STATE OF NORTH CAROLINA HAYWOOD COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 21CVS001224-430
MARY ANNETTE, LLC; JORGE CURE; DANA CURE; TWILIGHT DEVELOPMENTS, INC.; OZZIE 1, LLC; MICHAEL WASHBURN; and CHRISTINE SHEFFIELD, Plaintiffs, v. TERRI LYNN CRIDER and MOUNTAIN GIRL VENTURES, LLC, Defendants.	**ORDER AND OPINION ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

1. This case arises out of disputes concerning the creation, ownership, and management of Mary Annette, LLC. Plaintiffs include four individuals (Jorge Cure, Dana Cure, Michael Washburn, and Christine Sheffield) and three entities (Mary Annette itself, along with Twilight Developments, Inc. and Ozzie 1, LLC). They have moved for summary judgment on all remaining counterclaims asserted by Defendants Terri Lynn Crider and Mountain Girl Ventures, LLC. For the following reasons, the Court **GRANTS in part** and **DENIES in part** the motion.

McLean Law Firm, P.A., by Russell Lyway McLean, for Plaintiffs Mary Annette, LLC, Jorge Cure, Dana Cure, Twilight Developments, Inc., Ozzie 1, LLC, Michael Washburn, and Christine Sheffield.

Smathers & Smathers, by Patrick U. Smathers, for Defendants Terri Lynn Crider and Mountain Girl Ventures, LLC.

Conrad, Judge.

I.
BACKGROUND

2. The Court does not make findings of fact when ruling on a motion for summary judgment. The following background, drawn from the evidence submitted by the parties, provides context for the Court's analysis and ruling only.

3. This litigation has its roots in earlier litigation between Terri Crider and her brother Joey.[1] Some time ago, the siblings jointly inherited property in Maggie Valley, North Carolina, with a two-thirds interest going to Terri and the other third to Joey. The property is home to several cabins and sites for recreational vehicles, which Terri and Joey rented to vacationers under the name Smoky View Cottages & RV Resort. For reasons not revealed in the record, the siblings' relationship took an antagonistic turn, and a lawsuit ensued. To settle their disputes, Terri tentatively agreed in early 2020 to buy Joey's one-third interest for over half a million dollars. (*See, e.g.*, Dep. T. Crider 23:17–21, 25:22–26:6[2]; Dep. J. Kersten 13:2–5, ECF No. 127.4; Aff. H. Cope ¶ 4, ECF No. 127.1.)

4. Needing help coming up with the money, Terri consulted Jorge Cure, a long-time friend and licensed real estate agent. Jorge proposed a business deal. He would find investors to supply the cash to buy Joey's interest, and with Joey out of the picture, the investors would also pay to develop part of the resort property as a Planned Unit Development, converting the cabins and RV sites into individual units

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[1] Throughout this opinion, the Court will refer to Terri Crider, Joey Crider, Jorge Cure, Dana Cure, Michael Washburn, and Christine Sheffield by their first names. The Court will also refer to Mary Annette, LLC as Mary Annette, Mountain Girl Ventures, LLC as Mountain Girl, Twilight Developments, Inc. as Twilight, and Ozzie 1, LLC as Ozzie.

[2] Excerpts of Terri's deposition transcript can be found at ECF Nos. 126.1, 127.3, and 129.

for sale and tacking on a common area with a pool and other amenities. Terri, Jorge, and the investors would then sell the units and split the income. (*See, e.g.*, Dep. T. Crider 26:7–27:20; Dep. M. Washburn 44:13–18, ECF No. 127.2.)

5. Terri accepted Jorge's deal. But the devil is in the details. She claims that Jorge promised her two-thirds of the proceeds from all unit sales. She also claims that Jorge promised to let her continue to rent the units until they were sold, making her responsible for all business expenses but entitling her to keep all the rental income. And she claims that Jorge promised that she would own outright four of the five tracts that make up the resort property, excepting only the area designated for the Planned Unit Development. These claims are now points of contention: Terri and Jorge did not document their agreement, and he disputes much of her recollection. (*See, e.g.*, Dep. T. Crider 52:24–54:11, 67:4–68:16, 106:2–7; Dep. J. Cure 136:9–137:22, ECF No. 126.7.)

6. Not much seems to have happened through the end of 2020. At some point, Jorge invited Michael to participate in the project, and Jorge's wife, Dana, and Michael's wife, Christine, also joined. In early 2021, Terri, Jorge, and the others formed Mary Annette for the purpose of developing the individual units for sale. They named Mountain Girl (owned by Terri), Twilight (owned by Jorge and Dana), and Ozzie (owned by Michael and Christine) as the company's three members. Soon after its formation, Mary Annette applied for and received approval from local authorities for the Planned Unit Development. (*See, e.g.*, Dep. T. Crider 27:21–28:15; Dep. J.

Kersten 18:2–8; Mary Annette Art. of Org'n, ECF No. 20; Zoning Bd. Application, ECF No. 35.1.)

7. It was a few weeks later that the parties finalized Mary Annette's operating agreement. According to Terri, Jorge sent her a copy of the agreement, told her to "[f]lip through there," and urged her to sign it "immediately." She signed it without reading it. (*See* Dep. T. Crider 95:23–96:1; *see also* Op. Agrmt., ECF No. 31.)

8. Around this time, Michael brought a lender named Hunter Paschall to the resort property. Michael had contacted Paschall to gauge his interest in lending the funds needed to buy out Joey. According to Paschall, the site visit was part of the "preliminary gatherings of why we would even loan the money on the project," and he told Terri and Michael that the loan would need "to be done on [tracts] C-1, C-2 and C-4 . . . or I won't do the loan." Terri acknowledges having given Paschall a tour of the resort but denies having had any conversation about using tracts C-1 and C-2 to secure a loan. She says that her understanding was that Michael was the "moneyman" who would "purchase Joey out" and that Paschall was Michael's lender, nothing more. (Dep. T. Crider 51:6–52:23; Dep. H. Paschall 10:7–11:2, 11:24–12:11, ECF No. 126.5.)

9. The closing for the purchase of Joey's interest was set to take place on 1 April 2021. A few days before the closing, Michael sent Terri a copy of the nearly final loan documentation from Paschall. (*See, e.g.*, Pls.' Reply Br. Ex. D, ECF No. 132; *see also* Pls.' Br. in Supp. Ex. D, ECF No. 126.4.)

10. By all accounts, the closing was a hectic and disorderly affair. Terri says that she became aware for the first time that Jorge, Michael, and their wives were not contributing money toward the purchase of Joey's interest and that, instead, Mary Annette would borrow the money. She also learned that, to secure the loan, she would have to transfer tracts C-1 and C-2 to Mary Annette. Jorge assured Terri that both tracts would be hers once the loan was repaid. Although upset, Terri went through with the closing. The closing documents included a Contract for Deed stating that Mary Annette "shall immediately deed" tracts C-1 and C-2 back to Terri "[u]pon payment and satisfaction" of the mortgage. (*See* Dep. D. Cure 38:6–39:12, ECF No. 127.6; Dep. J. Kersten 28:12–31:12, 32:2–33:3; Contract for Deed, ECF No. 35.2; Aff. H. Cope, ¶¶ 14–17.)

11. After the closing, the parties' relationship deteriorated. Terri confronted the others after reading Mary Annette's operating agreement and learning that Mountain Girl, Twilight, and Ozzie were granted equal one-third interests in the LLC, which she says is contrary to her understanding that Mountain Girl would own a two-thirds interest. More disputes about Mary Annette's management and about Terri's rentals of the individual units followed. Eventually, Plaintiffs sued Terri. (*See, e.g.*, Dep. T. Crider 93:2–12, 96:10–23; Dep. D. Cure Ex. 2 & 59:11–23; *see also* Compl., ECF No. 2; Am. Compl., ECF No. 53.)

12. Terri and Mountain Girl counterclaimed, alleging that Plaintiffs schemed to take Terri's rental business and her property. Terri and Mountain Girl assert counterclaims for fraud, breach of contract, and conversion. They also seek to reform

the operating agreement to give Mountain Girl a two-thirds membership interest in Mary Annette. And they seek to quiet title to the individual units, alleging that neither Terri nor Joey transferred their interests in the individual units as part of the closing. (*See* Am. Countercl., ECF No. 55.)

13. Plaintiffs have moved for summary judgment. (ECF No. 125.) The motion is fully briefed, and the Court held a hearing on 12 July 2024. The motion is ripe for decision.

II.
LEGAL STANDARD

14. Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. R. Civ. P. 56(c). In ruling on a motion for summary judgment, the Court must consider the evidence in the light most favorable to the nonmoving party, drawing all inferences in the nonmoving party's favor. *See, e.g.*, *Morrell v. Hardin Creek, Inc.*, 371 N.C. 672, 680 (2018).

15. The moving party "bears the initial burden of demonstrating the absence of a genuine issue of material fact." *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 579 (2002). The moving party meets its burden "by proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim." *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681 (2002) (citations and quotation marks omitted). If the moving party makes that showing, "the burden shifts to the

nonmoving party to 'produce a forecast of evidence demonstrating that the nonmoving party will be able to make out at least a prima facie case at trial.' " *Cummings v. Carroll*, 379 N.C. 347, 358 (2021) (quoting *DeWitt*, 355 N.C. at 682). The nonmoving party "may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." N.C. R. Civ. P. 56(e).

III.
ANALYSIS

16. As the Court noted in an earlier order, the allegations in the counterclaim complaint are often confusing, especially when referring to the parties. *See Mary Annette, LLC v. Crider*, 2023 NCBC LEXIS 28, at *7 (N.C. Super. Ct. Feb. 23, 2023) (discussing vague references to "Plaintiff" and "Defendant" that do not "identify[] which Plaintiff or Defendant is intended" as well as confusing references to " 'Third Party Defendants' even though no third-party claims exist"). The briefs in support of and in opposition to Plaintiffs' motion for summary judgment are also confusing at times for similar reasons. Defendants' brief exacerbates these issues because, with rare exceptions, it lacks supporting citations to record evidence, as required by Business Court Rule 7.5 and the case management order. (*See* Case Management Order ¶ 28, ECF No. 52.)

17. The Court has aimed to understand the counterclaim complaint and to construe it accurately without expanding Defendants' counterclaims beyond what they fairly allege. Likewise, the Court has done its best to read each side's arguments

fairly while confining its analysis to arguments raised in a timely and procedurally appropriate manner.

A. Intentional Misrepresentation and Fraud

18. Fraud has five "essential elements": (a) a false representation or concealment of a material fact, (b) calculated to deceive, (c) made with intent to deceive, (d) that did in fact deceive, and (e) that resulted in damage to the injured party. *Rowan Cnty. Bd. of Educ. v. U.S. Gypsum Co.*, 332 N.C. 1, 17 (1992). The claimant must show not only that she actually relied on the misrepresentation but also that her reliance was reasonable. *See Forbis v. Neal*, 361 N.C. 519, 527 (2007). Reasonableness is a matter to be determined by the factfinder "unless the facts are so clear that they support only one conclusion." *Id.*

19. Defendants claim to have been the victims of a fraudulent scheme to deprive them of their interest in the resort property and their vacation rental business. Based on a fair reading of the counterclaim complaint, there are two misrepresentations that make up the fraud claim.

20. The first alleged misrepresentation concerns the source of the funds used to buy Joey's interest and pay for the Planned Unit Development. As alleged, Jorge, Michael, and their spouses falsely promised to contribute the needed funds when, in fact, they intended to have Mary Annette borrow the money from a third-party lender. The result, according to the counterclaim complaint, is that they obtained their membership interests in Mary Annette and their right to share in the potential profits from the Planned Unit Development at no cost to themselves. (*See* Am. Countercl. ¶¶ 7, 14(a)–(d).)

21. The second alleged misrepresentation occurred during the closing for the purchase of Joey's interest. Defendants allege that they learned for the first time at the closing that Mary Annette could not obtain the loan to buy Joey's interest unless Terri conveyed tracts C-1 and C-2 to the company to be used as collateral. Though upset, Defendants allege, Terri acquiesced because Jorge and the others pressured her to approve the loan documents while falsely promising "that she would be alright and that they would make things right." (Am. Countercl. ¶¶ 9, 14(e), 15.)

22. Plaintiffs contend that the undisputed evidence, including Terri's deposition testimony, shows that she knowingly assented to all the material terms of the purchase of Joey's interest at the time of closing and therefore could not have reasonably relied on earlier, contrary representations. The Court agrees.

23. There's no getting around the fact that Terri signed the closing documents fully aware of what they said. Those documents "plainly contradicted" any alleged misrepresentations about the source of the funds used to buy Joey's interest. *Atkinson v. Lackey*, 2015 NCBC LEXIS 21, at *40 (N.C. Super. Ct. Feb. 27, 2015) (granting summary judgment). Knowing that Mary Annette was borrowing money to buy Joey's interest and that tracts C-1 and C-2 would serve as collateral for the loan, Terri and Mountain Girl went through with the closing anyway. Simply put, Terri "could not have been deceived as to a material fact of which she was already aware," and no reasonable jury could conclude otherwise. *Watts v. Cumberland Cnty. Hosp. Sys., Inc.*, 317 N.C. 110, 117 (1986); *see also Sullivan v. Mebane Packaging Group, Inc.*, 158 N.C. App. 19, 27 (2003) (affirming summary judgment when

"plaintiff conceded [defendant] had provided him with that information"); *Jay Group, Ltd. v. Glasgow*, 139 N.C. App. 595, 601 (2000) (concluding that "plaintiffs' knowledge" of truth "in advance of" transaction was "fatal to their claims").

24. Plaintiffs also contend that any alleged representation that "they would make things right" is not sufficiently specific and definite to support a claim for fraud. Again, the Court agrees.

25. At best, the alleged statement is a vague promise lacking "clear terms" rather than the kind of "definite and specific" representation of an existing fact needed to support a fraud claim. *Batten v. Welch*, 2023 N.C. App. LEXIS 307, at *9 (N.C. Ct. App. 2023) (unpublished) (citing *Charlotte Motor Speedway, LLC v. Cnty. of Cabarrus*, 230 N.C. App. 1, 10 (2013)); *cf. Knowles v. Conerly*, 2024 NCBC LEXIS 131, at *35 (N.C. Super. Ct. Oct. 3, 2024) (concluding that allegation that one party promised the other "would be taken care of" did not amount to allegation of fraud). Moreover, even if the statement were sufficiently definite, the failure to fulfill the promise, standing alone, is not actionable fraud.[3] The evidence must show that the person making the promise did so with no intent to carry it out. *See, e.g.*, *Whitley v. O'Neal*, 5 N.C. App. 136, 139 (1969).

[3] Neither Defendants' pleading nor their brief clarifies what concrete action they believe the alleged promise to "make things right" would have entailed. The only arguable candidate, as best the Court can tell, is that Defendants believe it to have been a promise to restore Terri's ownership of tracts C-1 and C-2 once the development was complete and the loans had been paid. If so, that promise was fulfilled at the closing when Washburn signed a Contract for Deed on Mary Annette's behalf stating that the company "shall immediately deed" tracts C-1 and C-2 to Terri "[u]pon payment and satisfaction" of the mortgage. (Contract for Deed.)

26. Defendants needed "to come forth with evidence" on these points "or otherwise suffer entry of summary judgment." *Econo-Travel Motor Hotel Corp. v. Taylor*, 301 N.C. 200, 205 (1980). Yet they do not address this alleged misrepresentation at all in their opposition brief. "Having offered no argument about or evidence of the [alleged] misrepresentation," Defendants have "abandoned it." *Bucci v. Burns*, 2020 NCBC LEXIS 79, at *17 (N.C. Super. Ct. June 30, 2020).

27. There appear to be two other arguments in the opposition brief. First, Defendants argue that Terri felt pressured and confused at the closing. This argument is facially insufficient to create a genuine issue of fact because Defendants cite no law or evidence to support their position. Moreover, the undisputed evidence shows that Terri knew that a lender would be involved as early as February 2021 and that she received a copy of the loan terms and conditions several days before the closing. (*See* Dep. T. Crider 51:16–17, 52:1–5; Pls.' Reply Br. Ex. D.) Terri had ample time to ask questions, raise objections, or call off the closing if she believed the loan terms were too unpalatable or confusing.

28. Defendants also argue that Jorge and the others defrauded them by reneging on their agreement to let Terri rent the individual units in the Planned Unit Development until they were developed and sold. This theory comes too late. Although Defendants allege a breach of contract related to the unit rentals, the general rule is that "an unfilled promise cannot be made the basis for an action for fraud." *Pierce v. Am. Fidelity Fire Ins. Co.*, 240 N.C. 567, 571 (1954). To be fraudulent, the promise must be "made with no intention to carry it out." *Id.* Here,

Defendants have not alleged a false promise of that kind or any other misrepresentation related to unit rentals, certainly not with the particularity needed for fraud claims. *See* N.C. R. Civ. P. 9(a). "This unasserted theory of liability is no defense to summary judgment." *Brown v. Secor*, 2020 NCBC LEXIS 134, at *20 (N.C. Super. Ct. Nov. 13, 2020); *see also Atkinson*, 2015 NCBC LEXIS 21, at *42–43 n.15.

29. Accordingly, the Court grants the motion for summary judgment as to the counterclaim for fraud.

B. Reformation

30. Courts have equitable authority "to reframe written instruments where, through mutual mistake or the unilateral mistake of one party induced by the fraud of the other, the written instrument fails to embody the parties' actual, original agreement." *Metropolitan Prop. & Cas. Ins. Co. v. Dillard*, 126 N.C. App. 795, 798 (1997) (citation and quotation marks omitted). But there is "a strong presumption in favor of the correctness of the instrument as written and executed, for it must be assumed that the parties knew what they agreed and have chosen fit and proper words to express that agreement in its entirety." *Hice v. Hi-Mil, Inc.*, 301 N.C. 647, 651 (1981) (citation and quotation marks omitted). Indeed, "where no trick or device had prevented a person from reading the paper which he has signed or has accepted as the contract prepared by the other party, his failure to read when he had an opportunity to do so will bar his right to reformation." *Setzer v. Old Republic Life Ins. Co.*, 257 N.C. 396, 401 (1962).

31. The counterclaim complaint includes a demand to reform Mary Annette's operating agreement. Section III(A) of the operating agreement states that the

company's members are Mountain Girl, Twilight, and Ozzie, and grants to each a one-third membership interest. As alleged, though, this allocation is inconsistent with the parties' true agreement that Mountain Girl would hold a two-thirds interest and that Twilight and Ozzie would split the remaining one-third. (*See* Am. Countercls. ¶ 22.)

32. Plaintiffs argue that the evidence does not show fraud or mutual mistake and that the express terms of the operating agreement therefore control. They are correct.

33. The undisputed evidence shows that Terri received a copy of the operating agreement and signed it on Mountain Girl's behalf without reading it. (*See* Dep. T. Crider 95:3–5 ("I received the document on a DocuSign . . . with Jorge calling me, telling me to sign it."), 96:1 ("So I just signed it and moved on.").) The agreement that she signed states that all members "have been advised of their right to seek the advice of independent legal counsel before signing" and that they "have entered into this Agreement freely and voluntarily and without any coercion or duress." (Op. Agrmt. XIII.) Defendants do not contend that Terri is infirm, uneducated, or suffering some other disability or special circumstance that might have excused her decision not to read the operating agreement. Nor do they contend that anyone misrepresented the contents of the document or that Terri was denied the opportunity to read it. Although Terri says that Jorge urged her to sign the document "immediately," she concedes that he told her to "[f]lip through there" before signing. (Dep. T. Crider 95:24–25.)

34. Without some evidence of a trick or device that prevented Terri from reading the operating agreement, there is no genuine issue of material fact for a jury to decide. Her "failure to read" the agreement on this record "bars [Mountain Girl] from contract reformation" as a matter of law. *Cobb v. Pa. Life Ins. Co.*, 215 N.C. App. 268, 282 (2011) (affirming summary judgment); *see also W.B. Coppersmith & Sons, Inc. v. Aetna Ins. Co.*, 222 N.C. 14, 17 (1942) (concluding that complaining parties were not entitled to reformation when they "had free and full opportunity to read the policy and discover its contents, and if found not in accord with their understanding to have had it rewritten or to have declined to accept it, but failed to avail themselves of this opportunity"); *Underwood v. Nw. Mut. Life Ins. Co.*, 2002 N.C. App. LEXIS 2035, at *7 (2002) (unpublished) (affirming dismissal of reformation claim given "no indication that plaintiff lacked the capacity or the opportunity to discover any fraud or misrepresentation made at the time" of contract); *Richardson v. Webb*, 119 N.C. App. 782, 785 (1995) (affirming directed verdict when complaining parties "failed to produce evidence showing their failure to read the release was caused by a trick or device").

35. The Court grants the motion for summary judgment as to the reformation claim.

C. Breach of Contract

36. To establish a breach of contract, the complaining party must show that there is a valid contract and that a term of the contract was breached. *See Poor v. Hill*, 138 N.C. App. 19, 26 (2000). "A contract not required to be in writing may be partly written and partly oral." *Neal v. Marrone*, 239 N.C. 73, 77 (1953). But when

contracting parties reduce their agreement to a final writing, "all prior and contemporaneous negotiations or agreements, whether oral or written, are merged into the writing, which thus becomes the exclusive source of the parties' rights and obligations with respect to the particular transaction or the part thereof intended to be covered by it." *Borden, Inc. v. Brower*, 284 N.C. 54, 60–61 (1973) (cleaned up); *see also Oak Island Southwind Realty, Inc. v. Pruitt*, 89 N.C. App. 471, 473 (1988) ("When a final writing is executed or 'integrated' all prior or contemporaneous negotiations or agreements, whether written or oral, are said to be 'merged' into the writing.").

37. Here, Terri and Mountain Girl assert a counterclaim for breach of an oral contract, alleging that "Third Party Defendants have breached the terms of their contract to provide capital in the formation of Mary Annette, LLC, and have failed and refused to comply with the terms for developing the subject property." (Am. Countercl. ¶ 20.) Though confusing, the reference to "Third Party Defendants" apparently is intended to mean all Plaintiffs other than Mary Annette—in other words, Jorge, Dana, Michael, Christine, Twilight, and Ozzie.[4]

38. Plaintiffs point to the merger clause in Mary Annette's operating agreement. The clause states that the operating agreement "contains the entire understanding among the parties hereto with respect to the subject matter hereof, and supersedes all prior and contemporaneous agreements and understandings, inducements or conditions, express or implied, oral or written, except as herein contained." (Op.

[4] At an earlier point in the case, the Court realigned the parties to simplify the pleadings and more accurately reflect the claimants' interests. The reference to "Third Party Defendants" appears to be an artifact from the pleadings that were in place before the realignment. (*See* Scheduling Order, ECF No. 50.)

Agrmt. § XIV(I).) This language, Plaintiffs contend, extinguishes any preexisting oral contract.[5]

39. "North Carolina recognizes the validity of merger clauses and has consistently upheld them." *Zinn v. Walker*, 87 N.C. App. 325, 333 (1987). A merger clause works hand in hand with the parol evidence rule, which "excludes prior or contemporaneous oral agreements which are inconsistent with a written contract if the written contract contains the complete agreement of the parties." *Phelps-Dickson Builders, L.L.C. v. Amerimann Partners*, 172 N.C. App. 427, 436 (2005). A court may set the clause aside if it is the product of fraud, bad faith, or similarly unfair circumstances. *See Zinn*, 87 N.C. App. at 333.

40. In their opposition brief, Defendants argue that fraud negates the merger clause. This is unpersuasive for the reasons discussed above. Defendants have not offered evidence of circumstances that would excuse Terri's failure to read the operating agreement before signing it. Likewise, it is undisputed that Terri was aware of the closing documents' terms when she signed them. Thus, Defendants' deficient allegations of fraud furnish no reason to set aside the merger clause.

41. Defendants also argue that parts of the alleged oral contract are distinct from the subject matter of the operating agreement and, thus, outside the scope of its

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[5] For the first time in the reply brief, Plaintiffs point to a second merger clause in one of the closing documents. A document titled "Deed of Trust Loan Guaranty" includes a provision stating that it "represents the final agreement between the parties and may not be contradicted by evidence of prior, contemporaneous or subsequent oral agreements of the parties" and that "[t]here are no unwritten oral agreements between the parties." (Deed of Trust Loan Guaranty at 2, ECF No. 126.3.) The Court will not address this belated argument. *See* BCR 7.7 ("the Court may decline to consider issues or arguments raised by the moving party for the first time in a reply brief").

merger clause. It appears that Defendants are referring to three aspects of the alleged oral contract: first, terms about how to fund the Planned Unit Development and divide the proceeds; second, terms about Terri's right to rent the individual units until they were sold; and third, terms about who would hold title to the real property.

42. The funding of the development and the division of proceeds from unit sales are plainly within the subject matter of the operating agreement. Mary Annette's express purpose is "[t]o Purchase and renovate Smoky View Cottages and RV Spots and sell to individual owners." (Op. Agrmt. § II(A).) Its operating agreement includes terms addressing the identity of the members and size of their interests, the form and amount of the members' capital contributions, and the timing and allocation of distributions to members, along with other terms about internal governance. (*See, e.g.*, Op. Agrmt. §§ III(A), III(B), IV(C).) Even if the parties had orally agreed to fund the development in a different way or to divide sale proceeds in different proportions, that oral agreement would have merged into the written operating agreement. As a result, Defendants cannot maintain an action for breach of those terms. *See, e.g.*, *Craig v. Kessing*, 297 N.C. 32, 35 (1979) (holding that evidence of oral agreement as to "the purchase price and the expiration date" was "incompetent" because the terms "were terms on the written instrument"); *Phelps-Dickson Builders*, 172 N.C. App. at 436 (concluding that "plaintiff's attempt to enlarge or vary [defendant's] duties from those expressly undertaken in the contract is barred by the written terms of the contract and the merger clause").

43. The alleged oral agreement concerning unit rentals is a different matter. By its own terms, the operating agreement's merger clause applies only to "prior or contemporaneous" oral agreements, not later agreements. (Op. Agrmt. § XIV(I).) Yet some evidence tends to show that the parties maintained an oral agreement concerning unit rentals *after* signing the written operating agreement that governed Mary Annette's operations. (*See, e.g.*, Dep. M. Washburn 40:16–22 (testifying that the understanding, at the time of the closing, was that Terri "was going to continue to operate her business").) In any event, Plaintiffs do not address this aspect of the alleged oral agreement in their opening brief and, as a result, have not shown that they are entitled to summary judgment.

44. The remaining issues concern title to the resort property. Defendants allege an oral agreement in which Terri was to receive tracts C-1 and C-2 outright, following the purchase of Joey's interest, while maintaining a two-thirds interest in the individual units. (*See* Am. Countercl. ¶ 5(a).) These terms are outside the subject matter of the operating agreement, which does not address conveyances of real property.[6]

45. In sum, Defendants may not claim a breach of an alleged oral agreement concerning the funding of the Planned Unit Development and division of proceeds. But the Court denies the motion for summary judgment as to the alleged oral

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[6] Neither side addressed whether an oral contract to divide title to the resort property between Terri and Mary Annette runs afoul of the Statute of Frauds. *See* N.C.G.S. § 22-2 (requiring "[a]ll contracts to sell or convey any lands" to be in writing); *see also Ludwig v. Walter*, 75 N.C. App. 584, 586 (1985) (invalidating an oral promise to convey land). The Court intends to address that issue during the pretrial process.

agreement concerning Terri's ability to rent the individual units and as to the alleged oral agreement related to ownership of the resort property.

D. Quiet Title

46. "An action may be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claims." N.C.G.S. § 41-10. "The beneficial purpose of this section is to free the land of the cloud resting upon it and make its title clear and indisputable, so that it may enter the channels of commerce and trade unfettered and without the handicap of suspicion." *Heath v. Turner*, 309 N.C. 483, 488 (1983).

47. The parties dispute the ownership of the individual units that make up the Planned Unit Development. Terri and her brother Joey executed deeds of transfer to give Mary Annette their interests in tract "C-4" as it "appear[s] on that certain plat of survey titled, 'Final Plat for Smokey View Cottages and RV Resort' by L. Kevin Ensley." (Pls.' Br. in Supp. Ex. D.) But Terri claims that the reference to "C-4" means only the common area and excludes the individual units located within the tract's perimeter. She asks for a declaration that she remains the owner of a two-thirds interest in the individual units and that Joey remains the owner of the other one-third. (*See* Am. Countercls. ¶¶ 28, 29.)

48. In briefing their disputes about this claim, the parties essentially rehash old arguments that they previously made in connection with Terri's motion for summary judgment. Having thoroughly addressed these arguments once, the Court need not discuss them in depth here. In short, the Court concludes that the ownership of the individual units is a live issue in this case and has not been fully and finally litigated

at any point, as Plaintiffs contend. The Court also concludes that a genuine issue of material fact exists because the deeds at issue are ambiguous and the extrinsic evidence is disputed. *See Mary Annette, LLC v. Crider*, 2023 NCBC LEXIS 126, at *5–10 (N.C. Super. Ct. Oct. 11, 2023) (addressing nearly identical evidence and arguments in denying Terri's motion for summary judgment).

49. Accordingly, the Court denies the motion as to the quiet title counterclaim.

E. Conversion

50. Conversion is the "unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights." *Peed v. Burleson's, Inc.*, 244 N.C. 437, 439 (1956) (citation and quotation marks omitted). "Where there has been no wrongful taking or disposal of the goods, and the defendant has merely come rightfully into possession and then refused to surrender them, demand and refusal are necessary to the existence of the tort." *White v. Consol. Planning, Inc.*, 166 N.C. App. 283, 310–11 (2004) (citation and quotation marks omitted).

51. The counterclaim complaint alleges conversion of the personal property that Terri used in her vacation rental business. This property includes "trailer cabins, park models, maintenance equipment, [and] tools," among other things. (Am. Countercls. ¶ 31.)

52. Although Plaintiffs seek summary judgment as to this claim, the basis for their motion is unclear. They appear to concede that the alleged personal property belongs to Terri. And they do not point to evidence to show either that they have not exercised the right of ownership over that property or that they rightfully came into

possession of it. This means that Plaintiffs have not carried their "initial burden of demonstrating the absence of a genuine issue of material fact." *Liberty Mut. Ins. Co.*, 356 N.C. at 579.

53. The Court therefore denies the motion as to the conversion claim.

IV.
CONCLUSION

54. For these reasons, the Court **GRANTS in part** and **DENIES in part** Plaintiffs' motion for summary judgment as follows:

a. The Court **GRANTS** the motion as to the counterclaims for fraud and reformation. The Court enters summary judgment in Plaintiffs' favor as to these claims and **DISMISSES** them with prejudice.

b. The Court **DENIES** the motion as to the counterclaims for quiet title and conversion. These claims shall proceed to trial.

c. The Court **GRANTS** the motion as to the counterclaim for breach of contract to the extent that it is based on an alleged oral agreement concerning the funding of the Planned Unit Development and division of proceeds and **DISMISSES** this aspect of the breach of contract counterclaim with prejudice. The Court **DENIES** the motion as to the alleged oral agreement concerning Terri's ability to rent the individual units and as to the alleged oral agreement related to ownership of the resort property. The claim shall proceed to trial subject to this limitation.

SO ORDERED, this the 13th day of December, 2024.

/s/ Adam M. Conrad
Adam M. Conrad
Special Superior Court Judge
for Complex Business Cases