FILED
United States Court of Appeals
Tenth Circuit

October 31, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

LEE A. HOLLAAR; AUDREY M. HOLLAAR,

Plaintiffs - Appellants,

v.

MARKETPRO SOUTH INC., a Maryland corporation,

Defendant - Appellee.

No. 23-4018
(D.C. No. 2:22-CV-00559-TS)
(D. Utah)

ORDER AND JUDGMENT*

Before **HOLMES**, Chief Judge, **HARTZ**, and **PHILLIPS**, Circuit Judges.

Lee and Audrey Hollaar (Sellers) appeal the district court's dismissal of their claims against MarketPro South, Inc. (Buyer) in their breach-of-contract suit related to the sale of real property in Washington, D.C. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

BACKGROUND

Sellers owned a condominium unit in Washington, D.C. Sellers and Buyer entered into a "Contract for the Sale and Purchase of Real Estate" (the Contract). Aplt. App. at 25. They executed the Contract on January 25, 2022. A local statute, D.C. Code § 42-1904.11(a), gives condominium sellers ten business days after execution of the contract of sale to provide to buyers specified disclosures and documents to complete the transaction (the Resale Package) and affords buyers certain rights to cancel the contract. Sellers had not yet provided the required disclosures by February 2. On that day, Buyer emailed Sellers, stating:

> This letter is to inform you that after careful review, [Buyer] is unable to move forward with the purchase of your property. We made this determination after reviewing the retaining wall issue and completing our construction budget. I have copied Roman Mychajiw who is a whiz at listing homes in the "As Is" condition and may be able to assist you in getting the property sold.
>
> Thank you for the opportunity and if you should have any questions, please don't hesitate to reach out to us.

Aplt. App. at 28 (the February 2 Email). The parties did not close the sale.

Sellers sued Buyer in Utah state court, alleging anticipatory breach of contract, breach of contract, and breach of the implied covenant of good faith and fair dealing. Invoking diversity jurisdiction, Buyer removed the case to federal court and moved to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. Sellers, in turn, filed a motion for summary judgment. Their reply in support of the motion attached as an exhibit the Resale Package, which had not previously been provided to Buyer.

Two days later, Buyer personally served on Sellers a termination notice purporting to exercise its right to cancel the Contract. The district court granted Buyer's motion to dismiss, concluding that Buyer had properly cancelled the Contract under D.C. Code § 42-1904.11(a-1).

DISCUSSION

"We review de novo a district court's decision on a Rule 12(b)(6) motion for dismissal for failure to state a claim. Under this standard, we must accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff." *Waller v. City & Cnty. of Denver*, 932 F.3d 1277, 1282 (10th Cir. 2019) (cleaned up). "In evaluating a motion to dismiss, we may consider not only the complaint, but also the attached exhibits and documents incorporated into the complaint by reference." *Commw. Prop. Advocs., LLC v. Mortg. Elec. Registration Sys., Inc.*, 680 F.3d 1194, 1201 (10th Cir. 2011). "[A] complaint must contain sufficient factual matter . . . to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). To meet this standard, the plaintiff must "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

The district court, utilizing Utah's choice-of-law rules, applied the District of Columbia Code because the property is located in D.C. Neither party contests this determination, so we, too, apply D.C. law.

D.C. Code § 42-1904.11 provides, in relevant part:

> (a) In the event of a resale of a condominium unit by a unit owner other than the declarant, the unit owner shall obtain from the unit owners' association and furnish to the purchaser, on or prior to the 10th business day following the date of execution of the contract of sale by the purchaser, [the Resale Package].
>
> (a-1) (1) If the [Resale Package is] not furnished to the purchaser on or prior to the 10th business day following the date of execution of the contract of sale by the purchaser, the purchaser shall have the right to cancel the contract by giving notice in writing to the seller prior to receipt of the [Resale Package], but not after conveyance under the contract.
>
> (2) . . . [T]he purchaser shall have the right for a period of 3-business days following the purchaser's receipt of the [Resale Package], whether or not such receipt occurs within the time period described in subsection (a) of this section, to cancel the contract by giving notice in writing and returning the [Resale Package] to the seller, provided that the purchaser may not so cancel the contract after conveyance under the contract.

Sellers argue the district court misconstrued § 42-1904.11(a-1). As they interpret that provision, a party's right to cancel a condominium sales contract arises only after the expiration of the ten-business-day period allotted to provide the Resale Package. So, Sellers argue, Buyer's February 2 Email was not only ineffective as a cancellation, but it also constituted an anticipatory repudiation of its duties under the contract. Sellers further argue that this anticipatory breach relieved them of any obligation to further perform—including by providing the Resale Package. On Sellers' reading of the statute, Buyer *could have* cancelled the contract without

penalty on February 9 (11 business days after the execution of the contract), but its "termination of the [Contract] on February 2, 2022 . . . was premature and ineffectual." Aplt. Opening Br. at 7.

There is significant tension between Sellers' two characterizations of the February 2 Email—(1) that it constituted an anticipatory breach of the Contract and (2) that it was ineffective as a cancellation of the Contract. Under D.C. law, "A so-called anticipatory breach only becomes a wrongful act if the promisee elects to treat it as such. One method of manifesting such an election is to file an action for breach of contract." *Eastbanc, Inc. v. Georgetown Park Assocs. II, L.P.*, 940 A.2d 996, 1007–08 (D.C. 2008) (cleaned up). Thus, Sellers can sue for breach of contract on the ground that the February 2 Email was a wrongful anticipatory breach. Or they can claim that the email was legally ineffective (so the Contract was still in effect) and proceed from there. We consider both theories.

First, anticipatory breach. The problem with this theory is the failure to show damages from the alleged breach on February 2. Under § 42-1904.11(a-1)(1), Buyer could have cancelled the Contract 11 (or more) business days after signing if Sellers had not provided the Resale Package. Further, if Sellers had provided the Resale Package, § 42-1904.11(a-1)(2) would have given Buyer three business days to cancel the Contract. So ultimately, whether or not Sellers timely provided the Resale Package, Buyer had a statutory right to cancel the Contract. Here, Buyer simply exercised its right of cancellation too early In these circumstances, we are not persuaded that Sellers can state a claim for relief.

"In a breach of contract action, the measure of damages that a court must apply is the amount necessary to place the non-breaching party in the same position he or she would have been in had the contract been performed." *Mashack v. Superior Mgmt. Servs., Inc.*, 806 A.2d 1239, 1241 (D.C. 2002) (internal quotation marks omitted). This principle likewise applies to claims for breach of the implied covenant of good faith and fair dealing, which is treated as a term in "[e]very contract" under D.C. law. *Wright v. Howard Univ.*, 60 A.3d 749, 754 (D.C. 2013). We therefore look to see how Sellers were prejudiced by Buyer's failure to wait until it did (or did not) timely receive the Resale Package, when it had the absolute right to cancel the contract. Sellers do not suggest any prejudice. And the only effect on them that we can see as a result of the premature cancellation is that they were saved the time and effort involved in preparing the Resale Package. Thus, Sellers have not plausibly pleaded claims for breach of contract or breach of the covenant of good faith and fair dealing based on a theory of anticipatory breach. *See Tsintolas Realty Co. v. Mendez*, 984 A.2d 181, 187 (D.C. 2009) ("It is a longstanding principle in civil law that there can be no monetary recovery unless the plaintiff has suffered harm. Mere breach without proof of monetary loss is *injuria absque damno*, *i.e.*, a wrong which results in no loss or damage, and thus cannot sustain an action." (cleaned up)).[1]

[1] We also note that even if Sellers could demonstrate damages, their "sole remedy" for breach by Buyer is termination of the Contract. Aplt. App. at 26, ¶ 6. This limitation on the remedy does not make the Buyer's contractual promise illusory, because termination relieves Sellers of any continuing obligations under the Contract and frees them to seek another buyer.

We next turn to Sellers' argument that the February 2 Email was ineffective to cancel the Contract (1) because it was premature and (2) because it "[made] no mention of [D.C. Code § 42-1904.11] whatsoever, and actually claim[ed] to cancel for another reason entirely." Aplt. Opening Br. at 22.[2] But if Sellers elect not to treat the February 2 Email as an anticipatory breach and contend that the February 2 Email was ineffective to cancel the Contract, then their claim must be based on some enforceable breach of the Contract after February 2. Yet no enforceable breach occurred. Under the D.C. statute a buyer has an absolute right (at least if the condominium has not been conveyed to the buyer and at least 10 business days have passed since execution of the sale contract) to cancel the contract until the seller has provided the Resale Package. Sellers' complaint, however, does not allege that they ever provided the Resale Package to Buyer.[3]

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[2] We add that we see no merit to the second part of the argument. Nothing in § 42-1904.11 requires that a notice of cancellation expressly invoke the statute to be effective under that provision. Nor does any portion of § 42-1904.11 condition a buyer's right to cancel on the content or completeness of the Resale Package. All the statute requires is that the notice be "in writing," § 42-1904.11(a-1)(1), (2).

[3] The only time that one could possibly say the Resale Package was provided to Buyer was when it was attached to Sellers' reply brief in support of their motion for summary judgment. But Sellers deny that the attachment constituted provision of the Resale Package under the statute; and even if it did satisfy the statute, Buyer had a statutory right to cancel within three days, and it did so.

CONCLUSION

We affirm the judgment of the district court. We deny Sellers' "Motion to Certify Questions of D.C. Law."

Entered for the Court

Harris L Hartz
Circuit Judge