NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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January 10, 2017

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Re: David M. Coley, et al. v. Gregg L. Herpst, et al.
CL-2016-0005590

Dear Counsel:

This case came before the Court on December 15, 2016 for a hearing on the Defendants' Plea in Bar. Having taken the sole issue of the applicability of the Statute of Frauds under advisement and after reviewing the memoranda of law and arguments submitted by Counsel, the Court issues the following opinion granting Defendants' Plea in Bar as to Count I of the Amended Complaint.

BACKGROUND

This matter arises out of a purchase of real property. Plaintiffs, David and Sharron Coley, were prospective purchasers for a lot in Fairfax County, on which they desired to build a new home. To do so, they obtained the assistance of Defendant, Gregg L. Herpst ("Defendant Herpst"), a sales agent for ANV Construction Group ("ANV"), who offered to help acquire the land and negotiate with ANV to build the desired new home. Defendant Herpst also helped the

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Plaintiffs to obtain financing for the land and new construction. At that time, the lending bank would not cover approximately $197,000 of the purchase and construction price. The Sellers, Trust Communities, Inc. ("TCI"), agreed to cover the deficiency and executed a Promissory Second Trust Note ("Second Note Trust") with the Plaintiffs, which required full payment of the Note on completion of the construction and transfer of title or on September 30, 2014; whichever occurred first. This Second Trust Note formed a second deed of trust on the land. At the same time, TCI also executed a Note Purchase Agreement with Defendant Herpst's wholly owned investing business, New Homes Pros, LLC ("Defendant New Homes"). Specifically, the Note Purchase Agreement between TCI and Defendant New Homes guaranteed the prompt repayment of the Second Trust Note on its maturity date in the event Plaintiffs had not sold their previous home and could not cover the Second Trust Note. With the help of Defendant Herpst, the Parties devised a plan, where ANV would complete the construction of the new home in time for the Plaintiffs to convert their land purchase financing and construction financing into a permanent loan from which the Second Trust Note would be paid.

The crux of the matter before the Court begins at this juncture. At some point during construction, Plaintiffs became concerned that their new home would not be completed on time. Consequently, Plaintiffs assert Defendants orally agreed upon a bridge financing arrangement [hereinafter the "Bridge Loan Agreement"] in which Defendant Herpst would satisfy the second deed of trust obligation by purchasing the Second Trust Note from TCI, which he was obligated to do under the Note Purchase Agreement, and subsequently hold the Second Trust Note for payment by the Plaintiffs until the house construction was complete. The Plaintiffs assert that two emails from Defendant Herpst confirm this oral Bridge Loan Agreement. In one email, Defendant Herpst states, in part,

> "We can all agree that the Note Purchase Agreement that I am obligated to buy on Oct. 1, 2014 should be as short-lived as possible, since it was predicated on your refinance at end of construction."

Pls.' Tr. Ex. 10. In the second email, Defendant Herpst then states, in part,

> "One thing is for certain; I cannot carry a $200K second trust deed on your new home under this current contingent contract . . . I must assume the note and pay Jay $197,000+ . . . . My role was to help be short term bridge financing if needed."

Pls.' Tr. Ex. 11.

As Plaintiffs moved forward with the purchase of the land and the new home construction, the Second Trust Note eventually became due and owing. However, as most would expect, the house construction had been delayed and the home was not finished. When Defendant Herpst realized the construction would not be complete in time for payment of the Second Trust Note, he advised Plaintiffs that Defendant New Homes would not be able to honor its obligation under the Note Purchase Agreement. Hence, Plaintiffs had to find other funds to meet the Second Trust Note payment deadline. Though Plaintiffs were able to find other funds to pay such Note, it was a cost over and above what they would have expected to pay Defendant New Homes.

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Consequently, Plaintiffs filed their initial three-Count Contract Complaint on April 15, 2016. After a Demurrer was heard by this Court on June 3, 2016, the Demurrer was overruled as to Count II and sustained with leave to amend as to Counts I and III. Accordingly, an Amended Complaint was filed on June 21, 2016.

In the Amended Complaint, Plaintiffs now bring forth only two Counts: Count I – Breach of Contract and Count II – Plaintiffs as Third Party Beneficiaries in Breach of Contract. Plaintiffs allege that as a result of Defendants' breach under the oral Bridge Loan Agreement, they incurred $30,390 in damages, as the extra costs they had to pay above what was expected.

In response, Defendants filed a Plea in Bar as to Count I only, which was set for hearing on December 15, 2016. After hearing arguments on the Motion, the matter was taken under advisement to address the narrow issue of whether or not there is sufficient evidence to satisfy the Statute of Frauds - particularly, with respect to Plaintiffs' allegation that the Parties had, in fact, entered into the Bridge Loan Agreement, that required the Defendants to, not only purchase, but also hold the Second Trust Note. All Parties agree that the alleged oral Bridge Loan Agreement does fall within the purview of the Statute of Frauds.

In support of their Plea in Bar, Defendants argue that the Bridge Loan Agreement is barred by the Statute of Frauds because there is no writing containing the requisite material terms and signed by Defendant Herpst that effectively memorialized such bridge financing agreement, if there was even one. On the other hand, Plaintiffs contend that the two particular emails sent between the Parties, in fact, corroborated in writing the Bridge Loan Agreement between the Parties and thereby qualifies as a writing for purposes of the Statute of Frauds.

ANALYSIS

A plea in bar is a defensive pleading that reduces the litigation to a single issue, which, if proven, creates a bar to the plaintiff's right of recovery. *Cooper Indus., Inc. v. Melendez*, 260 Va. 578, 594, 537 S.E.2d 580, 590 (2000) (internal citations omitted). The burden of proof rests on the moving party. *Id.* A plea is distinguished from an answer or grounds of defense, in that the plea does not address the merits of the issues raised by the bill of complaint or the motion for judgment. *Nelms v. Nelms*, 236 Va. 281, 289, 374 S.E.2d 4, 9 (1988). However, a plea in bar may be used "to present a single issue [such as statute of limitations, res judicata, collateral estoppel, accord and satisfaction, or statute of frauds] which may result in ending the proceedings." Leigh B. Middleditch, Jr. & Kent Sinclair, *Virginia Civil Procedure* § 9.8 (2d ed., Michie 1992).

I. STATUTE OF FRAUDS

The Statute of Frauds in Virginia states, in relevant part, that:

> "Unless a promise, contract, agreement, representation, assurance, or ratification, or some memorandum or note thereof, is in writing and signed by the party to be charged or his agent, no action shall be brought in any of the following cases: . . . (6) Upon any contract for the sale of real estate, or for the lease thereof for more than a year; (7) Upon any agreement or contract for services to be performed in the sale of real estate by a party defined in § 54.1-2100 or § 54.1-2101 . . . . "

Va. Code Ann. § 11-2.

To satisfy the Statute, the writing "must contain the essential terms of the agreement." *Reynolds v. Dixon*, 187 Va. 101, 106, 46 S.E.2d 6, 8 (1948). Generally speaking, a written contract will meet the requirements of the statute of frauds if it contains certain material terms, such as the names of the parties, the terms and conditions of the contract, and a description of the property sufficient to render it capable of identification. *Id.* at 108. However, the writing need not constitute or embody the entire contract. *Troyer v. Troyer*, 231 Va. 90, 94, 341 S.E.2d 182, 185 (1986) (collecting citations); *see also Reynolds*, 187 Va. at 106 (stating that "[i]t is not requisite that the whole contract be in writing"). Moreover, the writing "need be signed only by the party to be charged thereby." *Reynolds*, 187 Va. at 106. In the end, the Statute of Frauds is procedural or remedial in nature, and is concerned, not with the validity of the contract, but with its enforceability. *C. Porter Vaughan, Inc. v. DiLorenzo*, 279 Va. 449, 456, 689 S.E.2d 656, 660 (2010); *see also Troyer*, 231 Va. at 94.

II. APPLICATION

While the Parties do not stipulate as to the existence of a Bridge Loan Agreement, they do agree that, for purposes of this Plea in Bar, that if there existed such an Agreement, it arose from an oral agreement and not a written one. Therefore, the only issue before the Court is whether or not the emails between the Parties regarding the alleged oral Bridge Loan Agreement constitute a writing sufficient to satisfy the Statute of Frauds.

To support their argument that the emails are a sufficient writing to reflect the oral terms of the Parties' Bridge Loan Agreement, Plaintiffs look to two land sale cases where the Supreme Court held particular writings, including letters, could constitute sufficient written memorandum of an oral contract. *C. Porter Vaughan, Inc. v. DiLorenzo*, 279 Va. 449, 458, 689 S.E. 2d 656, 660-61 (2010), *Drake v. Livesay*, 231 Va. 117, 120-21, 341 S.E.2d 186, 188 (1986). Indeed, in *Drake*, the Court clarified that,

> "[T]he Statute of Frauds does not require that contracts within its purview be written. It merely interposes a bar to the enforcement of certain oral contracts, which bar may be removed by proof of a sufficient written memorandum of the transaction. When the bar is removed, it is the oral contract which is subject to enforcement, not the memorandum. Because the memorandum serves only to remove a bar to the enforcement of the oral contract, the validity of the oral contract may be established by other evidence."

231 Va. at 120. Moreover, it is also well-established that multiple writings, taken together, may be used to defeat a plea of the statute of frauds. *C. Porter Vaughan,* 279 Va. at 459; *see Jordan & Davis v. Mahoney*, 109 Va. 133, 136, 63 S.E. 467, 468 (1909).

In review of these cases cited by Plaintiffs, the Supreme Court held that both the written memoranda in question could be properly taken out of the statute of frauds because they were found to express the "essential terms" of the alleged oral contracts. In the *C. Porter Vaughan* case, the Court determined that the "essential terms" included identifying the parties, identifying the properties to be sold, stated the purchase price, identified the terms of sale, and provided that a commission would be paid to the defendant. *C. Porter Vaughan,* 279 Va. at 458. In the *Drake* case, the Court found that by merely identifying the parties to the agreement and identifying the

property to be sold in a letter from the seller to the spurned buyer was enough to fulfill the requirements of the statute of frauds. *Drake*, 231 Va. at 120-21.

However, the oral agreements in controversy in both the *C. Porter Vaughan* case and the *Drake* case dealt with land purchases. In the instant case, the oral Bridge Loan Agreement is a financing agreement. While Virginia courts have not directly addressed what "essential terms" are necessary in financing agreements to make them enforceable, there are cases in sister jurisdictions that provide guidance to this Court. In addition to obvious terms necessary for any contract, such as the identity of the parties and the identity of the subject matter of the transactions, other "essential terms" of financial agreements can include the interest rate, the amount of the loan, the principal balance, and the repayment schedule or the collateral. *See Blackward Properties, LLC v. Bank of America*, 476 Fed. Appx. 639, 641 (6th Cir. 2012); *Detherage Enterprises, Inc. v. J.A.D. Coal Co., Inc.*, No. 01-390-DCR, 2002 U.S. Dist. LEXIS 27072, at *19 (E.D. Ky. Jun. 26, 2002). Moreover, bearing in mind that the instant Agreement is a "bridge loan[1]," which is basically a "short-term loan[2]" as defined by Black's Law Dictionary, it is reasonable for this Court to surmise that the duration of the term of the loan or otherwise the due date of the loan should also be considered an "essential term." *See, e.g., Am. Twine Ltd. P'ship. v. Whitten*, 392 F. Supp. 2d 13, 17 (D. Mass. 2005) (where the terms of the bridge loan provided for the annual interest rate as well as a one year term).

In the instant matter, after examination of the two emails provided by Plaintiffs, it is clear that, even when taken together, they lack the necessary essential terms to remove the bar to the enforcement of an oral financing agreement. While it does appear the Parties are identified, and the approximate amount of the Second Trust Note is generally provided, these are the only terms given. In the first email, Defendant Herpst initially acknowledges "the Note Purchase Agreement that I am obligated to buy . . . should be as short-lived as possible." In his second email, Defendant Herpst claims he cannot carry a "$200K second trust deed" but recognizes his obligation to "assume the note and pay Jay [*sic* TCI] $197,000+". It appears from the e-mails Defendant Herpst acknowledged his written contractual obligation to purchase the Second Trust Note but did not bring to paper any terms as to an oral obligation to hold it for the Plaintiffs' benefit. Considering these emails together, the Court is left to wonder what, if any, are Defendant Herpst's obligations regarding bridge financing concerning either the Note Purchase Agreement or the Second Trust Note.

Furthermore, the instant emails lack any other necessary terms of a proper short-term financing agreement, such as the interest rate, the duration of the loan, the due date, or any repayment schedule. An oral financing contract need not be supported by the full weight of an expressly termed writing; however, there must be a foundation that provides minimal terms to acknowledge a specific commitment to act that would effectively clear the oral contract from the cloud of the statute of frauds. Thereby, in the absence of any essential terms, the Court concludes that the instant emails are insufficient to constitute a writing that would satisfy the Statute of Frauds and cannot defeat the plea.

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[1] A "bridge loan" is defined as "[a] short-term loan that is used to cover costs until more permanent financing is arranged or to cover a portion of costs that are expected to be covered by an imminent sale." BLACK'S LAW DICTIONARY 1020 (9th ed. 2009).

[2] A "short-term loan" is defined as "[a] loan with a due date of less than one year, usually evidenced by a note." BLACK'S LAW DICTIONARY 1021 (9th ed. 2009).

CONCLUSION

Defendants' Plea in Bar as to Count I – Breach of Contract is granted. The Court requests Defendants' Counsel to prepare an order reflecting the Court's ruling.

[redacted]

Penney S. Azcarate
Fairfax County Circuit Court

PSA/kt

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