

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

KERTES ENTERPRISES, LLC, :
 :
 Plaintiff-Appellant, :
 : No. 107770
 v. :
 :
 STEVE SANDERS, ET AL., :
 :
 Defendants-Appellees. :
 :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED
RELEASED AND JOURNALIZED: June 6, 2019

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-17-885535

Appearances:

Berns, Ockner & Greenberger, L.L.C., Paul M.
Greenberger, and Jordan Berns, *for appellant*.

David J. Horvath, *for appellees*.

SEAN C. GALLAGHER, J.:

{¶ 1} Plaintiff-appellant Kertes Enterprises, LLC (“Kertes”), appeals the decision of the trial court that ruled upon the motions for summary judgment filed by the parties and declared void an agreement executed by Kertes and defendants-appellees Steve Sanders and Mirica Sanders (collectively “the Sanders”). Upon

review, we reverse the trial court's decision to grant summary judgment in favor of the Sanders on the counterclaim for declaratory relief. We find the agreement is not void for want of a proper party. Because no cross-appeal was filed, we affirm the trial court's decision to grant summary judgment in favor of Kertes on the remaining counterclaims. Because we determine the trial court erred in declaring the agreement void, the trial court's denial of summary judgment on the breach-of-contract claim is no longer a final, appealable order and is not subject to review. The case is remanded for further proceedings on the breach-of-contract claim.

Background

{¶ 2} On or about May 25, 2016, the parties executed an agreement titled "Purchase Agreement — Offer, Receipt and Acceptance" ("the agreement"). The agreement pertains to the purchase of residential property. The property at issue is a newly built, single-family home in Orange Village, Ohio ("the property"). The agreement set forth a purchase price of \$685,000 and required a deposit of \$7,000 as earnest money. The closing date for transfer of the property was to be on or about July 8, 2016. The following additional term and condition appears in handwriting on the agreement: "Parties agree to execute [within] 5 days the builder's purchase agreement [and] addendums[.] (Builders agree to build out basement at builder's cost subject to both parties)[.]"

{¶ 3} Subsequent to the execution of the agreement, the Sanders paid the earnest money into escrow. The builder's contract was not provided to the Sanders within five days, but was provided several days later, and the Sanders found certain

obligations imposed therein objectionable, which they assert included a \$3,000 capital contribution, a \$200 per month increase in monthly fees not previously disclosed, and other issues. The Sanders notified Kertes verbally on June 10, 2016, and in an email on June 29, 2016, that they would not be moving forward with the purchase, and they requested a release of the earnest money.

{¶ 4} At the time the agreement between Kertes and the Sanders was executed, the fee titleholder of the property was Lakes of Orange, LLC. Randy Kertesz, the president of Kertes, stated in an affidavit that the property was transferred to Kertes prior to the closing date set forth in the agreement with the Sanders. Kertes subsequently sold the property months later for a lesser amount than the purchase price set forth in the agreement.

{¶ 5} On September 6, 2017, Kertes filed a complaint that raised a breach-of-contract claim against the Sanders. Kertes alleged that the parties entered into a purchase agreement under which Kertes agreed to sell and the Sanders agreed to buy real estate and a house located in Orange Village, Ohio, and that the Sanders breached the agreement by refusing to close on the transaction. Kertes sought damages in the amount of \$84,637.92 plus interest, costs, and attorney fees.

{¶ 6} The Sanders filed an answer in which they admitted entering into the agreement. They raised a number of affirmative defenses, including, among others, that the contract is void for fraudulent representation, that the contract is void because the plaintiff is not the proper party in interest, and want of condition precedent. The Sanders included a counterclaim that raised causes of action for

intentional infliction of emotional distress, declaratory relief that the contract be declared void and unenforceable for want of a proper party, fraudulent misrepresentation, and violation of the Ohio Consumer Sales Practices Act.

{¶ 7} Kertes filed a motion for partial summary judgment seeking judgment in its favor on all of the counterclaims and on its claim for breach of contract, except reserving the issue of damages for trial. Kertes argued that the agreement entered by the parties was legally binding, that Kertes performed its material obligations under the agreement, that the Sanders breached the agreement by refusing to purchase the property, and that it was damaged by the reduced sale price of the property after using commercially reasonable efforts to minimize damages. Kertes also set forth arguments pertaining to the counterclaims.

{¶ 8} The Sanders also filed a motion for summary judgment. They argued that the agreement was nothing more than a contract to make a contract, that the agreement was intended to be an option contract, and that condition precedents and contingencies were not satisfied and relieved them of performance. They further argued that the contract was unenforceable because Kertes did not own the property at the time the agreement was executed and the agreement was rescinded before Kertes obtained title. They also presented arguments in support of their claims for fraudulent misrepresentation and violation of the Ohio Consumer Sales Practices Act.

{¶ 9} On the motion for partial summary judgment filed by Kertes, the trial court found Kertes was not entitled to summary judgment on the breach of contract

claim and on the counterclaim for declaratory relief. The court granted summary judgment in favor of Kertes on the counterclaims for intentional infliction of emotional distress, fraudulent misrepresentation, and for violations of the Ohio Consumer Sales Practices Act; the court dismissed those counterclaims. The Sanders have not appealed the dismissal of those counterclaims.

{¶ 10} On the motion for summary judgment filed by the Sanders, the trial court granted summary judgment in favor of the Sanders on the counterclaim for declaratory relief. The trial court held that “the purchase agreement entered into between the parties on 05/25/2015 is hereby declared void.” The court further ordered a return of the earnest money to the Sanders. The trial court’s decision to declare the contract void effectively resolved the plaintiff’s claim for breach of contract and created a final, appealable order for review.

{¶ 11} Kertes timely filed this appeal.

Assignments of Error and Standard of Review

{¶ 12} Kertes presents two assignments of error for our review. Under the first assignment of error, Kertes claims the trial court erred in granting summary judgment in favor of the Sanders on their counterclaim for declaratory relief and by declaring the agreement void. Under the second assignment of error, Kertes claims the trial court erred in denying its motion for summary judgment on its claim for breach of contract.

{¶ 13} Appellate review of summary judgment is de novo, governed by the standard set forth in Civ.R. 56. *Argabrite v. Neer*, 149 Ohio St.3d 349, 2016-Ohio-

8374, 75 N.E.3d 161, ¶ 14. Summary judgment is appropriate only when “[1] no genuine issue of material fact remains to be litigated, [2] the moving party is entitled to judgment as a matter of law, and [3], viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can reach a conclusion only in favor of the moving party.” *Id.*, citing *M.H. v. Cuyahoga Falls*, 134 Ohio St.3d 65, 2012-Ohio-5336, 979 N.E.2d 1261, ¶ 12. “[R]esolution of a controversy by summary judgment is disfavored whenever there is a realistic possibility that genuine issues of material fact will require jury consideration.” *Whiteleather v. Yosowitz*, 10 Ohio App.3d 272, 276, 461 N.E.2d 1331 (8th Dist.1983). Additionally, when a declaratory judgment claim is disposed of by summary judgment, the review of a trial court’s resolution of legal issues is de novo. *Amazing Tickets, Inc. v. Cleveland*, 8th Dist. Cuyahoga No. 107522, 2019-Ohio-1652, ¶ 8, citing *Hastings Mut. Ins. v. Halatek*, 174 Ohio App.3d 252, 2007-Ohio-6923, 881 N.E.2d 897, ¶ 29 (7th Dist.).

The Sanders’ Counterclaim for Declaratory Relief

{¶ 14} Kertes argues that the trial court erred by granting summary judgment in favor of the Sanders on their counterclaim for declaratory relief and declaring the agreement void. Although the trial court offered no rationale for this determination, the counterclaim for declaratory relief sought a declaration that the contract is null and unenforceable for want of a proper party.

{¶ 15} The Sanders contend that the agreement is unenforceable because Kertes did not own the property at the time the agreement was executed and the agreement was rescinded before Kertes obtained title. The Sanders assert that “as

[Kertes] did not own the property in question on June 29th [2016], all ‘contracts’ or other agreements were by operation of law null and void.” On the other hand, Kertes claims that it was only required to have title at the time of property conveyance, not at the time the agreement was executed.

{¶ 16} At the time the agreement was entered, the property was not owned by Kertes. Rather, Lakes of Orange, LLC, an entity affiliated with Kertes, was the fee titleholder to the property. However, there is evidence that fee title to the property was transferred from Lakes of Orange, LLC, to Kertes prior to the closing date under the agreement with the Sanders. Although the Sanders claim that they terminated the agreement prior to the time for consummation of the contract, thereby rendering the contract void, the law does not support their argument. Further, that Kertes did not have actual ownership of the property at the time the agreement was entered is irrelevant.

{¶ 17} As this court has previously recognized, “[a]n agreement for the sale of real estate is binding even though the offeror may not own the property at the execution of the agreement. The key element is whether at the time for consummation of the contract the seller is in a position to carry out the contract.” *Blackburn v. T & L Builders*, 8th Dist. Cuyahoga No. 71875, 1998 Ohio App. LEXIS 483, 5-6 (Feb. 12, 1998), citing *Brow v. Cannady*, 8th Dist. Cuyahoga No. 16903, 29 Ohio Law Abs. 497, 1939 Ohio Misc. LEXIS 1040 (May 8, 1939) (recognizing one not the owner may make a valid contract to sell property, provided the seller can carry out the contract at the time of consummation); *see also Qutifan v. Shafiq*,

2016-Ohio-4555, 70 N.E.3d 43, ¶ 17 (10th Dist.) (following *Blackburn*). Contrary to their argument, nothing in this case law suggests that the Sanders could rescind the agreement before Kertes obtained title. Accordingly, the Sanders are not entitled to have the agreement declared void for want of a proper party. The trial court erred in granting declaratory relief on the counterclaim. The first assignment of error is sustained.

Kertes's Claim for Breach of Contract

{¶ 18} Kertes also argues that the trial court erred in denying its motion for summary judgment on its claim for breach of contract. “A cause of action for breach of contract requires the claimant to establish the existence of a contract, the failure without legal excuse of the other party to perform when performance is due, and damages or loss resulting from the breach.” *Lucarell v. Nationwide Mut. Ins. Co.*, 152 Ohio St.3d 453, 2018-Ohio-15, 97 N.E.3d 458, ¶ 41. “In addition to a contract’s express terms, every contract imposes an implied duty of good faith and fair dealing in its performance and enforcement.” *Id.* at ¶ 42. Ordinarily, courts are to construe contractual language as a matter of law. *Arnott v. Arnott*, 132 Ohio St.3d 401, 2012-Ohio-3208, 972 N.E.2d 586, ¶ 14. When construing a contract, the court must ascertain and give effect to the intent of the parties, which is presumed to be reflected in the language used therein. *Bank of New York Mellon v. Rhiel*, Slip Opinion No. 2018-Ohio-5087, ¶ 20; *Granger v. Auto-Owners Ins.*, 144 Ohio St.3d 57, 2015-Ohio-3279, 40 N.E.3d 1110, ¶ 20.

{¶ 19} In *Kostelnik v. Helper*, 96 Ohio St.3d 1, 2002-Ohio-2985, 770 N.E.2d

58, the Supreme Court of Ohio described the requirements of a contract as follows:

“A contract is generally defined as a promise, or a set of promises, actionable upon breach. Essential elements of a contract include an offer, acceptance, contractual capacity, consideration (the bargained for legal benefit and/or detriment), a manifestation of mutual assent and legality of object and of consideration.” *Perlmutter Printing Co. v. Strome, Inc.* (N.D. Ohio 1976), 436 F. Supp. 409, 414. *A meeting of the minds as to the essential terms of the contract is a requirement to enforcing the contract. Episcopal Retirement Homes, Inc. v. Ohio Dept. of Indus. Relations* (1991), 61 Ohio St. 3d 366, 369, 575 N.E.2d 134.

(Emphasis added.) *Kostelnik* at ¶ 16. “A party will not be held to have waived a material term of a contract, unless he intends and consents to do so.” *List & Son Co. v. Chase*, 80 Ohio St. 42, 45, 88 N.E. 120 (1909).

{¶ 20} Kertes asserts that it demonstrated all of the elements of a breach-of-contract claim.¹ The Sanders claim that the agreement is not an enforceable contract and is nothing more than “an agreement to agree” to execute the builder’s contract agreement within five days, which intent is manifested by express inclusion of the additional term and condition that is handwritten in the agreement. Alternatively, they claim that the agreement is an option contract and that the original option to purchase expired because the builder’s contract was not timely presented or

¹ Although Kertes argues the Sanders made a judicial admission to the existence of a purchase agreement, the record reflects the Sanders admitted entering into the agreement but denied any statements pertaining to the contract to the extent the contract speaks for itself. There was no admission as to the enforceability of the agreement.

executed.² They further assert that conditions precedent and other contingencies to the agreement were not satisfied.³ Arguably, the additional term and condition requiring execution of the builder's contract was intended to be a material term. However, we are unable to resolve these issues herein.

{¶ 21} Because of our resolution of the first assignment of error, the trial court's denial of Kertes's motion for summary judgment on the breach-of-contract claim is now an interlocutory order and we lack jurisdiction to address the arguments presented. We recognize that the trial court's decision to grant declaratory relief and to declare the contract void effectively resolved the breach-of-contract claim. However, we have determined declaratory relief on the counterclaim is not warranted. Therefore, the denial of summary judgment on the breach-of-contract claim is no longer a final, appealable order because the action has not been determined and judgment may still be obtained. *See* R.C. 2505.02. Generally, the denial of a motion for summary judgment is not a final, appealable order. *Sinnott v. Aqua-Chem, Inc.*, 116 Ohio St.3d 158, 2007-Ohio-5584, 876 N.E.2d 1217, ¶ 27. Accordingly, we must overrule the second assignment of error and remand the matter for further proceedings on the breach-of-contract claim.

² A real estate option contract "is not a contract to buy and sell the property, but only a contract whereby the seller agrees to leave his offer to sell open for a time-certain." *Ritchie v. Cordray*, 10 Ohio App.3d 213, 215, 461 N.E.2d 325 (10th Dist.1983).

³ Although Kertes contends the failure of a condition precedent was not pled with particularity pursuant to Civ.R. 9(C), nothing herein shall preclude the Sanders from seeking leave to amend their answer in the trial court.

Conclusion

{¶ 22} We reverse the trial court's decision to grant summary judgment in favor of the Sanders on their counterclaim for declaratory relief and to declare the agreement void. In their counterclaim, the Sanders sought an order declaring the agreement null and unenforceable for want of a proper party. Upon review, we find that Kertes was not required to own the property at the time of execution of the agreement and was only required to have title at the time of property conveyance. We declare the agreement is not void for want of a proper party. Because no cross-appeal was filed, we affirm the trial court's decision to grant summary judgment in favor of Kertes on the remaining counterclaims.

{¶ 23} Because we determine the trial court erred in declaring the agreement void, we lack jurisdiction to review the trial court's denial of summary judgment on the breach of contract claim because there is no longer a final, appealable order. The case is remanded for further proceedings on the breach-of-contract claim.

{¶ 24} Judgment affirmed in part, reversed in part; case remanded.

It is ordered that appellant and appellees share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue of this court directing the common pleas court to carry this judgment into execution.

**A certified copy of this entry shall constitute the mandate pursuant to Rule 27
of the Rules of Appellate Procedure.**

SEAN C. GALLAGHER, JUDGE

**MARY J. BOYLE, P.J., and
MICHELLE J. SHEEHAN, J., CONCUR**