ARKANSAS COURT OF APPEALS

DIVISION IV
No. CA10-815

DRAGAN VICENTIC and JAMES WILKIE APPELLANTS V. BILL BISHOP and LORETTA BISHOP APPELLEES	**Opinion Delivered** FEBRUARY 23, 2011 APPEAL FROM THE GARLAND COUNTY CIRCUIT COURT [NO. CV-07-1187-3] HONORABLE THOMAS LYNN WILLIAMS, JUDGE REVERSED AND REMANDED

RAYMOND R. ABRAMSON, Judge

Dragan Vicentic and James Wilkie sued Bill and Loretta Bishop and Luther Saunoris[1] for breach of contract and unjust enrichment. The Bishops moved for summary judgment, stating that there was no written contract between them, Vicentic, and Wilkie and that they were not unjustly enriched. The circuit court ultimately granted the motion. Vicentic and Wilkie appeal. We reverse and remand.

Summary judgment is to be granted by a trial court only when it is clear that there are no genuine issues of material fact to be litigated and the moving party is entitled to judgment as a matter of law. *Sykes v. Williams*, 373 Ark. 236, 239–40, 283 S.W.3d 209, 213 (2008). When the moving party has established a prima facie entitlement to summary judgment, the nonmoving party must meet proof with proof and show that there is a material issue of fact

[1]Saunoris was named as a defendant, but never served. Thus, there is no finality problem here. Ark. R. Civ. P. 54(b)(5).

present. *Id.* at 240, 283 S.W.3d at 213. The circuit court, after reviewing undisputed facts, should nevertheless deny summary judgment if reasonable minds might reach different conclusions from those undisputed facts. *Id.*

When this court reviews on appeal a circuit court's grant of summary judgment, we look at whether the evidentiary items presented by the moving party in support of his motion leave a material question of fact unanswered. *Id.* In doing so, we view the evidence in the light most favorable to the nonmoving party and resolve all doubts and inferences against the moving party. *Id.* Our review is not limited to the pleadings—we also focus on the affidavits and other documents filed by the parties. *Id.*

The facts of this case are complicated. On May 16, 2002, Wilkie, Saunoris, and Bill Bishop entered into a handwritten contract whereby Bishop agreed to sell to Wilkie and Saunoris nearly sixteen acres of property at a cost of $8000 per acre. The contract contained a description of the property and also stated that Bishop received $5000 cash as a deposit. All three parties signed this contract. Sometime later, Bishop's attorney drafted an "offer and acceptance," laying out the terms of the contract in greater detail. This contract had places for Wilkie, Saunoris, and Bishop (and each of their wives) to sign, but the parties never did so. Under the terms of this contract, Saunoris and Wilkie were to build houses on the property, which had been divided into fifteen lots. Once they completed a house and sold it, they were supposed to pay Bishop $8000.

In June 2002, Wilkie and Saunoris approached Vicentic about forming a partnership to build houses on the lots they had purportedly purchased from Bishop. Both Vicentic and

Wilkie deposited $25,000 into a partnership account, but Saunoris did not. Around mid-June 2002, the partnership began construction on two houses on two of the lots. On June 15, 2002, the partnership, according to Vicentic and Wilkie, decided to go ahead and pay Bishop $16,000 for two lots before the homes were completed and sold. The partnership gave Bill Bishop a check, signed by Vicentic, for $16,000 with the notation "2 Lots." Bishop cashed this check. Vicentic claims that he spoke to Bishop at least twenty times about getting the deeds for the two lots. But Bishop never delivered the deeds to either Wilkie or Vicentic.

Meanwhile, the Bishops had entered into a contract with Saunoris and his wife, whereby the Bishops agreed to sell the same sixteen acres to the Saunorises for a total price of $125,520 ($5000 was to be delivered in cash, the receipt of which was acknowledged). The Saunorises also signed an accompanying promissory note, whereby the remaining $120,520 was due in two years and bore an 8% interest rate. At the beginning of the contract, it stated that it was made in April 2002, but the parties did not sign the contract and the promissory note until August 2002. Bill Bishop claimed that, in December 2002, the Saunorises paid $16,000 of the money they owed on the promissory note in exchange for the deeds to two of the lots. It is unclear whether this payment was the $16,000 check signed by Vicentic in June 2002 or a separate payment solely from the Saunorises.

In January 2003, Vicentic received notice from Regions Bank that it was garnishing the partnership's bank account in the amount of around $2300 as a result of an outstanding default judgment against Luther Saunoris in favor of a plumbing company. Luther Saunoris, at some point, filed for bankruptcy. Vicentic and Wilkie then filed a materialman's lien on

all fifteen of the lots for a total of $75,000. During this time, Vicentic continued to pay the insurance on the initial building.

In July 2004, when the Saunorises failed to pay the remaining amount due on their promissory note with the Bishops, the Bishops filed a foreclosure action against the Saunorises.[2] The circuit court entered a default judgment against them in September 2004. At the court-ordered commissioner's sale, the Bishops repurchased the property (less the two lots that had been deeded to the Saunorises) for $35,000. The circuit court confirmed the sale.

Vicentic was informed, in July 2005, that someone was putting brick on one of the houses he and Wilkie had started. Vicentic discovered that Brandon Rowland was purchasing the house and the lot from the Bishops. The Bishops, over Vicentic's objection, completed the sale to Rowland in October 2005 for the sum of $40,000.

Vicentic and Wilkie did not file their complaint until November 2007. The Bishops answered the complaint and then filed a motion for summary judgment. Vicentic and Wilkie responded to the motion but, after a hearing, the circuit court granted it. Below, Vicentic and Wilkie pointed strongly to the $16,000 check, signed by Vicentic and cashed by Bill Bishop for "2 lots," to the unsigned agreement, to which Wilkie, Saunoris, Bishop (and their wives) were to be parties, and to the parties' oral conversations surrounding their dealings. The circuit court, however, citing the statute of frauds and the parol evidence rule, was not convinced that a contract existed between Vicentic, Wilkie, and the Bishops.

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[2]It is unclear when Saunoris was dismissed or discharged from bankruptcy.

Generally, a land-sale contract must be in writing and signed by the parties. Ark. Code Ann. § 4-59-101(a)(4) (Repl. 2001). In order to satisfy the statute of frauds, the written and signed contract must contain "the terms and conditions of the sale, the price to be paid, and the time for payment." *Van Dyke v. Glover*, 326 Ark. 736, 743, 934 S.W.2d 204, 208 (1996). A check, if it meets these requirements, can satisfy the statute of frauds. *See generally Hotopp v. Adair*, 144 Ark. 629, 223 S.W. 393 (1920).

However, there are exceptions to the general rule. For example, "[t]o remove an oral contract from the statute of frauds, . . . it is necessary that the quantum of proof be clear and convincing both as to the making of the oral contract and its performance." *Langston v. Langston*, 3 Ark. App. 286, 288, 625 S.W.2d 554, 556 (1981). "[P]art payment alone is not sufficient part performance to take [a] contract out of the statute of frauds. However, partial or full payment together with taking possession pursuant to the contract is generally considered sufficient part performance." *Hyder v. Newcomb*, 236 Ark. 231, 235, 365 S.W.2d 271, 273 (1963) (citations omitted). And our supreme court has considered the effect of the seller cashing certain checks from the buyer in its analysis. *Id.*; *Marsh v. Marsh*, 213 Ark. 366, 367–68, 210 S.W.2d 811, 812 (1948).

It is true, as the circuit court pointed out, that there is no written contract signed by Vicentic, Wilkie, and the Bishops for the sale of the land. But there are other unresolved factual and legal issues. For example, what is the effect of the $16,000 check signed by Vicentic to Bill Bishop for "2 lots"? Can this check independently qualify as a land-sale contract under the statute of frauds? *See Hotopp*, *supra*. And did Vicentic and Wilkie have an

oral contract with the Bishops for the sale of the land? If so, was their partial payment (the $16,000 check) and alleged possession (they began construction on at least one house) sufficient to take the oral contract out of the statute of frauds? *See Hyder*, *supra*. The answers to these questions are material, fact-bound, and disputed. In short, summary judgment was inappropriate. *Sykes*, 373 Ark. at 240, 283 S.W.3d at 213.

Reversed and remanded.

GLOVER and HOOFMAN, JJ., agree.