Yoder v. Verm, 2024 NCBC 60.

STATE OF NORTH CAROLINA HENDERSON COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 23 CVS 1820
DANIEL YODER, M.D., Plaintiff, v. ALAN VERM, M.D.; LOOKING GLASS EYE CENTER, P.A.; and LOOKING GLASS ENTERPRISES, LLC, Defendants.	**ORDER AND OPINION ON DEFENDANTS' RULE 12(c) MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS OR, IN THE ALTERNATIVE, FOR PARTIAL SUMMARY JUDGMENT AND ON PLAINTIFF'S OBJECTIONS**

1. **THIS MATTER** is before the Court upon Defendants' Rule 12(c) Motion for Partial Judgment on the Pleadings or, in the Alternative, for Partial Summary Judgment[1] (the "Motion") and Plaintiff's Objections to Consideration of Affidavit of Jennifer Houti and Premature Consideration of Alternative Motion for Partial Summary Judgment[2] (the "Objections"; together with the Motion, the "Motions") in the above-captioned case.

2. Having considered the Motions, the parties' briefs in support of and in opposition to the Motions, the relevant pleadings, the arguments of counsel at the hearing on the Motions, and other appropriate matters of record, the Court hereby **DENIES** Defendants' Motion and **DENIES** Plaintiff's Objections as moot as set forth below.

[1] (Defs.' Rule 12(c) Mot. Partial J. on Pleadings or, the Alt., Partial Summ. J. [hereinafter "Defs.' Mot."], ECF No. 19.)

[2] (Pl.'s Objs. Consideration Aff. Jennifer Houti & Premature Consideration Alt. Mot. Partial Summ. J. [hereinafter "Pl.'s Obj."], ECF No. 31.)

Searson, Jones, Gottschalk & Cash, PLLC, by W. Scott Jones, and Prince, Massagee & Alexander, PLLC, by Sharon B. Alexander,[3] *for Plaintiff Daniel Yoder, M.D.*

James, McElroy & Diehl, P.A., by Jennifer M. Houti, Adam L. Ross, and Haley M. Lohr, for Defendants Alan Verm, M.D., Looking Glass Enterprises, LLC, and Looking Glass Eye Center, P.A.

Bledsoe, Chief Judge.

I.

FACTUAL AND PROCEDURAL BACKGROUND

3. The Court does not make findings of fact when ruling on a motion for judgment on the pleadings under Rule 12(c) of the North Carolina Rules of Civil Procedure (the "Rule(s)") and instead recites only those allegations in the pleadings that are relevant and necessary to the Court's determination of the motion.

4. Plaintiff Daniel Yoder, M.D. ("Dr. Yoder" or "Plaintiff") and Defendant Alan Verm, M.D. ("Dr. Verm") are ophthalmologists who once practiced medicine together in western North Carolina as sole and equal shareholders of Defendant Looking Glass Eye Center, P.A. ("LGEC").[4] At one time they were also the sole and equal members of Defendant Looking Glass Enterprises, LLC ("LGE"), which owns a medical office building and real property in Hendersonville, North Carolina.[5] LGE holds a 72%

[3] On 7 May 2024, after they filed briefs in support of Plaintiff's Objection and in opposition to Defendants' Motion, the Court permitted Alexander and the law firm of Prince, Massagee and Alexander, PLLC to withdraw as counsel of record for Plaintiff. (*See* Order Pl.'s Mot. Substitution Counsel, ECF No. 35.)

[4] (Verm Defs.' Answer ["Answer"], Affirmative Defenses, and Countercls. ["Countercls."], Countercls. ¶ 8, ECF No. 3.)

[5] (Countercls. ¶¶ 9, 10.)

membership interest in Healthcare LLC, VII ("Healthcare VII"), which holds the ground lease for and owns a medical office building in Brevard, North Carolina, out of which LGEC operates its Hendersonville medical office (the "Healthcare Building").[6]

5. This lawsuit has its origins in the settlement of three mandatory complex business cases previously before this Court: *Looking Glass Eye Center, P.A. v. Daniel M. Yoder, M.D.* (Henderson County Superior Court, Civil Action No. 22-CVS-1141), *Daniel Yoder v. Looking Glass Enterprises, LLC* (Henderson County Superior Court, Civil Action No. 22-CVS-1384), and *Daniel Yoder, M.D., individually and derivatively on behalf of Looking Glass Eye Center, P.A. v. Looking Glass Eye Center, P.A. and Alan Verm, M.D.* (Transylvania County Superior Court, Civil Action No. 22-CVS-332) (collectively, the "Original Litigation").

6. As in the current action, Dr. Yoder, Dr. Verm, LGEC, and LGE were the only parties to the Original Litigation, and they memorialized the settlement of the Original Litigation in a written settlement agreement (the "Settlement Agreement" or the "Agreement")[7] signed by all parties in late 2022.[8] Because the Transylvania County action contained derivative claims, the Court also approved the settlement in

[6] (Countercls. ¶¶ 11–13.)

[7] (Settlement Agreement and Mutual Release [hereinafter "Settlement Agreement"], ECF No. 2 (redacted), ECF No. 60 (unredacted).)

[8] (Settlement Agreement at 12.)

that action on 15 December 2022.[9] After the Settlement Agreement was executed, the parties dismissed all claims in each action, thereby bringing the Original Litigation to an end.

7. Eleven months later, on 28 November 2023, Dr. Yoder filed the Verified Complaint initiating the current action, asserting five claims based on his allegation that Dr. Verm, LGEC, and LGE (collectively, "Defendants") have "failed and refused to comply with all of the obligations imposed . . . by the terms of the Settlement Agreement."[10] More particularly, Dr. Yoder asserts breach of contract claims against Dr. Verm and LGEC for their alleged failure to pay (i) "Additional Funds," as defined in the Settlement Agreement (Count One)[11]; (ii) interest on a promissory note (Count Two)[12]; and (iii) the full agreed-upon buyout amount for Dr. Yoder's membership interest in LGE (Count Three).[13] Dr. Yoder also asserts a breach of contract claim against Dr. Verm and LGE for their alleged failure to pay "36% of the appraised value of the Healthcare Building and any cash held by Healthcare VII, after subtracting the amount of outstanding debts of Healthcare VII in existence as of the date of the Settlement Agreement."[14] In addition, Dr. Yoder broadly seeks a declaratory

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[9] (Verified Compl. ¶¶ 8–9, ECF No. 2; Order Approving Proposed Settlement Agreement, Transylvania County Civil Action No. 22-CVS-332, ECF No. 38.)

[10] (Verified Compl. ¶ 16.)

[11] (Verified Compl. ¶¶ 18–27.)

[12] (Verified Compl. ¶¶ 28–44.)

[13] (Verified Compl. ¶¶ 45–63.)

[14] (Verified Compl. ¶¶ 64–83.)

judgment "relating to the parties' respective rights and obligations under the Settlement Agreement."[15]

8. Defendants filed their Answer, Affirmative Defenses, and Counterclaims (the "Counterclaims") on 17 January 2024,[16] and Dr. Yoder filed his Affirmative Defenses and Reply to the Counterclaims on 14 February 2024.[17] Defendants filed the current Motion on 18 April 2024,[18] and Dr. Yoder filed his Objections on 7 May 2024.[19]

9. After full briefing, the Court held a hearing on the Motions on 10 July 2024 (the "Hearing"), at which all parties were represented by counsel. The Motions are now ripe for resolution.

II.

LEGAL STANDARD

10. Rule 12(c) provides that "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." N.C. R. Civ. P. 12(c). Rule 12(c) is intended "to dispose of baseless claims or defenses when the formal pleadings reveal their lack of merit and is appropriately employed where all the material allegations of fact are admitted in the pleadings and only

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[15] (Verified Compl. ¶ 85.)

[16] (Answer and Countercls.)

[17] (Pl.'s Affirmative Defenses and Reply, ECF No. 6.)

[18] (Defs.' Mot.)

[19] (Pl.'s Obj.)

questions of law remain." *DiCesare v. Charlotte-Mecklenburg Hosp. Auth.*, 375 N.C. 63, 70 (2020) (quoting *Ragsdale v. Kennedy*, 286 N.C. 130, 137 (1974)).

11. In considering a motion for judgment on the pleadings:

> all well pleaded factual allegations in the nonmoving party's pleadings are taken as true and all contravening assertions in the movant's pleadings are taken as false. As with a motion to dismiss, the trial court is required to view the facts and permissible inferences in the light more favorable to the nonmoving party. A Rule 12(c) movant must show that the complaint fails to allege facts sufficient to state a cause of action or admits facts which constitute a complete legal bar to a cause of action.

Tully v. City of Wilmington, 370 N.C. 527, 532 (2018) (cleaned up).

12. Under Rule 12(c), the trial court may consider "[a]n exhibit, attached to and made a part of the [complaint]," *Wilson v. Crab Orchard Dev. Co.*, 276 N.C. 198, 206 (1970), and documents that are "the subject of the action and specifically referenced in the complaint," *Erie Ins. Exch. v. Builders Mut. Ins. Co.*, 227 N.C. App. 238, 242 (2013). Where a document is attached to a pleading, "[t]he terms of such exhibit control other allegations of the pleading attempting to paraphrase or construe the exhibit, insofar as these are inconsistent with its terms." *Wilson*, 276 N.C. at 206.[20]

13. "The party moving for judgment on the pleadings must show that no material issue of fact exists and that he is entitled to judgment as a matter of law." *Daniels v. Montgomery Mut. Ins. Co.*, 320 N.C. 669, 682 (1987). Moreover, a "motion under Rule 12(c) must be carefully scrutinized lest the nonmoving party be precluded

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[20] A redacted version of the Settlement Agreement was attached to Plaintiff's Verified Complaint. (*See* ECF No. 2.) At the Court's direction, Dr. Verm filed an unredacted version of the Settlement Agreement on the Court's docket on 9 September 2024. (*See* ECF No. 60.)

from a full and fair hearing on the merits." *Newman v. Stepp*, 376 N.C. 300, 305 (2020) (citation and internal quotation marks omitted).

III.

ANALYSIS

14. Defendants have substantially narrowed the matters at issue on the Motion since its filing. Although they originally sought "judgment on Plaintiff's claim for declaratory judgment and [Defendants'] counterclaim for declaratory judgment with respect to the declarations identified in [Defendants'] prayer for relief at Paragraph 2(c), (d), (e), and (f)," Defendants orally withdrew this aspect of their Motion at the Hearing under both Rules 12(c) and 56. Thereafter, Defendants filed a Notice of Partial Withdrawal of Motion (the "Withdrawal Notice") to formalize the withdrawal.[21]

15. Defendants also withdrew at the Hearing and through the Withdrawal Notice their alternative motion for summary judgment under Rule 56 to the extent Defendants sought (i) dismissal of "Count Four (Breach of Contract Against Verm and LGE, LLC) of Plaintiff's Complaint" and (ii) judgment on Defendants' "counterclaim for declaratory judgment as stated in Paragraph 2(h) of [Defendants'] prayer for relief, which seeks a declaration that: Pursuant to the Settlement Agreement, upon the sale of the [Healthcare Building,] Yoder is entitled to

[21] (Not. Partial Withdrawal Mot., ECF No. 58.)

disbursement of 36% of the net proceeds from the sale plus 36% of the net cash held by Healthcare LLC, VII at that time, and nothing more."[22]

16. As a result, the only issues that remain for determination are Defendants' Motion under Rule 12(c) to (i) dismiss Count Four of Plaintiff's Complaint and (ii) enter judgment for Defendants on their counterclaim as stated in Paragraph 2(h) of Defendants' Prayer for Relief. These claims essentially mirror one another and reflect the parties' competing interpretations of section 2.H.c of the Settlement Agreement. Dr. Yoder alleges in Count Four of his Verified Complaint that, under section 2.H.c, he is "entitled to 36% of *the appraised value* of the Healthcare Building and any cash held by Healthcare VII, after subtracting the amount of any outstanding debts of Healthcare VII in existence as of the date of the Settlement Agreement."[23] In contrast, and as noted above, Defendants argue section 2.H.c provides that "upon the sale of the [Healthcare Building], [Dr.] Yoder is entitled to disbursement of 36% of *the net proceeds from the sale* plus 36% of the net cash held by Healthcare LLC, VII at that time, and nothing more."[24]

17. Section 2.H.c. provides, in relevant part, as follows:

> c. **Purchase of Yoder's Interest in Healthcare VII**
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> Upon receipt of the appraisals of the Healthcare Building, Verm shall act promptly and work in good faith and in a commercially reasonable

[22] As a result of the Withdrawal Notice, Defendants have withdrawn their alternative motion under Rule 56 in its entirety. Therefore, Plaintiff's Objections to the Court's consideration of that alternative motion shall be denied as moot.

[23] (Verified Compl. ¶ 79 (emphasis added).)

[24] (Countercls. Prayer for Relief ¶ 2(h) (emphasis added).)

> manner to effectuate his purchase of Yoder's membership interest in Healthcare VII. More specifically, Verm shall work in good faith with ACN to permit Verm to purchase Yoder's membership interest in Healthcare VII for 36% of the appraised fair market value of the Healthcare Building and any cash held by that entity, after subtracting the amount of any outstanding debts of that entity in existence as of the dates of this Agreement, i.e., the Healthcare VII Buyout. Upon Yoder's receipt of such payment, Yoder's membership interest in Healthcare VII shall be considered sold and transferred in full to Verm, and Yoder shall be deemed to have resigned from any and all positions or affiliations with Healthcare VII, including, but not limited to, as a member, officer, director, manager, or agent.
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> Notwithstanding the foregoing, in the event that, during the thirty days following the Settlement Date, the Parties confirm that ACN intends to market and sell the Healthcare Building, Verm shall instead promptly work in a good faith and commercially reasonable matter [sic] with ACN to cause Healthcare VII to market and to sell the Healthcare Building in a commercially reasonable manner, and upon consummation of the sale, Yoder shall be paid net proceeds, plus any cash held by that entity at the time of the closing of the sale of the Healthcare Building, commensurate with his 36% membership interest in Healthcare VII.[25]

18. Defendants argue that, on the pleaded facts, the second-quoted paragraph above applies. Defendants acknowledge that "33 days after the Settlement Date, a lawyer for [ACN] confirmed in writing that [ACN] did wish to proceed with marketing and selling the [Healthcare Building]"—thus implicitly conceding that ACN's confirmation of its intent to market and sell did not come within thirty days after the Settlement Date. Even so, they argue that, under North Carolina law, "[ACN's] desire to market and sell the [Healthcare Building] simply had to occur within a reasonable time after 30 days from the Settlement Date."[26] Asserting that where, as

[25] (Settlement Agreement, at sec. 2.H.c.)

[26] (Verm Defs. Br. Supp. Rule 12(c) Mot. 12 [hereinafter "Br. Supp. Defs. Mot."], ECF No. 20.)

here, the Settlement Agreement does not contain a "time is of the essence" clause, Defendants contend that "North Carolina law implies that performance must be completed within a reasonable time" and that the timing of ACN's performance three days after the expiration of the 30-day confirmation period was reasonable.[27] As such, Defendants argue that the second-quoted paragraph in section 2.H.c. applies, Dr. Yoder's claim and defense based on the applicability of the first-quoted paragraph are therefore without merit, and thus that judgment should be entered for Defendants under Rule 12(c).[28]

19. The Court finds Defendants' argument without merit. Indeed, Defendants fundamentally misapprehend North Carolina's "reasonable time to perform" rule. Our courts have long made clear that the "the reasonable time to perform" rule applies only to contracts for the purchase and sale of real property, rather than in all contexts, as Defendants appear to contend. As our Court of Appeals has summarized:

> As a general rule, the language of a contract should be interpreted as written; however, there is a well-settled exception, the "reasonable time to perform rule," that applies to contracts for the sale of real property. With respect to these realty sale contracts, it has long been held that in the absence of a "time is of the essence" provision, time is not of the essence, the dates stated in an offer to purchase and contract agreement serve only as guidelines, and such dates are not binding on the parties.

Harris v. Stewart, 193 N.C. App. 142, 146 (2008). *See, e.g.*, *Kassel v. Rienth*, 289 N.C. App. 173, 183 (2023) (recently applying *Harris*).

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[27] (Br. Supp. Defs. Mot. 11–12.)

[28] (Br. Supp. Defs. Mot. 10–16.)

20. It is undisputed that the Settlement Agreement is concerned with Dr. Verm's purchase of Dr. Yoder's interests in LGEC, LGE, and Healthcare VII and that section 2.H.c., in particular, concerns Dr. Verm's purchase of Dr. Yoder's interest in Healthcare VII. While section 2.H.c. contemplates that the Healthcare Building may be sold to a third party, neither that section nor the Settlement Agreement more broadly creates a contract for the purchase and sale of real property. As such, the "reasonable time to perform rule" has no application to section 2.H.c., and instead that section's language must be interpreted as written.[29]

21. Based on its careful review of the Settlement Agreement, the Court concludes that section 2.H.c. unambiguously provides that, unless the parties confirm that ACN intends to market and sell the Healthcare Building within thirty days following the Settlement Date, the procedure outlined in the first paragraph of section 2.H.c. shall control. Here, Dr. Yoder has alleged that "during the thirty days following the Settlement Date, the Parties did NOT confirm to Yoder that ACN intends to market and sell the Healthcare Building."[30] Assuming the truth of this allegation, Dr. Yoder has successfully pleaded facts that require Dr. Verm to purchase his interest in Healthcare VII based on 36% of the appraised fair market value of the Healthcare Building as set forth in the first-quoted paragraph in section 2.H.c.

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[29] North Carolina's other "reasonable time" rule—that "if no time for the performance of an obligation is agreed upon by the parties, then the law prescribes that the act must be performed within a reasonable time," *Metals Corp. v. Weinstein*, 236 N.C. 558, 561 (1952) (cleaned up)—does not apply here either because section 2.H.c. expressly supplies a thirty-day time period for the parties' performance.

[30] (Verified Compl. ¶ 77 (emphasis in original).)

Although Defendants denied Dr. Yoder's allegation that confirmation of ACN's intent did not occur within the required 30-day period,[31] that denial does not support their motion under Rule 12(c), which requires that the pleadings contain undisputed facts on which judgment may be entered as a matter of law for the moving party. *See, e.g.*, *Shehan v. Gaston County*, 190 N.C. App. 803, 806 (2008) ("Judgment on the pleadings, pursuant to Rule 12(c), is appropriate when all the material allegations of fact are admitted in the pleadings and only questions of law remain."). Based on the foregoing, the Court concludes that Defendants' Motion must be denied.

IV.

CONCLUSION

22. **WHEREFORE**, based on the foregoing, the Court hereby **DENIES** Defendants' Motion and **DENIES** Plaintiff's Objections as moot.

SO ORDERED, this the 10th day of September, 2024.

/s/ Louis A. Bledsoe, III
Louis A. Bledsoe, III
Chief Business Court Judge

[31] (*See* Answer ¶ 77.) The Court notes that Defendants' Counterclaim does not contain factual averments suggesting that within thirty days of the Settlement Date, the parties did, in fact, confirm that ACN intended to market and sell the Healthcare Building. The only reference to the timing of that confirmation is the 18 January 2023 communication from ACN's lawyer the Court discussed above. (*See* Countercls. ¶ 41.) Given Defendants' counterclaim allegation, and considering that Defendants argued on the Motion that confirmation was not received until thirty-three days after the Settlement Date, it is unclear to the Court on what basis Defendants denied, and continue to deny, Dr. Yoder's allegation at paragraph 77 of his Complaint.