the plaintiff cannot demonstrate the existence of a contract between the parties, its request for specific performance of the contract cannot stand. The trial court properly granted the defendant's motion to dismiss. We affirm.

¶ 3 BACKGROUND

¶ 4 The plaintiff filed a two-count complaint alleging it entered into a contract with the defendants, under which the defendants agreed to sell certain real estate in Yorkville, Illinois, known as Raintree Village. The plaintiff alleged the defendants breached the parties' agreement and asserted a claim for specific performance of the purported agreement. While conceding the absence of a formal contract, the plaintiff contends an enforceable agreement was memorialized in a chain of emails and letters exchanged between the parties.

¶ 5 The first correspondence, an email, with the subject, "Raintree Proposal," was sent on October 6, 2009, from Greg Mix, Executive Director of Morgan Stanley, to Dean Dabbah, on behalf of the plaintiff. In its brief, the plaintiff refers to Greg Mix as "defendants' Executive Director;" the defendants contend the plaintiff's characterization is wrong, but they do not set out their relationship to Greg Mix. The defendants state only that he is "Executive Director of Morgan Stanley." We set out the October 6 email.

"As we discussed in email messages with you over the past couple of days, MSR is proceeding with work in Unit 2/3 at Raintree after making the determination there was not adequate cushion in the City of Yorkville's extensions to justify delaying the work. The transaction we were discussing previously where you would take over the cost of those improvements is therefore not available as we approach to the sale.

We have throughly reviewed the potential sale of the Raintree property to the [Alyasmen] Group with the Executive Committee of the MSR Venture. We are willing to complete the transaction on the terms outlined below. To revise these terms further will require us to return to our Executive Committee which will only extend the time further and it is unlikely they will agree to any further changes. I agree with the sentiments of your message earlier today it is time to do this deal or move on.

Terms:

Sale Price: $1,300,000, all cash at close of escrow

Credit to MSR from Seller for September SSA Payment: $103,000

Credit to MSR from Seller for Unit 2/3 Improvements: $84,000

Close of Escrow 10/30/09.

MSR to complete Unit 2/3 Punch List Work.

Buyer to take over obligations for Unit 4/5/6 work.

All MSR/Lennar Bonds and Letters of Credit to be released or replaced on or before the closing.

Dean, we thank you for your patience. I look forward to your favorable response."

¶ 6 On October 7, 2009, the plaintiff's attorney Daniel Kramer emailed the following response to Greg Mix.

"I have received through yourself and Dean both your October 6, 2009 offer with regard to the potential sale of the Raintree Property.

Our Counter-Offer is as follows:

Terms:

Sale Price: $1,250,000, all cash at close of escrow

Credit to MSR from Seller for September SSA Payment: No credit whatsoever, since we did not timely close.

Credit to MSR from Seller for Unit 2/3 Improvements: No credit since Purchaser was not able to do the improvements as requested in his most recent offer.

Close of Escrow:11/30/2009 (because of delay in closing funds will take time to accumulate, plus it has cost Purchaser the

construction season when Purchaser had originally anticipated closing in July, 2009)

MSR to complete Unit 2/3 Punch List Work: Agreed by Purchaser.

Buyer to take over obligations for Unit 4/5/6 work: Agreed by Purchaser.

All MSR/Lennar Bonds and Letters of Credit to be released or replaced on or before the closing: Agreed by Purchaser.

SSA Bond Construction Escrow Account: All right to the Construction Bond Account to be assigned to Purchaser.

In the event the terms are agreeable, Purchaser would immediately tender a draft contract to Seller for approval. We would like to get this done within one week, to assure that both parties are serious about this endeavor and there are no further delays.

The Purchaser will be carrying the obligation through the winter months, which will require obviously interest payments without the ability to produce product unless we have an exceedingly mild winter. This is why we are not willing to offer any of the credits indicated above. " (Underlining in original.)

¶ 7 On October 9, 2009, Greg Mix replied by email with a courtesy copy being sent to Dean Dabbah, and Glenn Richmond and Anthony Seijas of Lennar.

"Thank you for your letter. We will not consider any further modifications to the terms of the transaction. All terms must be as outlined in my email message to you of October 6, 2009. If your client wishes to accept our terms for the transaction, please provide written confirmation no later than next Tuesday, October 13, 2009. After that we will proceed with other avenues for disposition of this property."

¶ 8 On October 12, 2009, the plaintiff, through its attorney Daniel Kramer, responded.

"Please be advised that my client has reviewed your e-mail from 5:06 p.m. October 6, 2009 and agrees to all terms to that e-mail verbatim.

We would like to have a signed Contract from Morgan Stanley today.

I will, upon advice from you that you will sign, send you a Contract for execution, unless you would like to prepare one from your end, please do so with no changes from the October 6, 2009 e-mail sent at 5:06 p.m. as indicated in the 1:46 p.m. e-mail on October 9, 2009."

¶ 9 That afternoon, Greg Mix replied.

"I understand your response as acceptance of 100% of the terms we outlined. Please modify the draft P&S agreement to

> match those terms and send to us today. Glenn Richmond will forward to our attorney for review. We will not execute today but will review promptly."

¶ 10 The plaintiff's complaint alleged the October 6, 2009, email and the exchange of emails on October 12, 2009, constituted a binding contract between the parties. The plaintiff alleged the defendants breached the contract by refusing to sell the property on the terms set forth in the October 6, 2009, email. In count two of the complaint, the plaintiff alleged it was willing and able to purchase the property on the terms set forth in the October 6, 2009, email, which entitled it to specific performance of the contract as an alternative remedy to money damages for breach of contract.

¶ 11 On May 25, 2010, the defendants moved to dismiss the plaintiff's complaint pursuant to section 2-615 and 2-619 of the Code of Civil Procedure (735 ILCS 5/2-615, 619 (West 2008)). The defendants first contended the parties' correspondence clearly demonstrated an intent that the agreement be reduced to a purchase and sale agreement ("P&S agreement"), subject to attorney review, and binding upon the parties only after the execution of the formal contract. Secondly, the defendants argued any purported agreement reached by the exchange of emails was unenforceable under the statute of frauds (740 ILCS 80/2 (West 2008)), because the written correspondence between the parties was not signed and did not contain definite terms.

¶ 12 On August 26, 2010, the trial court dismissed the case with prejudice pursuant to section 2-615 of the Code for failure to state a cause of action. The court first noted the complaint failed to allege that Greg Mix, as the Executive Director of Morgan Stanley, had the authority to enter

into a binding agreement on behalf of the defendants. Consistent with the absence of any purported authority in Greg Mix to act on behalf of the defendants, the court found the parties' correspondence "attached to the Complaint contemplated the execution of a formal, written contract document." The absence of a formal, written contract highlighted other deficiencies in the complaint. While the seven parcels of real estate sought to be purchased by the plaintiff were identified in the complaint by legal description and the corresponding property identification numbers (PIN), "[n]one of the e-mails identif[ied] the specific property to be sold, except to refer to 'the Raintree property.' " Ultimately, the court found the terms of the purported contract were too indefinite to be enforceable.

> "One of the problems in this case is that if [the email correspondence is] in fact a contract, then there are many unanswered questions: Who is the seller? Who is authorized to negotiate and execute the sale? Who has title and can transfer title to the property? What property is being transferred? How are any mechanics liens on a partially developed property to be apportioned or resolved? Are real estate taxes to be prorated? Are there any environmental issues or code violations to be remedied? What documents are to be deposited into escrow? What are the terms of attorney approval or right to cancel?"

According to the trial court's ruling, the very communications the plaintiff relied on to assert its contract cause of action supported the defendants' assertion that the parties' communications

contemplated the reduction to a written agreement for the sale and purchase of the property before it could constitute a binding contract. Without sufficiently definite terms, the plaintiff's complaint, alleging the existence of a contract, failed as a matter of law.

¶ 13 Based on its ruling that no enforceable contract existed, the trial court did not reach the defendants' motion to dismiss pursuant to section 2-619 based on the statute of frauds.

¶ 14 The plaintiff timely appealed.

¶ 15 ANALYSIS

¶ 16 A section 2-615 motion to dismiss challenges the legal sufficiency of a complaint on its face. *Vernon v. Schuster,* 179 Ill. 2d 338, 344 (1997). The dismissal of a complaint under section 2-615 of the Code is subject to *de novo* review. *Doe ex rel. Ortega-Piron v. Chicago Board of Education*, 213 Ill. 2d 19, 23-24 (2004). On *de novo* review of a dismissal, we assume the truth of all well-pled factual allegations in the complaint. *Doe v. McKay*, 183 Ill. 2d 272, 274 (1998).

¶ 17 To state a cause of action for breach of contract, the plaintiff must allege facts in the complaint to meet four elements: (1) a valid, enforceable contract; (2) performance by the plaintiff; (3) the defendant's breach; and (4) damages resulting from that breach. *Braille v. Sears Roebuck & Company*, 289 Ill. App. 3d 171, 175 (1997).

¶ 18 Whether there is a valid, enforceable contract is often the center of the dispute, as it is in the instant appeal. To establish the existence of a contract, the plaintiff must allege the formation of the contract, specifically, offer and acceptance, consideration, and definite and certain terms. *Village of South Elgin v. Waste Management of Illinois, Inc.*, 348 Ill. App. 3d 929, 940 (2004).

In the absence of a formal, written contract, the formation of a contract turns on the intent of the parties. "Whether a writing that contains all the essential terms of a contract but contemplates the later execution of a formal document is itself a contract depends on the intent of the parties." *Magnus v. Lutheran General Health Care System*, 235 Ill. App. 3d 173, 181 (1992) (citing *Inland Real Estate Corp. v. Christoph*, 107 Ill. App. 3d 183, 185 (1981)).

¶ 19 At least initially, the intent of the parties to form a contract presents a question of law for the trial court to decide. *Quake Construction, Inc. v. American Airlines, Inc.*, 141 Ill. 2d 281 (1990). In *Quake*, our supreme court explained the analysis a court must undertake to determine whether there is a binding agreement between the parties.

> "A circuit court must initially determine, as a question of law, whether the language of the purported contract is ambiguous as to the parties' intent. [Citation omitted.] If no ambiguity exists in the writing, the parties' intent must be derived by the circuit court, as a matter of law, solely from the writing itself. [Citation omitted.] If the terms of the alleged contract are ambiguous or capable of more than one interpretation, however, parol evidence is admissible to ascertain the parties' intent. [Citation omitted.] If the language of an alleged contract is ambiguous regarding the parties' intent, the interpretation of the language is a question of fact which a circuit court cannot properly determine on a motion to dismiss. [Citation omitted.]." *Id.* at 288-89.

There is no issue of ambiguity raised by the plaintiff before us. Hence, we look to the communications alleged in the complaint to determine whether they support the formation of a contract as the plaintiff contends.

¶ 20 The most reliable indicator of the parties' intent is the language used by the parties. *Dayan v. McDonalds Corp.*, 138 Ill. App. 3d 367, 374 (1985). Intent of the parties regarding whether a formal document is contemplated turns on certain factors.: "whether the type of agreement involved is one usually put into writing, whether the agreement contains many or few details, whether the agreement involves a large or small amount of money, whether the agreement requires a formal writing for the full expression of the covenants, and whether the negotiations indicated that a formal written document was contemplated at the completion of the negotiations." *Quake Construction, Inc.*, 141 Ill. 2d at 289.

¶ 21 We examine the circumstances present in this case against the *Quake* factors. There is no room for dispute that contracts involving the purchase and sale of real property are "usually put into writing." The trial court made clear that the communications upon which the plaintiff relied in the complaint left many of the covenants pertaining to real estate contracts unanswered.

> "Who is the seller? Who is authorized to negotiate and execute the sale? Who has title and can transfer title to the property? What property is being transferred? How are any mechanics liens on a partially developed property to be apportioned or resolved? Are real estate taxes to be prorated? Are there any environmental issues or code violations to be remedied? What documents are to

be deposited into escrow? What are the terms of attorney approval or right to cancel? "

Certainly the large purchase price of $1.3 million favors a formal, written contract between the parties. Finally, the language used by the parties in the emails exchanged on October 12, 2009, leads to only one conclusion: the parties contemplated a formal, written document before a contract would come into existence. Counsel for plaintiff stated: "We would like to have a signed Contract from Morgan Stanley today. I will, upon advice from you that you will sign, *send you a Contract for execution*, unless you would like to prepare one from your end ***." (Emphasis added.)

¶ 22 Every one of the *Quake* factors supports the conclusion that the plaintiff itself contemplated, "the later execution of a formal document" before the agreement purportedly reached in the exchange of communications would come into existence.

¶ 23 Nonetheless, the plaintiff argues the allegations in its complaint are sufficient to survive a section 2-615 motion to dismiss grounded on its claim that inferences drawn from the pleadings are to be made in the plaintiff's favor. In its reply brief, the plaintiff contends the parties' correspondence makes clear the plaintiff accepted the defendants' detailed offer, as contained in its October 6, 2009, email, to sell the property to the plaintiff by agreeing to "all terms" of the October 6th email, in its October 12, 2009, email. The plaintiff asserts it did not request modification of the terms contrary to the defendants' contention and, therefore, based on the parties' email correspondence, "[the plaintiff] unambiguously accepted those terms, thereby creating a binding and enforceable contract." The plaintiff argues that "[a]t the very least, the

issue of whether the parties intended their agreement to be subject to [the] preparation of a formal writing raises issues of fact that hinge on hearing the testimony of the parties to the negotiations." The defendants respond, as they did before the trial court, that regardless of the details provided in the exchange of correspondence, the unassailable fact is that the parties contemplated the execution of a formal, comprehensive contract with an attorney review clause, which never occurred. The trial court agreed; we agree as well.

¶ 24 The communications between the parties is not so unusual that Illinois case law provides no answer to the plaintiff's contention. Quite the opposite is true.

> "Where the parties made the reduction of the agreement to writing, and its signature by them, a condition precedent to its completion, it will not be a contract until that is done. And this is true although all the terms of the contract have been agreed upon. But where the parties have assented to all the terms of the contract, the mere reference to a future contract in writing will not negate the existence of a present contract. [Citation omitted.]." *Quake Construction, Inc.*, 141 Ill. 2d at 288.

¶ 25 " 'The issue really is not whether a 'condition' must occur before a contract comes into existence but whether the parties have mutually assented or agreed to make it a binding contract. If there is such mutual assent, agreed on conditions clearly affect only the duty to perform. If no mutual agreement is reached, there is no contract. The 'condition precedent' to the formation or existence of a contract is thus the mutual assent or agreement of the parties.' " *Catholic Charities*

of Archdiocese of Chicago v. Thorpe, 318 Ill. App. 3d 304, 307-08 (2000) (quoting *Edmund J. Flynn Co. v. Schlosser*, 265 A.2d 599, 601 (1970)). The question is whether mutual assent of the parties to form a binding contract can be found in the correspondence exchanged by the parties. In other words, do the exchange of emails contain the equivalent of what the parties would have memorialized in a formal, written contract. The clear answer is no.

¶ 26 We find no room for the plaintiff's implicit claim that a trier of fact, were it asked to determine whether the exchanges of communications created "a binding and enforceable contract," could determine the opposite of the circuit court's ruling and have that verdict stand. While the "condition precedent" language may be inapt, its clear implication remains valid. When the parties contemplate the execution of a formal, written contract, there is no enforceable contract until a formal, written contract is executed. See *Magnus*, 235 Ill. App. 3d at 181 (dismissal of the complaint for enforcement of the parties' letter of intent upheld where the plain language of the letter made clear the parties' intent was to merely engage in preliminary negotiations). That the plaintiff claims it can draw a contrary inference from the emails is of no moment.

¶ 27 The language of the parties' correspondence is unambiguous. The parties were engaged in negotiations for the sale of real property and although the parties may have reached an agreement on the major terms of the purchase and sale of the property, neither party considered the agreement binding until the parties executed a formal purchase and sale agreement, which would include covenants and terms normally contained in such an agreement, not the least of which is attorney review, which indisputably was never discussed in the emails. Consequently,

only one conclusion can be drawn from the emails as a matter of law: the negotiations, while substantially complete as to price, were still ongoing.

¶ 28 We need not look to the language used on behalf of the defendants to reach the conclusion that negotiations were ongoing. The plaintiff's attorney, reasonably and professionally, acknowledged as much in his October 7, 2009, response to the defendants' email. "In the event the terms are agreeable, Purchaser would immediately tender *a draft contract* to Seller for approval." (Emphasis added.) When the plaintiff acceded to the defendants' terms in its October 12, 2009, correspondence, plaintiff nonetheless conditioned its acceptance on the execution of a purchase and sale agreement: "We would like to have a *signed Contract* from Morgan Stanley today. I will, upon advice from you that you will sign, send you a Contract for execution, unless you would like to prepare one from your end ***." (Emphasis added.) As with virtually every sale and purchase contract with valuable real estate involved, attorney review of the formal, written contract was anticipated. "Please modify the draft P&S agreement to match those terms and send to us today. Glenn Richmond will forward to our attorney for review. We will not execute today but will review promptly." *Both* parties anticipated the execution of a formal contract, subject to attorney review, as the essential step to having a binding and enforceable contract.

¶ 29 In dismissing the plaintiff's complaint, the trial court correctly relied on this court's decision in *Brunette v. Vulcan Materials, Co.*, 119 Ill. App. 2d 390 (1970). In *Brunette*, the purchasers brought an action against the defendant for specific performance of an alleged contract to convey land or in the alternative to recover damages for breach of contract. The

plaintiff had purchased land from the defendant's predecessor in 1956. The plaintiff alleged the predecessor orally agreed to give it priority over other purchasers should the defendants decide to sell an adjacent parcel of land, the subject matter of the litigation. In 1964, the plaintiff began negotiations to purchase the adjacent tract of land owned by the defendant. The plaintiff alleged that in 1965, the parties reached an agreement and attached the parties' correspondence as proof of their contract. In granting the defendant's motion to dismiss the suit, the circuit court found the correspondence between the parties, much like the correspondence before us here, contained repeated references to the preparation of a formal contract. We concluded that as a matter of law, the parties' correspondence was not a binding contract, but ongoing negotiations to be memorialized in a written, binding agreement. *Brunette*, 119 Ill. App. 2d at 392-93. The plaintiff appealed. This court held that even though certain terms had been agreed upon by the parties, no contract was formed because "[t]he intention to be bound by the terms of the correspondence is affirmatively shown to be absent." *Id.* at 397. Our words in *Brunette* apply equally to the instant case.

> "There is no allegation of offer or acceptance by either party unless we accept plaintiffs' view that the correspondence should be so construed. Since as we have hereinbefore concluded, the letters all look forward to and are contingent upon the execution of a formal contract, they cannot be considered as an offer or acceptance. Any agreement derived from such correspondence is clearly an agreement only as to possible terms

> and not an agreement to sell. The former represents the typical negotiation process, whereas the latter is the legal event upon which all rights and duties are predicated." *Id.* at 396.

¶ 30 The plaintiff's reliance on *Quake Construction, Inc.,* and *Chapman v. Brokaw*, 225 Ill. App. 3d 662 (1992), for a contrary outcome is misplaced. The cases do not support the plaintiff's assertion that they "are controlling authority, since there was no conclusive statement in any of the emails that the execution of a comprehensive contract was a condition precedent to having a binding agreement."

¶ 31 Neither *Quake Construction* nor *Chapman* addresses the circumstances present here. Neither case involved an agreement for the sale of real property. We agree with the trial court's reading of Illinois case law: whether the agreement is for the sale of real property is an important distinction. See *Intini, III v. Marino*, 112 Ill. App. 3d 252, 255 (1983) ("This principal [of the requirement of a formal agreement] is applied even more strongly to contracts for the sale of land.").

¶ 32 We agree with the trial court that *Brunette* controls the outcome of the case before us. The trial court properly concluded that though the parties' correspondence reflected the near completion of negotiations, the parties intended to prepare and execute a formal, written contract for the sale of the property before it would be binding on the parties, an event which never occurred.

¶ 33 Because there was no contract for the sale of the property, there is no need to address the specific performance alternative remedy or to reach the statute of frauds issue.

¶ 34 CONCLUSION

¶ 35 The trial court properly dismissed the plaintiff's complaint for failure to state a cause of action based on the existence of a contract, where the correspondence between the parties clearly evinced the need for a formal, written purchase and sale agreement, subject to attorney review, prior to the creation of an enforceable contract for the sale of real property between the parties. Accordingly, we affirm the trial court's dismissal.

¶ 36 Affirmed.