THE SUPREME COURT OF NEW HAMPSHIRE

Hillsborough-northern judicial district
Case No. 2024-0560
Citation: J&C Properties v. Rayster Realty, 2026 N.H. 12

J&C PROPERTIES, LLC

v.

RAYSTER REALTY, LLC

Argued: November 12, 2025
Opinion Issued: April 2, 2026

Joshua L. Gordon, of Concord, on the brief and orally, for the plaintiff.

Cleveland, Waters and Bass, P.A., of Concord (Jeffrey C. Christensen on the brief and orally), for the defendant.

DONOVAN, J.

[¶1] This case arises from the failed purchase and sale of an apartment complex. Following a trial in Superior Court (Delker, J.), the jury found the defendant, Rayster Realty, LLC (seller), liable for breach of the purchase and sale contract (P&S). The trial court awarded specific performance to the plaintiff, J&C Properties, LLC (buyer).

[¶2] On appeal, the seller argues, among other things, that the court erred by: (1) denying the seller's motion for partial summary judgment; (2) admitting certain oral conversations between the parties; and (3) granting the buyer's request for specific performance. We affirm.

I. Facts

[¶3] The jury could have found, or the record otherwise supports, the following facts. The seller owns a twelve-unit apartment complex at Beech and Silver Streets in Manchester. In late September 2021, the parties signed the P&S for the property's sale at a price of $1.3 million, with the closing to occur "[o]n or before November 30th, 2021."

[¶4] The P&S included a financing contingency that required the buyer to provide the seller with a written financing commitment by November 26, 2021, or evidence of the buyer's inability to secure financing. The contingency stated that "TIME IS OF THE ESSENCE" and that, if the buyer failed to meet this deadline, the seller could declare the buyer in default of the P&S or, alternatively, "[t]reat[] the financing contingency as having been waived by" the buyer. The contingency further provided that if the seller deemed the buyer to have waived the contingency and the buyer subsequently did "not close in a timely manner," the seller could then declare the buyer in default. Declaring the buyer in default at either stage — upon a financing delay or due to the buyer's failure to timely close — would permit the seller to terminate the P&S, keep all deposits, and return the property to the market for sale or retain it.

[¶5] In late October 2021, the buyer's bank approved financing, conditioned on an appraisal of the property. However, the bank also notified Jeff Duchesne, the buyer's co-owner, that the appraisal would likely be delayed.

[¶6] On November 2, Duchesne contacted Robert Camann, the seller's co-owner, by phone to inform him that the bank had conditionally approved a loan, but the appraisal would cause a delay in finalizing the financing. Duchesne testified that, based upon the November 2 conversation, he understood that the seller was "fine with" delaying the financing deadline. On the same date, Duchesne also sent the seller a proposed written addendum extending the financing deadline to December 10, which the seller did not sign. The buyer did not send a written financing commitment or evidence of its inability to obtain financing to the seller by November 26.

[¶7] On November 29, Steve April, the seller's other co-owner, emailed Duchesne regarding the property's certificate of compliance and application and inspection fees. That same day, April and Duchesne met to close on another property, during which they discussed the property at Beech and Silver Streets and orally agreed to close in December.

[¶8] That afternoon, Donna Podd, a paralegal at the closing agent, emailed April and Camann to schedule the closing. Camann replied by email, "12-9 works best for me." On November 30, after conferring separately with the buyer and seller, Podd emailed Duchesne, Camann, and April to "confirm our closing scheduled for 12/10 at 10:00 am here at our office."

[¶9] On November 29 and 30, Duchesne emailed Camann and April proposed addenda to the P&S that would extend the financing deadline and closing date to dates in December. The seller did not sign the addenda.

[¶10] On December 3, April emailed Duchesne to terminate the P&S. Specifically, he wrote: "[W]ith respect to the extension for Beech & Silver, [Camann] and I have decided to hit the pause button on this deal . . . . We do not see ourselves extending this deadline or closing on [December] 10th at this point." The next day, Camann emailed Duchesne: "I do not want to sell and [April] feels as though we are under valuating ourselves. Obviously we will give you guys back your deposit money asap." Around this time, Camann phoned Duchesne and apologized for having the deal fall apart.

[¶11] The parties did not close on the property, and on December 10, the buyer sued the seller for specific performance of the P&S. The seller counterclaimed and moved for partial summary judgment. As relevant to this appeal, it asserted that: (1) the buyer had breached the P&S by missing the financing deadline; and (2) this breach entitled the seller to terminate the P&S. The trial court denied the seller's motion for partial summary judgment.

[¶12] Before trial, the seller moved in limine to preclude: (1) evidence of the seller's oral communications with Duchesne or Podd; (2) documents from the closing agent that the buyer produced approximately one month before trial, over a year after the close of discovery; and (3) the closing agent's emails with the parties. The court denied the seller's first two motions and deferred ruling on the third until trial. At trial, it admitted the closing agent's emails.

[¶13] The jury returned a verdict in the buyer's favor, finding that: (1) the buyer did not materially breach the P&S; (2) the parties agreed to extend the closing date beyond November 30, 2021; and (3) the seller materially breached the P&S. After considering the parties' memoranda regarding the buyer's requested remedy, the court granted the buyer specific performance and ordered the parties to close on the property within thirty days, consistent with the terms of the P&S. This appeal followed.

II. Analysis

A. Summary Judgment

[¶14] We first address the seller's appeal of the trial court's order denying its motion for partial summary judgment. The seller asserts that the trial court erred by concluding that a material factual dispute — whether the seller treated the P&S's financing contingency as waived after the buyer missed the financing deadline — precluded summary judgment. The buyer does not argue that we should decline to review the trial court's denial of summary judgment, given that there has been a full trial on the merits. See Lama v. Borras, 16 F.3d 473, 476 n.5 (1st Cir. 1994) (stating that federal appeals court would not review "the propriety of the denial of summary judgment" that "ha[d] been overtaken by subsequent events, namely, a full-dress trial and an adverse jury verdict"). Therefore, we assume, without deciding, that this issue is reviewable.

[¶15] "To obtain summary judgment, the moving party must show that there 'is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" O'Malley-Joyce v. Travelers Home & Marine Ins. Co., 175 N.H. 245, 250 (2022) (quoting RSA 491:8-a, III (2010)). "An issue of fact is material if it affects the outcome of the litigation." Porter v. City of Manchester, 155 N.H. 149, 153 (2007). When reviewing a denial of summary judgment, "we consider the affidavits and other evidence, and all inferences properly drawn from them, in the light most favorable to the non-moving party." Id. "If no genuine issue of material fact existed, and the moving party was entitled to judgment as a matter of law, then summary judgment should have been granted." Id. "We review the trial court's application of the law to the facts de novo." Robinson v. 1 Bouchard Street Realty, 177 N.H. 59, 61 (2024), 2024 N.H. 59, ¶6.

[¶16] Pursuant to the financing contingency's terms, once the buyer missed the November 26 deadline, the seller had "the option of either: (a) Declaring BUYER in default of this Agreement; or (b) Treating the financing contingency as having been waived by BUYER." In its summary judgment order, the trial court determined that the buyer failed to meet the November 26 financing deadline, but that the parties' subsequent emails on November 29 and 30 "support[ed] the conclusion that the parties were operating as if . . . the financing contingency had been waived." As the court noted, this conduct conflicted with the seller's assertion that its cancellation of the P&S on December 3 was a declaration of the buyer's default pursuant to the contingency. The court thus found that a "material factual dispute as to whether the [seller] deemed the [buyer] to have defaulted or to have waived the financing contingency" precluded summary judgment.

[¶17] On appeal, the seller argues that waiver of a contractual right requires "a clear expression of intent to waive the right," and that here, there

was no writing in which the seller agreed to waive the contingency or its deadline. (Quoting Pine Gravel, Inc. v. Cianchette d/b/a Site Prep., 128 N.H. 460, 465 (1986)). The buyer counters that the seller's conduct and communications with the buyer and the closing agent after November 26 constituted a waiver of the financing deadline.[1]

[¶18] "[A] waiver is the voluntary or intentional abandonment or relinquishment of a known right." Private Jet Servs. Grp. v. Tauck, Inc., 176 N.H. 553, 557-58 (2024), 2024 N.H. 20, ¶12. For example, in the context of contractual rights, "[w]hen a provision is placed in a contract for a party's benefit, that party may waive the beneficial provision and proceed with his performance under the contract." Leavitt v. Fowler, 118 N.H. 541, 544 (1978). "A waiver may be based upon an intention expressed in explicit language or upon conduct under the circumstances justifying an inference of a relinquishment of a known right." Private Jet Servs. Grp., 176 N.H. at 558, 2024 N.H. 20, ¶12. Nonetheless, "a clear expression of intent to waive the right must exist." Pine Gravel, Inc., 128 N.H. at 465.

[¶19] The factual dispute found by the trial court concerned "whether the [seller] deemed the [buyer] to have . . . waived the financing contingency" after the buyer missed the November 26 deadline. The seller's "[t]reating the financing contingency as having been waived" would constitute a waiver of its option, under the terms of the P&S, to instead declare the buyer in default. Thus, the question before us is whether the trial court could properly have concluded that the seller's "conduct under the circumstances justif[ied] an inference" that it waived its contractual right to declare the buyer in default, notwithstanding the lack of any express waiver. See Private Jet Servs. Grp., 176 N.H. at 558, 2024 N.H. 20, ¶12.

[¶20] The financing contingency granted two options to the seller if the buyer failed to meet the November 26 deadline. The P&S's use of the phrase "[t]reating the financing contingency as having been waived" expressly contemplated that the seller could manifest its decision to exercise this option through conduct alone. (Emphasis added.) Under these circumstances, the court could properly have found that the seller's emails discussing closing

[1] The buyer also asserts that the seller did not preserve its arguments regarding the buyer's failure to meet the financing contingency's deadline. We construe the buyer's argument as contending that the seller's claims regarding the contingency are unpreserved because: (1) the seller's counterclaim did not sufficiently raise them; or (2) the seller did not confront the buyer regarding its failure to meet the November 26 deadline before the buyer sued. "Generally, we do not consider issues raised on appeal that were not presented to the trial court." State v. Batista-Salva, 171 N.H. 818, 822 (2019) (describing preservation requirement). The seller raised its arguments pertaining to the contingency's deadline in its counterclaim, its motion for partial summary judgment, its motion in limine to exclude its oral communications, and during trial in its motion for a directed verdict. Thus, the trial court had ample opportunity to consider these arguments, and we reject the buyer's contention that the seller failed to preserve them.

preparations, sent on November 29 and 30 after the buyer missed the financing deadline, constituted conduct waiving its option to declare the buyer in default. See id.; Pine Gravel, Inc., 128 N.H. at 465. Accordingly, the trial court properly determined that the seller's conduct after November 26 gave rise to a material factual dispute that precluded summary judgment. We thus affirm the trial court's denial of partial summary judgment to the seller.

B. Statute of Frauds

[¶21] Next, the seller contends that because there was no writing in which the seller agreed to modify the P&S's financing contingency, the trial court erred under the statute of frauds by admitting oral communications at trial that suggested the seller's consent to extend or waive the November 26 financing deadline. Conversely, the buyer maintains that the parties orally extended the financing deadline. It argues that, even if a writing was necessary to prove this agreed-upon change, the buyer partially performed the P&S in reliance on the parties' oral modification.

[¶22] "We will uphold a trial court's decision to admit evidence absent an unsustainable exercise of discretion." Barking Dog v. Citizens Ins. Co. of America, 164 N.H. 80, 86 (2012). When applying our unsustainable exercise of discretion standard of review, "we determine only whether the record establishes an objective basis sufficient to sustain the discretionary judgment made." Stachulski v. Apple New England, LLC, 171 N.H. 158, 164 (2018). "[O]ur task is not to determine whether we would have found differently, but only to determine whether a reasonable person could have reached the same decision as the trial court on the basis of the evidence before it." Id.

[¶23] Whether the statute of frauds applies to an agreement "is a question of law that we review de novo," Byblos Corp. v. Salem Farm Realty Trust, 141 N.H. 726, 729 (1997), while "[w]hether an agreement complies with the statute of frauds is a mixed question of law and fact," Tsiatsios v. Tsiatsios, 140 N.H. 173, 176 (1995). The statute of frauds provides: "No action shall be maintained upon a contract for the sale of land unless the agreement upon which it is brought, or some memorandum thereof, is in writing and signed by the party to be charged, or by some person authorized by him in writing." RSA 506:1 (2010). "To satisfy the statute of frauds, the writing must express the essential terms of the contract." Greene v. McLeod, 156 N.H. 724, 727 (2008) (quotation omitted). "These terms include: the purchase price, the identity of the parties, and a description of the real estate in question." Id.

[¶24] "In addition, it is well settled that a real estate contract can be modified only by a subsequent writing or other equitable circumstances." Cowern v. Norris, 137 N.H. 719, 722 (1993). Notably, we have required a "writing or other equitable circumstances," id., to modify a term appearing in the parties' written contract even where the altered term was not "essential"

under Greene. For example, in Cowern, we concluded that a modification to a real estate contract's financing contingency was subject to the statute of frauds. Cowern, 137 N.H. at 722-23 (rejecting buyers' argument that their notification to sellers of their need for an equity loan modified the contingency). Similarly, in Langdon v. Sibley, we determined that, due to the statute of frauds, a home sale contract could not be modified to waive a term requiring third-party consent merely through the parties' conduct. Langdon v. Sibley, 100 N.H. 373, 376 (1956).

[¶25] Thus, whether the statute of frauds bars evidence of the seller's oral communications suggesting its consent to extend or waive the November 26 financing deadline depends on whether these communications modified the P&S's deadline. Even where the statute would ordinarily apply, however, the "part performance doctrine . . . effectively withdraws [an agreement] from the operation of the statute of frauds when application of the statute would result in fraud or irreparable injury on the purchaser who has performed his part of the agreement." Greene, 156 N.H. at 728 (quotations and citations omitted).

[¶26] The seller challenges, as barred under the statute of frauds, the admission of testimony regarding: (1) Camann's phone call with Duchesne on November 2, in which Camann purportedly agreed to a delay in financing; and (2) April's conversation with Duchesne on November 29 and Camann's conversation with Podd on November 30 about scheduling a closing date in December. We first address the November 2 phone call. The buyer argues that, even if this phone call modified the financing contingency, the buyer's partial performance of the P&S should exempt this oral conversation from the statute of frauds. We agree with the buyer.

[¶27] Under the part performance doctrine, an oral agreement pertaining to the sale of real estate is enforceable "where the purchaser has proceeded, either in performance or pursuance of the contract, so far to alter his or her position as to incur an unjust injury and loss." Id. (quotation omitted). "When a contract required by statute to be in writing has been orally modified and the plaintiff has performed it, or has taken action in reliance on it, as thus modified, the modification has been sustained when carried into effect." Warren v. Dodge, 83 N.H. 47, 49 (1927). In these situations, "[i]t is not the enforcement of the oral agreement that is sought, but a legal excuse for non-compliance with the terms of the written contract that is claimed." Id. at 49-50. Thus, "an oral extension of time given and acted upon is a legal equivalent for compliance with the terms of a written contract as to time." Id. at 51. "A party to a purchase and sale agreement who consents to a postponement of the time for performance and induces the other party to act upon the consent cannot claim default . . . . This is true even when time has been made of the essence." Bower v. Davis & Symonds Lumber Co., 119 N.H. 605, 608 (1979).

[¶28] Following the November 2 phone call, Duchesne corresponded with the seller and the appraisers to schedule the appraisal necessary to finalize financing. He also discussed other details of the sale with the seller and conferred with Podd to arrange the closing. In rebutting the buyer's partial performance argument, the seller contends that Duchesne would have needed to take these actions even under the original P&S. The record reflects, however, that the buyer worked to secure the appraisal and close on the property even with the knowledge that the financing would not be finalized until after the deadline. The buyer's actions thus constitute sufficient partial performance to justify admitting evidence of the "oral extension of time" granted during the parties' November 2 phone call. Warren, 83 N.H. at 51; see Bower, 119 N.H. at 608.

[¶29] As for the seller's conversations with Duchesne and Podd on November 29 and 30 seeking to schedule the closing, the determinative issue is whether these oral communications modified the P&S's financing contingency. A contractual modification entails "either an express or implied mutual agreement between the parties." Guaraldi v. Trans-Lease Group, 136 N.H. 457, 460-61 (1992). "It is a fundamental principle of contract law that one party to a contract cannot alter its terms without the assent of the other party; the minds of the parties must meet as to the proposed modification." Id.

[¶30] As previously discussed, evidence of the seller's communications after November 26 about the P&S could prove that, pursuant to the P&S's terms, the seller deemed the buyer to have waived the contingency by its failure to meet the financing deadline. The seller's conduct in considering the buyer to have waived the contingency would necessarily "waive" the November 26 financing deadline, because the buyer would no longer have to meet that deadline.

[¶31] Such a deadline "waiver" — resulting from the seller's decision that the buyer had waived the contingency, pursuant to the contingency's stipulations — would fall within the original contract's scope. Cowern and Langdon are inapposite, because neither case involved a contract with express terms providing for a change to the terms of the contract. See Cowern, 137 N.H. at 721, 722-23; Langdon, 100 N.H. at 376. Further, the seller's unilateral decision to treat the contingency as waived by the buyer would not involve the "express or implied mutual agreement between the parties" that is necessary to produce a contract modification. See Guaraldi, 136 N.H. at 460.

[¶32] Accordingly, the seller's oral communications after November 26 about scheduling a closing date would not constitute a modification of the P&S's financing contingency. Consequently, the statute of frauds would also not bar these communications. We thus affirm the trial court's order denying the seller's motion in limine to exclude its oral communications.

C. Specific Performance

[¶33] Finally, the seller argues that the trial court erred by awarding the buyer specific performance, rather than monetary damages. "The granting of specific performance of a contract is a matter within the sound discretion of the trial court, which bases its decision upon consideration of all of the circumstances of the case." Atlantic Restaurant Mgt. Corp. v. Munro, 130 N.H. 460, 463 (1988). "We will uphold a decree of specific performance unless it is unsupported by the evidence or based upon untenable grounds." Id.

[¶34] In general, following a breach of a contract, "specific performance will be denied if the plaintiff has an adequate remedy at law." Tuttle v. Palmer, 117 N.H. 477, 478 (1977). However, "[i]n contracts for the sale of land, the inadequacy of the legal remedy is well settled, and specific performance will be decreed absent circumstances rendering it inequitable or impossible to do so." Atlantic Restaurant Mgt. Corp., 130 N.H. at 463. This conclusion is based upon the premise that "the unique character of real estate makes the damages for breach of contract irreparable as a matter of law." Moore v. Sterling Warner Indus. Inv. Corp., 114 N.H. 520, 522 (1974) (per curiam). "Land is considered unique, and it is therefore not necessary to submit proof that money damages would not be an adequate remedy." 25 S. Williston, Contracts § 67:65 (4th ed. 2019).

[¶35] The seller asserts that New Hampshire courts' inclination to award specific performance in land sale contracts is ill suited to "modern real estate investment practices." It contends that the traditional presumption that a real estate buyer has no adequate remedy at law, and thus specific performance is warranted, should not apply to real estate investors like the buyer in this case. The seller therefore urges this court to require that, to receive specific performance of a land sale contract, "a buyer must present evidence that it had a particular liking to the land" that renders a monetary award inadequate, or the buyer's damages must be difficult to calculate. The seller submits that because the buyer in this case sought the property purely as an investment, it lacked any such "particular liking to the land." Further, the seller claims, the trial court could quantify the buyer's remedy at law: its projected profit from acquiring the property.

[¶36] In its order awarding specific performance to the buyer, the trial court noted that "there is a presumption in favor of specific performance in land sale contracts unless such an order would be inequitable or impossible to perform." Indeed, we have previously applied this traditional presumption to affirm an award of specific performance where a corporate buyer sought a lot for commercial use. See Atlantic Restaurant Mgt. Corp., 130 N.H. at 463.

[¶37] We decline to alter our well-established presumption that damages are an inadequate remedy in land sales.[2] As the buyer argues, changing this longstanding presumption would cast fresh uncertainty over well-established real estate practice. "The presumption that specific performance will be ordered as a matter of course following the seller's breach of a purchase agreement for real property is a foundational assumption in the real estate industry and taken into account whenever prospective parties to a contract negotiate the other terms." Tanya D. Marsh, Sometimes Blackacre Is a Widget: Rethinking Commercial Real Estate Contract Remedies, 88 NEB. L. REV. 635, 674 (2010). Thus, altering this presumption would contravene "the fundamental contract policy of giving effect to the intention of the parties and their reasonably justified expectations." Cecere v. Aetna Ins. Co., 145 N.H. 660, 662 (2001). We therefore reject the seller's argument that monetary damages suffice because the buyer intended to purchase the property as an investment.

[¶38] Nor has the seller shown that the trial court's award was "unsupported by the evidence or based upon untenable grounds." Atlantic Restaurant Mgt. Corp., 130 N.H. at 463. To the contrary, in its order awarding the buyer specific performance, the trial court expressly considered and explained its reasoning for discounting the seller's argument that the property had a "sentimental value" to it. The court observed that the seller, like the buyer, leased the property to tenants for profit. As further justification to award specific performance, the court also noted its finding that the seller had terminated the P&S merely because the contract price no longer appeared advantageous. We therefore affirm the trial court's conclusion that "there are no equitable considerations that would warrant denying the [buyer] specific performance."

[¶39] The seller asserts other challenges to the trial court's admission of evidence and jury instructions. We have considered these remaining arguments and have concluded that they do not require further discussion. See Vogel v. Vogel, 137 N.H. 321, 322 (1993).

III. Conclusion

[¶40] In summary, we conclude that the parties' conduct after the buyer missed the financing contingency's deadline gave rise to a material factual dispute as to whether the seller deemed the financing contingency waived,

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[2] Contrary to the seller's argument, New Hampshire cases discussing specific performance in the context of a land sale contract do not uniformly rely on the reasoning in Dow v. Railroad, 67 N.H. 1, 65 (1887). See, e.g., Atlantic Restaurant Mgt. Corp. v. Munro, 130 N.H. 460, 463 (1988). Further, the discussion in Dow regarding a buyer's "particular liking to the land," Dow, 67 N.H. at 65 (quotation omitted), is dicta, because that case did not concern the question of whether monetary damages would satisfy a buyer for whom the land did not hold a special value. See id. at 2-5.

pursuant to the P&S's provision allowing the seller to do so once the buyer missed the deadline. Thus, the trial court properly denied partial summary judgment to the seller. Further, the court did not err in admitting the parties' oral communications. Finally, under our longstanding presumption favoring specific performance following breach of a land sale contract, the trial court properly awarded specific performance to the buyer.

Affirmed.

MACDONALD, C.J., and COUNTWAY, J., concurred.