6-11-2012

Order on Motion for Summary Judgment (Stillwater Asset-Backed Fund _First American Title Insurance)

Alice D. Bonner
Superior Court Judge

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

STILLWATER ASSET-BACKED FUND, LP,	
Plaintiff,	
v.	**Civil Action File No. 2010CV184502**
FIRST AMERICAN TITLE INSURANCE COMPANY, INC. and DOSS & ASSOCIATES	
Defendants.	

Bol

ORDER ON MOTION FOR SUMMARY JUDGMENT OF DEFENDANT DOSS & ASSOCIATES

On May 10, 2012, counsel appeared before the Court to present oral argument on the Motion for Summary Judgment of Defendant Doss & Associates. Upon consideration of the motion, the briefs submitted on the motion, and the arguments of counsel, this Court finds as follows:

This case arises from a $4,750,000 loan from Plaintiff Stillwater Asset-Backed Fund, LP ("Stillwater") to Cohutta Water, Inc. ("Cohutta"). Steve Carroll ("Mr. Carroll"), Cohutta's President and CEO, guaranteed the loan and executed a security deed to secure it, which covered seven parcels of real estate. Stillwater complains that, although Mr. Carroll purported to grant Stillwater a first position lien on all seven tracts of land, it did not acquire a first interest in Tract 4 (a 48.2 acre tract) due to a prior encumbrance held by Branch Banking & Trust Company ("BB&T").

In 2008, Cohutta defaulted on the loan, and Mr. Carroll breached the guaranty. On July 7, 2009, BB&T foreclosed on the 48.2 acre tract, wiping out Stillwater's lien.

On April 7, 2009, Stillwater foreclosed on the other six lots, emerging as the highest bidder with a credit bid of $5.6 million. Although this amount is in excess of the principal amount of the loan, Stillwater contends it is owed an additional $2,474,357, for interest and costs, as well as attorneys' fees.

Stillwater has sued the closing attorney and title agent, Doss, as well as First American Title Insurance Company, Inc. ("First American"), asserting claims against First American for breach of contract of title insurance, bad faith for failure to insure, and attorneys' fees. Stillwater asserts claims against both First American and Doss for breach of escrow agreement and breach of closing protection letter. First American has filed a cross-claim against Doss for indemnification and professional negligence. Doss has filed a motion for summary judgment against Plaintiff.

A court should grant a motion for summary judgment pursuant to O.C.G.A. § 9-11-56 when the moving party shows that no genuine issue of material fact remains to be tried and that the undisputed facts, viewed in the light most favorable to the non-movant, warrant summary judgment as a matter of law. Lau's Corp., Inc. v. Haskins, 261 Ga. 491, 491 (1991).

1. Escrow Agreement

Doss contends that Plaintiff's breach of contract claim based on the Escrow Agreement fails to satisfy the Statute of Frauds and therefore fails as a matter of law. Under O.C.G.A. § 13-5-30(4) a contract for the sale of lands, or any interest in, or concerning lands, must be in writing and signed by the party charged therewith or some person lawfully authorized by him to be binding on the promisor.

Doss contends that the Escrow Agreement "concerns lands" and thus must be in writing and signed by both parties. Here, it is undisputed that neither Doss nor Plaintiff signed the Escrow Agreement.

Plaintiff argues that the Escrow Agreement is not one of the agreements involving land that falls within the Statute of Frauds. Rather, an escrow is "a transaction involving the deposit of documents or funds, or both, with a third party to be kept until the time for delivery or disbursement arrives." See 3 PINDAR'S GA. REAL ESTATE LAW & PROC. § 27-2 (6th ed.)(2011).

The Court agrees with Plaintiff's position. Doss cites no authority that specifically provides that an escrow agreement comes within the Statute of Frauds. An escrow agreement is an agreement over the transfer of money, and it is an arrangement used in a variety of transactions, some of which involve the sale of land, and some of which do not. Simply because the agreement here is part of the larger context of a real estate transaction does not change the nature of its purpose. Accordingly, the Court finds that the Escrow Agreement does not amount to "a contract for sale of lands, or any interest in, or concerning lands" to come within the purview of O.C.G.A. § 13-5-30.

Nevertheless, the Court finds in favor of Doss and **GRANTS** summary judgment as to the claim for breach of the Escrow Agreement. Although the Escrow Agreement does not have to be signed to be enforceable, Plaintiff has failed to come forward with evidence that it assented to the terms of the version of the Escrow Agreement at issue. "The consent of the parties being essential to a contract, until each has assented to all the terms, there is no binding contract; until assented to, each party may withdraw his bid or proposition." Harmon v. Innomed Technologies, Inc., 309 Ga. App. 265 (2011).

It is undisputed that the Escrow Agreement was never signed by either party. It is undisputed that Plaintiff did not in written correspondence to Doss ask Doss to sign the Escrow Agreement or indicate Plaintiff's own assent to the terms of the Escrow Agreement after Doss had made revisions to it. Plaintiff's attorney testified in her deposition that she believes that she requested that Doss sign an escrow agreement at some point, but she could not recall a specific conversation and she could not recall when such a conversation may have occurred. Thus, there is nothing in the record to suggest that Doss was instructed to sign the version of the Escrow Agreement that is before the Court, rather than a general request that it sign some type of escrow agreement on unspecified terms. Finally, Plaintiff has failed to come forward with evidence that the terms of the revised Escrow Agreement were even acceptable. In her deposition, Plaintiff's attorney merely states that the last version "seemed to have most of the requirements that I had asked for." This does not amount to an unqualified assent and acceptance, which is required to go forward with a breach of contract claim.

2. Closing Protection Letter

Doss seeks summary judgment on Plaintiff's claim for breach of the closing protection letter, contending that it did not fail to comply with "written" closing instructions. The Closing Protection Letter provides that First American will reimburse Plaintiff for actual loss incurred due to the closing attorney's failure to comply with written closing instructions or fraud or dishonesty of the closing attorney in handling funds or documents in connection with the closing. Plaintiff contends that Doss failed to comply with instructions to obtain a first priority lien position on the 48.2 acre tract.

Additionally, Plaintiff argues that Doss is liable under the Closing Protection Letter for fraud and/or dishonesty in handling funds and documents in connection with the closing.

The Court finds that a fact issue exists as to whether Plaintiff's instruction to obtain the first priority lien position on the 48.2 acre tract constitutes a sufficient "written closing instruction" under the Closing Protection Letter. As such, summary judgment is **DENIED** on that basis. However, the Court notes that Doss is not a signatory to the Closing Protection Letter. Plaintiff contends that Doss is liable, along with First American, as a "joint obligor and /or joint contractor under the Closing Protection Letter." But it is not clear to the Court how Doss is obligated under the Closing Protection Letter sufficient to support a breach of contract claim. The Court requests further briefing on this issue and directs the parties to submit their supplementary briefs within 30 days.

SO ORDERED this 11th day of June, 2012.

ALICE D. BONNER, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

Copies to:

Attorneys for Plaintiffs	Attorneys for Defendants
Halsey G. Knapp, Jr. Jonathan Hawkins FOLTZ MARTIN, LLP 3525 Piedmont Road, NE Five Piedmont Center, Suite 750 Atlanta, GA 30305 404-321-9397	Lewis E. Hassett MORRIS, MANNING & MARTIN, LLP 1600 Atlanta Financial Center 3343 Peachtree Road, N.E., Suite 1600 Atlanta, GA 30326 404-233-7000 *Counsel for Defendant First American Title Insurance Company* H. Lane Young Jackson Dial HAWKINS, PARNELL, THACKSTON & YOUNG, LLP 4000 SunTrust Plaza 303 Peachtree Street Atlanta, GA 30308 404-614-7400 *Counsel for Defendant Doss & Associates*