2022 WL 3137308 (Va.Cir.Ct.) (Trial Order)
Circuit Court of Virginia.
Norfolk City

JOSHUA BRITT HOMES, LLC,

v.

Max W. SLOOP, Jr., Jacob M. Sloop, Norman Hecht, Constance Jacobson, First American Title Insurance Co., and First-Citizens Bank & Trust Co.

No. CL22-2504.
August 3, 2022.

Trial Order

David W. Lannetti, Judge.

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Dear Counsel:

Today the Court rules on the demurrer (the "Demurrer") filed by Defendants Max W. Sloop, Jr., and Jacob M. Sloop (collectively, "Defendants") to the complaint ("the Complaint") filed by Plaintiff Joshua Britt Homes, LLC ("Britt Homes") stemming from the potential purchase of three parcels of property by Britt Homes from Max.

Britt Homes has filed claims against Max for specific performance and breach of contract, and against Jacob to "quiet title/ partition" the properties. Defendants claim that Britt Homes has failed to state a proper claim for specific performance or breach of contract because there was a mutual mistake of fact between the parties at the time of contracting and Britt Homes has not properly alleged cognizable damages. The Defendants also assert that, under the circumstances, the Court cannot compel Jacob to convey his interest in the parcels and that Jacob is not a proper party defendant, so a "quiet title/partition" action is inappropriate.

The Court finds that Britt Homes has failed to state a viable claim for specific performance, quiet title or partition, or breach of contract. The Court finds that there was a mutual mistake of fact between Britt Homes and Max because both erroneously

believed that Max had full title to the properties at issue, thereby precluding specific performance. The Court also finds that Britt Homes fails to allege a viable breach of contract claim and that there is no basis for a "quiet title/partition" action.

The Court SUSTAINS Max W. Sloop, Jr., and Jacob M. Sloop's demurrer and dismisses Jacob Sloop from the suit.

Background

On January 8, 2022, Max Sloop entered separate one-page contracts ("the Contracts") to sell three residential properties located at 9628, 9630, and 9634 Elnora Street in the City of Norfolk ("the Properties") to Britt Homes. (Compl. 2-3 & Ex. A.) The Contracts provided that the conveyed titles to the Properties were to be "free, clear, and unencumbered" and that closing was to occur on or before February 25, 2022. (*Id.* Ex. A.)

Max and his wife, Jeannie Sloop, had acquired title to the Properties by deed from Marc and Constance Jacobson on August 28, 1996. (*Id.* at 3.) Max and Jeannie Sloop held the Properties as tenants by the entirety until their divorce on or about June 8, 2010. (*Id.* Ex. B.) Max and Jeannie entered into a "Stipulation Agreement" ("the Stipulation") on September 10, 2009, which was subsequently incorporated into their divorce decree. (*Id.* at 3.) There is no allegation that either the Stipulation or the divorce decree was recorded. Pursuant to the Stipulation, Max would own the Properties "as his sole and separate property." (*Id.* Ex. C.) The Stipulation also provided that Max would (1) refinance the Properties solely in his name within twenty-four months of the date of the Stipulation, (2) prepare deeds of transfer transferring ownership to him, and (3) present the deeds of transfer to Jeannie "within 30 days." [1] (*Id.*) Jeannie agreed to sign "any and all documents presented to her necessary to transfer said deeds" to Max. (*Id.*) Despite these provisions, no deeds transferring Jeannie's interest in the Properties from Jeannie to Max were ever recorded. (*Id.* at 4.) Further, the original recorded first deed of trust is still in place. (*Id.* at 22.) Jeannie died intestate on December 3, 2018, with her son Jacob Sloop listed as her sole heir on the recorded list of heirs affidavit. (*Id.* at 4.)

***2** After contracting with Max for the purchase of the Properties, Britt Homes hired Beach Title to research the Properties' titles in order to obtain a title insurance policy from Stewart Title Guaranty Co. (*Id.* at 3.) Because Jeannie's interest in the Properties had never been transferred from Jeannie to Max, the title insurer required Jacob's signature--in his capacity as Jeannie's sole heir--on the applicable conveyance documents to transfer the titles to Britt Homes. (*Id.* at 4.) As of the contractual closing date of February 25, 2022, Jacob had not signed the conveyance documents, and Max therefore was unable to close. (*Id.* at 5.)

On March 3, 2022, Britt Homes filed suit against Defendants Max Sloop; Jacob Sloop; Constance Jacobson; Norman Hecht, trustee of a deed of trust for the benefit of Constance and the late Marc Jacobson, who had extended seller financing to Max and Jeannie Sloop; First-Citizens Bank and Trust Co., who benefits from a second-position deed of trust to the Properties; and First American Title Insurance Co., as trustee of the second-position deed of trust. (*Id.* at 1.) Britt Homes seeks specific performance of the Contracts against Max, asking the Court to either compel Max to convey title or appoint a special commissioner to sell the Properties. (*Id.* at 5.) Alternatively, Britt seeks a "quiet title" or "partition" action against Jacob "based on the doctrine of equitable conversion" or a breach of contract action against Max for damages. (*Id.* at 6-7.)

Position of the Parties

Defendants' Position

Defendants argue that at the time of contracting, both Britt Homes and Max Sloop believed Max had exclusive title to the Properties. (Dem. 2.) The title search conducted by Beach Title after the Contracts were executed and before the scheduled closing date revealed that Max did not in fact have full title. (*Id.*) Instead, Defendants assert that upon Max and Jeannie Sloop's divorce, their tenancy by the entirety was extinguished, leaving Max and Jeannie as tenants in common with each owning a 50% interest in the Properties. Hr'g Tr. ("Tr.") 3-4. Then, according to Defendants, upon Jeannie's death in 2018, her 50% interest passed to her son, Jacob Sloop, as her heir. Tr. 4. Defendants argue that the requirement in the Stipulation for Max to refinance

the Properties in his name and transfer sole ownership to him by deed were conditions precedent to him receiving full title. Tr. 4, 7-8. Therefore, Defendants contend that it was impossible for Max to transfer full title to Britt Homes. Tr. 5-6. They argue that this mutual mistake of fact-that Max had full title-precludes specific performance and that Max cannot force Jacob to transfer his interest in the Properties. (Dem. 5.) Defendants also assert that Britt Homes is not entitled to the damages it seeks, as they are precluded by law. Tr. 14-15. Finally, Defendants argue that any cause of action of Britt Homes against Jacob is invalid because Jacob is not a party to the Contracts. (Dem. 7.)

Britt Homes's Response

Britt Homes argues that Max Sloop had a contractual obligation to convey "free, clear, and unencumbered" title to the Properties on the contractual closing date. (Mem. Resp. Dem. 3.) It contends that Max had a duty to cure any title defects associated with the Properties prior to closing. (*Id.* at 4.) Britt Homes claims that in order to convey good title, Max only needed to procure Jacob's signature on associated deeds prior to the contractual closing date and "nothing ... in the Complaint leads to the unyielding conclusion" that Jacob Sloop would not transfer his interest. (*Id.*) Britt Homes further alleges that Max "formed a plan to convey his interest... to his son ... with the purpose of hindering and frustrating Britt Homes." (Compl. 5.)

***3** Further, Britt Homes argues that Max knew at the time of contracting that Jeannie Sloop had never transferred her interest to him and that Jacob Sloop was her only heir. (Mem. Resp. Dem. 5.) Therefore, Britt Homes contends that there was no mutual mistake of fact between the parties. (*Id.*) It also argues that the Stipulation created "a present right vested in [Max] to receive title to the Properties." (*Id.* at 6.) Therefore, Britt Homes claims that Max was entitled to enforce the Contracts against Jacob Sloop at the time of closing by either voluntary signature or action to quiet title. (*Id.* at 8.)

Analysis

Legal Standard

A demurrer tests the legal sufficiency of the claims stated in the pleading challenged. *Dray v. New Mkt. Poultry Prods., Inc.*, 258 Va. 187, 189, 518 S.E.2d 312, 312 (1999). The only question for the court to decide is whether the facts pleaded, implied, and fairly and justly inferred are legally sufficient to state a cause of action against the defendant. *Thompson v. Skate Am., Inc.*, 261 Va. 121, 128, 540 S.E.2d 123, 126-27 (2001). On demurrer, the court must admit the truth of all material facts properly pleaded, facts that are impliedly alleged, and facts that may be fairly and justly inferred from the alleged facts. *Cox Cable Hampton Rds., Inc. v. City of Norfolk,* 242 Va. 394, 397, 410 S.E.2d 652, 653 (1991). A demurrer does not admit the correctness of any conclusions of law. *Ward's Equip., Inc. v. New Holland N. Am., Inc.,* 254 Va. 379, 382, 493 S.E.2d 516, 518 (1997).

Even if imperfect, a complaint drafted such that a defendant cannot mistake the true nature of the claim should withstand demurrer. *Catercorp, Inc. v. Catering Concepts, Inc.,* 246 Va. 22, 24, 431 S.E.2d 277, 279 (1993). A court, in ruling on a demurrer, may consider documents mentioned in the challenged pleading or documents that the parties stipulate may be considered. *Flippo v. F& L Land Co.,* 241 Va. 15, 17, 400 S.E.2d 156, 156 (1991). If a court sustains a demurrer, it is within the court's discretion to allow leave to amend the complaint, and such leave "should be liberally granted in furtherance of the ends of justice." Va. Sup. Ct. R. 1:8.

"Upon the entry of a decree of divorce from the bond of matrimony, all contingent rights of either consort in the real and personal property of the other ... to which is vested in the parties as joint tenants or as tenants by the entirety ... shall be extinguished, and such estate by the entirety shall thereupon be converted into a tenancy in common." *Va. Code* § 20-111 (2016 Repl. Vol.).

> Specific performance is an equitable remedy. A suit in equity for specific performance is distinct from an action at law for breach of contract. There is no right to specific performance that a court is obligated to enforce. He who seeks specific performance bears the burden of proving both that there is a definite

> contract and that he has performed all that is required of him (or that he is ready and willing to perform at the time of his suit), and that all conditions precedent have been fulfilled. Even if all the required proofs are made, the court in equity is not required to grant the relief sought.

Denton v. Browntown Valley Assocs., 294 Va. 76, 82-83, 803 S.E.2d 490, 494 (2017) (citations omitted). Generally, specific performance of a contract is not available unless it is equitable and free of fraud, misrepresentation, or mistake. *Seaboard Ice Co. v. Lee,* 199 Va. 243, 251, 99 S.E.2d 721, 727 (1957).

The essential elements of a cause of action for breach of contract are (1) a legal obligation of a defendant to a plaintiff, (2) a violation or breach of that obligation, and (3) a consequential injury or damage to the plaintiff. *Hamlet v. Hayes,* 273 Va. 437, 442, 641 S.E.2d 115, 117 (2007).

***4** Under Virginia law, "[w]hen a contract is complete on its face and is plain and unambiguous in its terms, a court is not free to search for its meaning beyond the contract itself." *Aetna Cas. & Sur. Co. v. Fireguard Corp.,* 249 Va. 209, 215, 455 S.E.2d 229, 232 (1995). In construing a contract, a court must "read the contract as a single document, the meaning of which is gathered from all its associated parts when assembled as the unitary expression of the agreement of the parties." *Quesenberry v. Nichols,* 208 Va. 667, 670, 159 S.E.2d 636, 638 (1968).

"A contract may be reformed or rescinded in equity on the ground of mutual mistake. The mistake must be common to both parties." *Langman v. Alumni Ass'n of the Univ. of Va.,* 247 Va. 491, 503, 442 S.E.2d 669, 677 (1994). A mutual mistake occurs when "there has been a meeting of minds -- their agreement actually entered into, but the contract... in its written form, does not express what was really intended by the parties." *Dickenson Cnty. Bank v. Royal Exch. Assurance,* 157 Va. 94, 103, 160 S.E. 13, 16 (1931). To prevail on a claim of a mutual mistake, a party must present proof that is "clear, convincing, satisfactory, and such as to leave no reasonable doubt on the mind that the writing does not correctly embody the intention of the parties." *Id.* at 104, 160 S.E. at 16.

In a claim for breach of a real estate purchase agreement, a purchaser may not normally recover damages beyond the purchase money already paid, with interest absent one of three conditions. The purchaser may recover additional damages only if the seller (1) acted in bad faith contracting to convey title, (2) voluntarily rendered themselves unable to complete the conveyance, or (3) was able to make the conveyance but neglected to do so. *Chesapeake Builders v. Lee,* 254 Va. 294, 299-300, 492 S.E.2d 141, 145 (1997).

A plaintiff asserting a quiet title claim must plead and prove that it has superior title to the property over the defendant. *Maine v. Adams,* 277 Va. 230, 238, 672 S.E.2d 862, 866 (2009).

"Tenants in common, joint tenants, executors with the power to sell, and coparceners of real property ... shall be compellable to make partition and may compel partition." *Va. Code* § 8.01-81 (2015 Repl. Vol.).

Discussion

The Court has considered the pleadings, oral argument at the June 14, 2022, hearing (the "Hearing"), post-hearing briefs, and applicable authorities.

A. Specific Performance Is Unavailable Due to a Mutual Mistake of Fact.

Britt Homes seeks specific performance of the Contracts despite the fact that Max does not have full title to the Properties. Because there was a mutual mistake of fact underlying the Contracts, the Court holds that specific performance is unavailable.

When both contracting parties are under the same mistaken belief concerning the "substance of the thing contracted for"-and no fraud is "imputable to either party"-there is a mutual mistake of fact. *Seaboard Ice Co. v. Lee,* 199 Va. 243, 252, 99 S.E.2d 721, 727 (1957). If a person is mistaken regarding his own property interests and enters into a transaction that would affect those interests, "equity will grant its relief, defensive or affirmative, treating the mistake as analogous to, if not identical with, a mistake of fact." *Burton v. Haden,* 108 Va. 51, 58, 60 S.E. 736, 738 (1908); *see also* Kent Sinclair, *Sinclair on Virginia Remedies* § 43-9 (5th ed. 2016) ("Equity will... give relief for mistake by not ordering specific performance of contracts that would not have been entered but for a mistake of fact." (citing *Cotman v. Whitehead,* 209 Va. 377, 164 S.E.2d 681 (1968)).

***5** Although Britt Homes suggested at the Hearing that Max knew that he did not have full title to the Properties *at the time of contracting,* there are no related allegations in the Complaint. In fact, Britt Homes asserts in the Complaint that it was the title search conducted by Beach Title--*after* execution of the Contracts--that revealed that Max did not in fact have full title to the Properties. Further, Britt Homes's reference in the Complaint to an alleged plan between Max and Jacob "with the purpose of hindering and frustrating Britt Homes" is clearly implied to have occurred *after* execution of the Contracts. Therefore, the Court finds that there was a mutual mistake of fact, *i.e.,* a belief that Max had full title to the Properties, and that there are no allegations of fraud at the time of contracting.

In *T. Nevil Ingram, Inc. v. Lunsford,* the Supreme Court of Virginia held that specific performance could not be ordered to enforce a purchase agreement where the wife, one of the owners, failed to sign the contract. 216 Va. 785, 787, 224 S.E.2d 129, 130 (1976). There, the husband and wife owned a parcel of real estate as tenants by the entirety. *Id.* at 786, 224 S.E.2d at 129. The husband executed an agreement to sell the parcel; the wife's name was not mentioned in the contract, and she did not sign the contract. *Id.,* 224 S.E.2d at 129. On appeal, the supreme court held that under the circumstances, the buyer was precluded from obtaining specific performance, although he could still maintain an action for breach of contract. *Id.* at 787, 224 S.E.2d at 130.

Similarly, in *Wright v. Bryan,* the Supreme Court of Virginia held that because the wife failed to sign a purchase agreement, specific performance was inappropriate. 226 Va. 557, 561, 311 S.E.2d 776, 778 (1984). There, a husband and wife owned a parcel of real estate as tenants by the entirety. *Id.* at 558, 311 S.E.2d at 777. The husband executed an agreement to sell the parcel; the wife's name did not appear on the contract. *Id.* at 559, 311 S.E.2d at 777. Prior to closing, the buyers claimed that the contract was unenforceable and filed suit for return of their deposit. *Id.* at 559-60, 311 S.E.2d at 777. The trial court ordered the seller to return the deposit because the contract was void. *Id.* at 560, 311 S.E.2d at 778. On appeal, the supreme court held that the contract did not lack mutuality merely because the wife was not a party and that it remained valid between the executing parties and, as such, could be the foundation for a breach of contract claim. *Id.* at 561, 311 S.E.2d at 778. However, the absence of the wife's signature precluded specific performance because the property at issue was held by the husband and wife as tenants by the entirety. *Id.*

Here, the Court finds that specific performance similarly is unavailable because Jacob-who owns a 50% interest in the Properties-is not a party to the Contracts. Stated differently, Max does not have full title to the Properties to convey. Because Max and Jeannie held the Properties as tenants by the entirety until their divorce, and Jeannie's half-interest was never transferred by deed as anticipated by the Stipulation, Jeannie's interest converted from tenants by the entirety to tenants in common upon her divorce from Max and then passed to Jacob upon her death. *Va. Code* § 20-111 (2016 Repl. Vol.). Although it is unclear why Jeannie's interest was not conveyed to Max as contemplated, the Court notes that the conveyance was expressly conditioned

upon Max performing certain actions that he may have been unable to perform; hence, as discussed in more detail below, the Court finds that the conveyance-as envisioned by the Stipulation--was not guaranteed and, in any case, was not recorded.

The Court holds that an action for specific performance has not been adequately pleaded. The Court acknowledges that real property is unique and that equitable relief therefore may be appropriate. *See* *Bank of Hampton Rds. v. Powell,* 292 Va. 10, 16, 785 S.E.2d 788, 791 (2016). However, the appropriate remedy when there is a mutual mistake of fact underlying a contract is recission. *See Langman v. Alumni Ass'n of the Univ. of Va.,* 247 Va. 491, 503, 442 S.E.2d 669, 677 (1994). Recission returns the parties to their pre-contract positions, so Britt Homes would be entitled to the return of any deposit it may have paid and Max would retain his interest in the Properties.

B. Quiet Title/Partition Is Inappropriate Because Jacob Is Not a Party to the Contracts, Max Does Not Have Full Title, and the Conditions of the Stipulation Were Not Met.

***6** Britt Homes asks the Court to view Jacob's legal interest in the Properties as a cloud on title and compel Jacob to convey to Max his interest in the Properties so that Max will have full title. Alternatively, Britt Homes seeks a declaration that Max already has equitable full title as a result of the Stipulation. The Court declines to do either.

As discussed in more detail below, the Court holds that Jacob is not a proper party to this suit because there is no relationship between Britt Homes and Jacob and because any conveyance issues controlled by the Stipulation are between only Max and Jacob. Hence, there is no valid basis for the Court to order Jacob to convey his interest in the Properties to either Max or Britt Homes.

It is undisputed that Max does not have full title to the Properties. Although the Stipulation clearly anticipated that he would eventually own the Properties as his "sole and separate properties," actual ownership was *subject to certain conditions.* Specifically, Max was required to refinance the Properties solely in his name, prepare deeds of transfer, and ensure that Jeannie signed the deeds to remove her name. Further, Britt Homes alleges that the Properties are still encumbered by an original first deed of trust securing financing to both Max and Jeannie.

The Court holds that Max's right to Jeannie's interest in the Properties did not transfer upon execution of the Stipulation, as Britt Homes argues. In *Hart v. Pace,* the Circuit Court of the City of Roanoke found that a wife's half-interest in her ex-husband's property, granted to her by a post-nuptial agreement incorporated into the couple's divorce decree, did not vest until she recorded a related conveyance document. 49 Va. Cir. 434, 435 (1999)49 Va. Cir. 434, 435 (1999). [2] Her interest therefore was subject to a deed of trust and two judgment liens recorded prior to the conveyance of her half-interest, as Virginia's recording statutes typically grant priority of interests based upon "a race to the courthouse." *Id.* Similarly, in *Prunty v. Terry,* the U.S. District Court for the Eastern District of Virginia determined that, under Virginia law, a marital agreement did not result in a transfer of property until an associated conveyance document was recorded and the transfer was reflected in the applicable land records. 408 B.R. 79, 85-86 (E.D. Va. 2009). [3]

The Court finds that although the Stipulation granted Max the opportunity to acquire full title after certain conditions were satisfied, a recorded conveyance was necessary for Max to actually gain full legal title. *See Hart,* 49 Va. Cir. at 435; *Prunty,* 408 B.R. at 85-86. Here, there is no allegation that the required conveyance-from Jeannie to Max-was ever made or recorded. Moreover, Britt Homes has not alleged that all required conditions were fulfilled in order to transfer title to the Properties from Jeannie to Max. *See Denton v. Browntown Valley Assocs.,* 294 Va. 76, 83, 803 S.E.2d, 490, 494 (2017) (explaining that the plaintiff bears the burden of demonstrating that all conditions precedent to performance of the contract have been fulfilled).

***7** Britt Homes argues that Max acquired Jeannie's interest in the Properties upon execution of the Stipulation via equitable conversion. The Court disagrees. As an initial matter, Virginia has long recognized the doctrine of equitable conversion. *Clay*

v. Landreth, 187 Va. 169, 172, 45 S.E.2d 875, 877 (1948) ("That the doctrine of equitable conversion exists in Virginia cannot be doubted."). The Supreme Court of Virginia has held that "as soon as a contract is made for the sale of an estate, equity considers the buyer as the owner of the land, and a seller as the trustee for him." *Devine v. Buki* 289 Va. 162, 173, 767 S.E.2d 459, 465 (2015) (quoting *Ferry v. Clarke,* 77 Va. 397, 407 (1883)). However, equitable conversion is limited to real estate contracts. *Id.* Hence, it does not apply to the Stipulation, so Max did not somehow acquire Jeannie's interest in the Properties when the Stipulation was executed by virtue of equitable conversion.

Britt Homes also argued at the Hearing--although there are no related allegations in the Complaint--that, alternatively, the Court should order Max to convey as much title as he has and leave it to Britt Homes to subsequently sue Jacob in a partition suit. In *Chesapeake Builders v. Lee,* the Supreme Court of Virginia affirmed a commissioner's decision awarding the buyer in a real estate purchase agreement conveyance of that portion of the contracted property the seller was able to convey, with abatement of the purchase price paid for the lots mistakenly contracted to sell. 254 Va. 294, 300-01, 492 S.E.2d 141, 145-46 (1997). However, the ruling in that case appears to have been based on the ability to easily segregate lots for which the seller did and did not have title. *Id.* at 296, 492 S.E.2d at 296. Such is not the case here, where Max and Jacob own each of the Properties as tenants in common and the Properties each contain a single set of improvements.

In *Reid v. Allen,* the Supreme Court of Virginia reversed the trial court's decision granting specific performance of a partial real-property interest. 216 Va. 630, 633-634, 221 S.E.2d 166, 169 (1976). There, one of the owners of a half interest in a parcel of real estate--a "family farm" used by all owners to jointly operate a dairy business--refused to sign the sales contract. *Id.* at 631, 221 S.E.2d at 168. The trial court granted specific performance of the other fifty-percent partial interest in the property and ordered the purchasers to pay one half of the contract price. *Id.* However, the Supreme Court of Virginia reversed the trial court, holding that specific performance of a partial interest in the property would "amount[t] to the substitution of an agreement which the parties had not contracted for," as the agreement was for an operating dairy farm. *Id.* at 633-634, 221 S.E.2d at 169. The Court finds that this is analogous to the situation here, as the Properties are not easily segregable.

Moreover, the specific language in the Complaint does not properly allege a quiet title action or a partition suit. Jacob's interest in the Properties is not a cloud on title, as Britt Homes argues, but rather is a legitimate legal interest. Brit Homes also has not alleged that it has superior title to the Properties over Jacob. *Maine v. Adams,* 277 Va. 230, 238, 672 S.E.2d 862, 866 (2009). Additionally, there are insufficient allegations to support that Britt Homes either has standing to seek or can compel partition of the Properties. *Va. Code* § 8.01-81 (2015 Repl. Vol.).

Britt Homes therefore has not adequately pleaded a claim for either quiet title or partition.

C. Britt Homes Failed to Sufficiently Allege a Viable Breach of Contract Claim.

Britt Homes alleges a breach of contract action, in which it seeks damages that allegedly stem from Max's breach of the Contracts. The essential elements of a breach of contract action are (1) a legal obligation of a defendant to a plaintiff, (2) a violation or breach of that obligation, and (3) a consequential injury or damage to the plaintiff. *Hamlet v. Hayes,* 273 Va. 437, 442, 641 S.E.2d 115, 117 (2007).

***8** The mutual mistake of fact shared by Britt Homes and Max regarding the status of Max's title at the time the Contracts were executed precluded the parties from entering fully enforceable purchase contracts. [4] *Briggs v. Watkins,* 112 Va. 14, 25, 70 S.E. 551, 554 (1911) (holding that rescission, and not specific performance, is the appropriate remedy for a mutual mistake of fact). [5] Although there may have been a meeting of the minds, the agreements actually entered into do not express what the parties intended. *Dickenson Cnty. Bank v. Royal Exch. Assurance,* 157 Va. 94, 103, 160 S.E. 13, 16 (1931). *But see* Kent Sinclair, *Sinclair on Virginia Remedies* § 43-9 (5th ed. 2016) (opining that "if a mutual mistake did occur as to a material matter,

there was no meeting of the minds and therefore no contract to enforce" (citing *Seaboard Ice Co. v. Lee,* 199 Va. 243, 251, 99 S.E.2d 721, 727 (1957)).

Even assuming, *arguendo,* that the Contracts were enforceable, a real estate purchaser cannot recover damages for breach of contract beyond return of purchase money already paid unless the seller (1) acted in bad faith contracting to convey title, (2) voluntarily rendered themselves unable to complete the conveyance, or (3) was able to make the conveyance but neglected to do so. *Chesapeake Builders v. Lee,* 254 Va. 294, 299-300, 492 S.E.2d 141, 145 (1997). Of note, Britt Homes includes no allegation in the Complaint that it has paid any purchase money or is seeking return of any purchase money paid.

Britt Homes asserts that additional damages are available because Max had the ability to convey title to the Properties--ostensibly by getting Jacob to sign conveyance documents-but refused to do so. The Court notes, as previously mentioned, that it is undisputed that Max does not have full title to the Properties. Further, the Court finds Britt Homes's claim that Max and Jacob "formed a plan to convey his interest... to his son ... with the purpose of hindering and frustrating Britt Homes" insufficient to show that Max either "acted in bad faith" or "voluntarily rendered [himself] unable to complete the conveyance." Accordingly, the Court finds that Britt Homes cannot recover damages beyond any purchase money paid. Therefore, the Court finds that Britt Homes cannot recover the damages it seeks in the Complaint, *i. e.,* "investment costs, time and costs to secure alternate investment property, loss of revenue, less favorable financing or other conditions of an alternate transaction, in the amount of $49,000."

***9** Because Britt Homes has no claim for recoverable damages, its breach of contract claim must fail.

D. Jacob Sloop Is Not a Proper Party to the Suit.

The Court finds that Jacob Sloop is not a proper party to this lawsuit. As an initial matter, there clearly is no privity of contract between Britt Homes and Jacob. *Privity, Black's Law Dictionary* (11th ed. 2019) (defining "Privity of contract" as "[t]he relationship between the parties to a contract, allowing them to sue each other but preventing a third party from doing so."). Instead, Britt Homes asserts that because Jacob's interest in the Properties is only the result of the failure of an intended conveyance under the Stipulation, Max is the equitable owner of Jacob's interest. It seeks recovery from Jacob in the form of a quiet title action or a partition of the Properties. [6] Britt Homes claims that it is the assignee of Max's rights under the Stipulation and, thus, the Court has the power to quiet title or partition the Properties as a result of the language in the Stipulation. The Court disagrees.

A plaintiff asserting a quiet title claim must plead and prove that it has superior title to the property over the defendant. *Maine v. Adams,* 277 Va. 230, 238, 672 S.E.2d 862, 866 (2009). Under Virginia law, "[t]enants in common, joint tenants, executors with the power to sell, and coparceners of real property ... shall be compellable to make partition and may compel partition." *Va. Code* § 8.01-81 (2015 Repl. Vol.).

As discussed above, the doctrine of equitable conversion does not apply to the Stipulation, so neither Max nor Britt Homes-as the alleged assignee of Max's rights under the Stipulation-can assert an equitable conversion claim. Accordingly, Britt Homes has failed to plead that it has superior title to the Properties over Jacob as required to bring a quiet title action. Britt Homes has also failed to plead that it is a tenant in common with Jacob and therefore does not have standing to bring a partition suit.

Therefore, the Court dismisses Jacob Sloop from the suit.

Conclusion

Because the Court finds that Britt Homes's complaint alleges facts that constitute a mutual mistake of fact between Britt Homes and Max Sloop at the time of contracting and because the Complaint does not allege sufficient facts to support specific performance, quiet title/partition, or breach of contract, the Court SUSTAINS Sloop's Demurrer. The Court also dismisses Jacob Sloop from this action.

The Court recognizes that leave to amend "should be liberally granted in furtherance of the ends of justice." Va. Sup. Ct. R. 1:8. Although amending the Complaint in an attempt to cure the factual deficiencies and therefore state viable claims likely is futile, the Court grants Britt Homes leave to amend within twenty-one days of this order if it so chooses.

Attached is an Order incorporating the Court's ruling. Any objections shall be filed with the Court within fourteen days.

***10** Sincerely,

<<signature>>

David W. Lannetti

Chief Judge

DWL/amt

Footnotes

1 It is unclear whether "within 30 days" refers to the date of refinancing or the date of the Stipulation.

2 As is appropriate, the Court does not consider Virginia circuit court opinions to hold precedential value. The Court instead considers the rationale offered by that court to the extent that this Court finds it persuasive. *See Fairfax Cnty. Sch. Bd. v. Rose,* 29 Va. App. 32, 39 n.3, 509 S.E.2d 525, 528 n.3 (1999).

3 The Court also does not consider U.S. District Court opinions to hold precedential value, but rather considers the rationale offered only to the extent this Court finds it informative. *See* Va. Sup. Ct. R. 5:1(f).

4 Although mutual mistake of fact is a defense to a breach of contract claim, Kent Sinclair, *Sinclair on Virginia Remedies* § 43-9 (5th ed. 2016), and therefore normally would not be evaluated in the context of a demurrer, here Britt Homes includes allegations in the Complaint that essentially concede that there was a mutual mistake of fact. *See Cox Cable Hampton Rds., Inc. v. City of Norfolk,* 242 Va. 394, 397, 410 S.E.2d 652, 653 (1991) (holding that, on demurrer, the Court must admit the truth of all material facts properly pleaded, facts that are impliedly alleged, and facts that may be fairly and justly inferred from the alleged facts).

5 It is unclear under Virginia law whether a mutual mistake of fact renders a contract void or voidable. *Compare* *Ware v. Scott,* 220 Va. 317, 320, 257 S.E.2d 855, 857-58 (1979)) (holding that a mutual mistake of fact "made the contract voidable"), *with* *Va. Iron, Coal & Coke Co. v. Graham,* 124 Va. 692, 708, 98 S.E. 659, 664 (1919) ("If certain facts are assumed by both parties as the basis of the contract, and it subsequently appears that such facts did not exist, the contract is inoperative."), *and* *Briggs v. Watkins,* 112 Va. 14, 25, 70 S.E. 551, 554 (1911) ("Nothing is more clear in

equity than the doctrine that a contract founded in mutual mistake of the facts constituting the very basis or essence of it will avoid it." (quoting Kerr on Fraud and Mistake 416)).

6 As noted above, the specific relief requested in the Complaint related to this cause of action is a Court-ordered declaration compelling Jacob to surrender his interest in the Properties.

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