U.S. BANKRUPTCY COURT
District of South Carolina

Case Number: 04-15363

ADVERSARY PROCEEDING NO: 05-80204

The relief set forth on the following pages, for a total of 17 pages including this page, is hereby ORDERED.

FILED BY THE COURT
04/21/2008

Entered: 04/21/2008

US Bankruptcy Court Judge
District of South Carolina

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

In re: Schuyler Lansing Moore and Yvonne Ridings Moore, Debtors.	C/A No. 04-15363-HB C/A No. 04-15364-HB (Substantively Consolidated) Chapter 11
Moore Family Trust, Debtor.	Adv. Pro. No. 05-80204-HB
Schuyler Lansing Moore, Yvonne Ridings Moore, Moore Family Trust, Plaintiffs, v. Arthur Whisnant, Gary J. Hoy, Sr., Defendants.	**ORDER**

This matter comes before the Court on cross motions for summary judgment. This is a breach of contract and collection action between Plaintiffs, represented by the Litigation Trustee appointed pursuant to the Chapter 11 plan of the Debtors, and Defendants Whisnant and Hoy. In addition to the arguments made at the hearing on this matter, the parties asked the Court to review transcripts of hearings held on April 11 and 18, 2005, and March 27, 2006, all summary judgment pleadings, a Motion to Sell and an Order Approving Sale filed in the underlying Chapter 11 bankruptcy cases, and various other pleadings on the record in the Chapter 11 cases and this adversary.[1]

[1] The adversary and the consolidated Chapter 11 cases were transferred to the undersigned judge on May 22, 2006.

BACKGROUND AND RELEVANT FACTS

This is a core proceeding and the Court has jurisdiction over this matter and all parties hereto. Schuyler Lansing Moore and Yvonne Ridings Moore filed Chapter 11 bankruptcy proceedings in this Court on December 30, 2004. Thereafter they initiated Chapter 11 proceedings for the Moore Family Trust as well. The cases were substantively consolidated on March 31, 2005.

A Notice and Application for Sale of Property Free and Clear of Liens ("Motion to Sell") was filed in Case No. 04-15364 on March 7, 2005. It proposed a sale of certain real property and improvements to Mansions Unlimited, LLC, for $3,200,000. The pleadings included the following standard sale notice language: "The court may consider additional offers at any hearing held on this notice and application for sale. The court may order at any hearing that the property be sold to another party on equivalent or more favorable terms." The docket indicates that various responses to the Motion to Sell were filed, including some stating an intention to make a higher or better offer for the property.

A sale hearing was held on Monday, April 18, 2005 before Judge Wm. Thurmond Bishop, the judge then assigned to the case. At the hearing the court heard testimony from potential purchasers Arthur H. Whisnant, Jr., and Gary J. Hoy, Sr., [2] and from Johnny Raymond Hoy. Mr. Whisnant testified about his purchase offer:

> Q. Would you please . . . advise the Court as to the terms of that contract?
> A. The contract states it's 3.2 million; 750,000 down with a loan to be obtained in the amount of 2.5 million.
> Q. Do you have the, or have you presented any earnest money towards the purchase?
> A. Yes, sir.
> Q. How much is that?
> A. Ten thousand.

[2] It is not clearly spelled out in the record, but the Motion to Set Aside Order Approving the Sale filed on May 9, 2006 by Whisnant and Hoy states that Whisnant was a member of Mansions Unlimited, LLC, the original proposed purchaser.

Mr. Whisnant's testimony continued on cross examination:

> Q. Mr. Whisnant, I have in my hand the contract dated April 18, 2005 by Gary J. Hoy, Sr. and Art Whisnant, which is four pages in length, and on the last page it bears certain signatures. Do you see those signatures?
> A. Yes, sir. Mine is at the top.
> Q. Okay. And do you know whose signature appears below yours?
> A. Yes, Gary Hoy, Sr. I watched him sign it.

The proposed contract was introduced into evidence along with a copy of the earnest money check for $10,000. The document was not signed by the Debtors or any other party on their behalf. The proposed contract in Paragraph 8 recognizes that the "Sale is subject to the approval of the U.S. Bankruptcy Court." Paragraph 30 of that document is entitled "Expiration of Offer" and reads as follows: "This offer from Purchaser shall be withdrawn at Five o'clock P.m. on April 19, 2005 unless accepted by Seller in written form prior to such time; unless otherwise agreed to by the parties."

Paragraph 3(C) of the proposed contract stated, "$2,500,000 Loan amount . . . to be obtained by Purchaser." Mr. Whisnant testified that it was his intention to obtain this loan from Washington Mutual Bank. Mr. Whisnant testified that as he understood it, Washington Mutual had agreed to make a loan sufficient to close the sale and he and Mr. Hoy had done everything necessary to obtain that loan. He identified two documents that supplemented his testimony: a Commitment letter dated March 11, 2005, and a Disclosure letter, both of which were entered into evidence. The parties to the proceeding also agreed to allow into evidence a copy of a letter faxed to the court on the day of the hearing dated April 18, 2005 on behalf of the potential purchasers. It said:

> Washington Mutual has approved you for a home loan on the property at 10 Leitner Point Road, Columbia, SC 29210 with a sales price of $3,600,000. Washington Mutual has confirmed the value of the property and you have met all the conditions

> on the loan in the amount of $2,500,000. Your commitment is valid through May 30, 2005. Please feel free to call me with any questions. . . .

Mssrs. Hoy and Hoy, Sr., confirmed the testimony of Mr. Whisnant.

At the beginning of the sale hearing and at the close of evidence counsel for the Debtors requested that the sale and contract in question be only conditionally approved on that day, and that the court not finalize the matter until the following Friday for the purpose of allowing upset bids by other parties not present in the courtroom. Counsel stated that there would likely be excess in the estate and therefore a possible return to the Debtors. Therefore, the Debtors were highly motivated to hold out for a higher price from another potential purchaser. Counsel stated:

> I realize that this being conditional on one side of the table affords the people that have spent all day today putting forth their purchase [Hoy and Whisnant] the opportunity to say, "Our offer is contingent on Friday, also," but I have no choice under the circumstances but to put forth to the Court what my client has, is insisting upon.

Thereafter there was some discussion of a break-up fee for Whisnant and Hoy should another purchase offer later be accepted and approved, but counsel for an objecting creditor holding a security interest in the property and the broker representing Hoy and Whisnant both spoke up to request that, on the contrary, the court approve the sale on that date and approve Hoy and Whisnant's offer to purchase without further delay or opportunity for upset bid. Mr. Jack Cobb, the real estate broker utilized by Mr. Hoy and Mr. Whisnant, spoke on behalf of his clients as follows:

> We feel that this sale should be confirmed today, right now, and that we should then be able to go to Washington Mutual and say, "Let's get this thing closed." That's the whole objective. We wait until Friday, that's another five days' time. I mean, Mr. Anderson's [counsel for the debtors in possession] asking us to please try to close by May 15th, but yet, we keep pushing the days out that we actually have a final contract.

> So it's our view that we need to have this thing confirmed and have it confirmed, now. If that doesn't occur, then my clients definitely should be left completely open to walk away on Friday, change the terms on Friday, come in with a lower price, if they want to, on Friday. I mean, if they don't get a solid, confirmed deal now, then there's no need for them to be bound through Friday, if someone else is going to be able to come in and upset the contract as it is. That's their feel.

The broker continued:

> But, you see, the Court's asking that they be bound to a contract between now and Friday, but yet, they've got nothing. They have no contract at all.
> . . . .
> What we want is for the Court to confirm the sale today, let us proceed on and let us get this transaction closed.

The court agreed with the arguments made by Mr. Cobb on behalf of Whisnant and Hoy and by the secured creditor's counsel, and Judge Bishop found that, "I think the burden has been met under the Code, under 363(f), and the sales price exceeds the amount of the liens and so the Court approves the sale." The court approved the offer and sale to Hoy and Whisnant only, and did not leave the matter open to other potential purchasers. The transcript indicates that counsel for the secured creditor was to submit a written order. The court's docket reflects an entry on April 18, 2005 of "sale approved, proposed order due" from secured creditor's counsel.

Although the sale was approved, Debtors did not sign the contract. The record includes a version of the proposed contract apparently altered by Debtors, which they signed on May 5, 2005.[3]

On May 5, 2005, the court's docket reflects submission by secured creditor's counsel of a fifteen-page proposed order approving the sale. On May 11, 2005, the docket reflects electronic submission to the court of a one-page alternative order approving the sale by counsel for the Debtors. The court finally entered the first submitted order on May 16, 2005

[3] This document was never before the Court for approval.

on one case docket, and on May 19, 2005 noted that entry on the consolidated case docket.[4] The Order Approving Sale included the following language: "the Contract of Gary J. Hoy, Sr. and Arthur H. Whisnant is approved, with a purchase price of $3.2 million and a closing date of on or before May 30, 2005, on such terms as described herein." The court found that "Whisnant and Hoy, Sr. have demonstrated the financial ability to close pursuant to the Contract." The court stated the reasons for this finding, which included a summary of the financial abilities of the purchasers and a finding that Washington Mutual represented in writing that all contingencies or conditions for the loan commitment had been met.

Regarding financing, in an affidavit dated October 11, 2006 Mr. Cobb stated:

> 6. The contract between Arthur Whisnant and Gary W. Hoy, Sr., and the Bankruptcy Estate, had no financing contingencies.
> . . . .
> 8. It was clear from the beginning of negotiations among Arthur Whisnant and Gary W. Hoy, Sr., the creditors of the Chapter 11 case, and the Bankruptcy Estate, that no contract would be acceptable if it had any financing contingencies.
> 9. Arthur Whisnant and Gary W. Hoy, Sr., clearly understood at all times, in my opinion, that the contract, and any agreement for the purchase of any realty from this Chapter 11 Estate could have no financing contingencies.

On May 20, 2005 for reasons undisclosed to this judge the court entered a First Order in Aid of Closing which ordered the Debtors to execute documents as necessary to close the sale and stated that they would be in contempt of court if they failed to do so. A Second Supplemental Order Regarding Payment at Closing was also entered on May 20, involving among other matters, the amount to be paid to certain lienholders at closing.

Mr. Whisnant's Affidavit of February 8, 2008 states that there were unique features in the house including special carpeting that alone had a value of $80,000, and that shortly

[4] Various orders and pleadings are entered in either or both of the consolidated cases, No. 04-15363-hb and No. 04-15364-hb.

before the anticipated closing the carpeting and numerous lighting fixtures had been removed.

The sale did not close and the property was thereafter sold at foreclosure for $2,200,000 on June 6, 2005. Mr. Whisnant's Affidavit of February 8, 2008, merely states that "[h]e subsequently learned that Washington Mutual refused to fund the loan." He further states that by the time he learned that Washington Mutual would not fund the loan he had no time to arrange financing before the May 30 closing date and the early June foreclosure sale.

The record includes an Affidavit of Nicholas D. Atria, Hoy and Whisnant's closing attorney, which alleges that the Defendants tried to close the loan but that a Washington Mutual representative was not cooperative after the sale hearing and that the loan was subsequently denied without explanation.[5]

A transcript from a status hearing in the consolidated cases includes comments of counsel for Washington Mutual made on March 27, 2006, long after the foreclosure, that the April 18, 2005 letter confirming the loan presented as evidence at the sale hearing was a "mistake."

On July 18, 2005, Debtors initiated this adversary proceeding, claiming that they have been damaged in the amount of $1,000,000 as a result of a breach of contract by Mr. Whisnant and Mr. Hoy.[6] Mr. Whisnant and Mr. Hoy as defendants filed an Answer denying numerous allegations and including a Third-party Complaint asserting causes of

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[5] Mr. Atria's Affidavit is Exhibit 7 to Hoy and Whisnant's Reply Memorandum filed in the consolidated Chapter 11 cases on June 15, 2006 in support of their Motion to Set Aside. The parties argued the renewed Motion to Set Aside pending in the Chapter 11 cases along with the present cross-motions, and Mr. Atria's Affidavit is part of the record in those cases.

[6] That lawsuit was initiated by counsel for the Debtors, but on September 6, 2006, the court appointed a litigation trustee now in charge of the case pursuant to the terms of the Debtors' confirmed Chapter 11 plan.

action against Washington Mutual due to its alleged failure to honor the loan commitment. On December 14, 2005 Washington Mutual filed a motion for withdrawal of reference, sending this adversary case to the United States District Court. Thereafter the District Court returned this case to the Bankruptcy Court for resolution by Order entered October 24, 2007, citing the dismissal of Washington Mutual by stipulation, with prejudice.[7] Washington Mutual is no longer a party to this adversary proceeding.

CONCLUSIONS OF LAW

Procedural issues

Recently the Fourth Circuit set forth the standard of review for summary judgment as follows:

> A court may award summary judgment only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); In re Apex Express Corp., 190 F.3d 624, 633 (4th Cir. 1999); see also Fed. R. Civ. Proc. 56(c) (providing that award of summary judgment is appropriate only "if 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 the moving party is entitled to a judgment as a matter of law"). In evaluating a summary judgment motion, a court "must consider whether a reasonable jury could find in favor of the non-moving party, taking all inferences to be drawn from the underlying facts in the light most favorable to the non-movant." Apex Express Corp., 190 F.3d at 633. In so doing, a court is not entitled to either weigh the evidence or make credibility determinations. See Anderson, 477 U.S. at 255, 106 S.Ct. 2505 ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. . . ."). If the moving party is unable to demonstrate the absence of any genuine issue of material fact, summary judgment is not proper and must be denied. See Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); Honor v. Booz-Allen & Hamilton, Inc., 383 F.3d 180, 185 (4th Cir. 2004).

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[7] On July 6, 2006, after the filing of their Motion to Set Aside, Mr. Hoy and Mr. Whisnant also filed a Motion to Withdraw Reference as to the Chapter 11 cases, sending them to the United States District Court as well. The District Court issued a Final Order Closing Case on May 7, 2007. That order was filed in the Bankruptcy Court and the Chapter 11 cases were closed. However, on October 11, 2007, the District Court reopened the case and remanded it to the Bankruptcy Court for further proceedings. On November 30, 2007, on application of the debtors in possession this Court issued a final decree again closing the Chapter 11 cases.

Mercantile Peninsula Bank v. French (In re French), 499 F.3d 345, 351-52 (4th Cir. 2007).[8]

"When faced with cross-motions for summary judgment, the court must review each motion separately on its own merits 'to determine whether either of the parties deserves judgment as a matter of law.'" Rossignol v. Voorhaar, 316 F.3d 516, 523 (4th Cir. 2003) (quoting Philip Morris Inc. v. Harshbarger, 122 F.3d 58, 62 n.4 (1st Cir. 1997)). "When considering each individual motion, the court must take care to 'resolve all factual disputes and any competing, rational inferences in the light most favorable' to the party opposing that motion." Id. (quoting Wightman v. Springfield Terminal Ry. Co., 100 F.3d 228, 230 (1st Cir. 1996)). The fact that both parties have moved for summary judgment does not mean that summary judgment should be granted one or the other. In re Kugler, 170 B.R. 291, 303 (Bankr. E.D. Va. 1994). Nor does it establish that there are no genuine issues left for trial. McCown v. Humble Oil & Refining Co., 405 F.2d 596, 597 n.1 (4th Cir. 1969). "It is possible, therefore, that in any given case involving genuine disputes of material fact that neither party filing cross motions would be entitled to summary judgment having failed to meet its burden under Fed. R. Civ. P. 56." Medimaging Tech., Inc. v. Mallinkrodt, Inc. (In re Medimaging Tech., Inc.), No. 03-8090, 2007 WL 3024068, at *6 (Bankr. D. Md. Oct. 12, 2007). When presented with cross motions for summary judgment, the normal procedure is to "'consider each motion separately, drawing inferences against each movant in turn.'" Id.

[8] In French, the Fourth Circuit emphasized that the trial court must assess whether *a reasonable fact finder* could find in favor of the non-moving party. In that case, the debtor's intent to defraud was at issue. While the bankruptcy court evaluated two pertinent affidavits, it did not address the "central" summary judgment question of "whether a reasonable trier of fact, viewing the evidence in the light most favorable to [debtor], could have found that he lacked" the necessary intent. 499 F.3d at 353. The court also noted that the bankruptcy court erred by making credibility determinations regarding two affidavits which it rejected as unreliable. "In the summary judgment context, a court is simply not empowered to make [credibility] determinations." Id. at 354. Further, the bankruptcy court weighed the evidence of whether debtor's records were adequate with regard to movant's § 727(a)(3) claim. The appellate court reiterated that while the bankruptcy court could make such determinations at a bench trial, it cannot weigh the evidence or make credibility determinations at the summary judgment stage. Id. at 357 n.10.

at *7 (quoting Wright v. Keokuk County Health Ctr., 399 F. Supp. 2d 938, 946 (S.D. Iowa. 2005)).

Defendants' Motion for Summary Judgment

Defendants assert that as a matter of law there is no enforceable contract for sale because Plaintiffs did not accept their court-approved, April 18 offer in writing before it expired on April 19, 2005. They argue that if an offer requires written acceptance, oral acceptance is inadequate, citing Fender & Latham, Inc. v. First Union National Bank of South Carolina, 316 S.C. 48, 446 S.E.2d 448 (S.C. Ct. App. 1994).[9]

The language of the April 18 offer requires written acceptance by Seller by a certain date "unless otherwise agreed to by the parties." However, at the sale hearing the Defendants demanded approval of a sales contract by the court that was "binding on that day." Unlike the facts in Fender & Latham, these Defendants took actions and made representations that were inconsistent with the written acceptance provision. See id. at 51, 446 S.E.2d at 450 (written acceptance requirement and other conditions precedent were enforceable because the party asserting them took no action and made no representations to the contrary). Taking the facts in the light most favorable to the Plaintiffs, Defendants cannot demonstrate the lack of a genuine issue of material fact as to whether they waived the requirement of a written acceptance and allowed acceptance of the offer by a different method.

Further, a bankruptcy court can bind a purchaser and seller with its sale order. "Once an Order confirming a sale is entered, it is binding on the parties. Their rights and

[9] Defendants also cited South Carolina's statutory enactment of the Statute of Frauds which requires that contracts for the sale of land be "signed by the party to be charged therewith or some person thereunto by him lawfully authorized." S.C. Code Ann. § 32-3-10 (2007). However, the April 18 offer was signed by Defendants, the party being "charged" with the existence of a contract. The Moores, who allegedly did not sign the proposed contract, admit the existence of a contract.

obligations are fixed thereby, and they are not permitted to deviate therefrom. The purchaser is bound by the Order." In re Pizazz Disco & Supperclub, Inc., 114 B.R. 104, 108 (Bankr. W.D. Pa. 1990), aff'd, 1991 WL 331033 (W.D. Pa. June 19, 1991), (citing In re Rosecrest Enter., Inc., 80 B.R. 354, 356 (Bankr. W.D. Pa.1987)); see also In re Chateaugay Corp., 186 B.R. 561, 593-94 (Bankr. S.D.N.Y. 1995) ("[T] the successful bidder at a bankruptcy sale is bound by the offer as stated and embodied in an approval order."); In re Homestead Indus., Inc., 138 B.R. 788, 790 (Bankr. W.D. Pa. 1992) ("If parties are to be encouraged to bid at judicial sales there must be stability in such sales and a time must come when a fair bid is accepted and the proceedings are ended.").

"Public policy requires stability in bankruptcy sales. To induce bidding at such sales and reliance upon them, the purpose of the law is that they shall be final." In re Winston Inn & Rest. Corp., 120 B.R. 631, 635 (E.D.N.Y. 1990) (quoting In re Karpe, 84 B.R. 926, 932 (Bankr. M.D. Pa. 1988)) (internal citations omitted):

> Bidders have an obvious interest in knowing that an accepted bid will not lightly be set aside. . . .
>
> The debtor and lienholders, of course, also have an interest in finality: the debtor, because it is committing itself to a particular bid, while other bids, perhaps only slightly less favorable, are rejected; the lienholders, because they are entitled to know the terms under which property in which they hold an interest is to be sold, free of the uncertainty that the debtor and bidder will later reach some different private agreement that fails to safeguard their interests.

Id.[10]

[10] For more regarding finality of judicial sales, see In re Silver Bros. Co., Inc., 179 B.R. 986, 1006 (Bankr. D.N.H. 1995) ("Sales approved by a bankruptcy court are not simple commercial contractual undertakings between two independent parties. Because the sale of an asset in a bankruptcy estate necessarily impacts parties other than the particular parties to the transaction, judicial sales encompass institutional and policy concerns not involved in ordinary commercial transactions. Application of the ordinary contractual law concerning private party sales transactions is inappropriate in this context." (citations omitted)), and In re Target Two Associates, L.P., No. 04-8657, 2006 WL 3068668, at *6 (S.D.N.Y. Oct. 27, 2006) ("Courts repeatedly emphasize the importance of enforcing the finality of bankruptcy sales. With respect to buyers at such sales who fail to complete their purchase of real property, courts pursue this policy of finality by strict enforcement of the terms of sale against the buyer. Where the terms of sale expressly provide that the

Rosecrest Enterprises, Inc. v. Highland, Inc. (In re Rosecrest), 80 B.R. 354 (Bankr. W.D. Pa. 1987), presents a case factually similar in that the purchaser argued that a term contained in an Assets Purchase Agreement was a condition precedent to the sale, even though the court's written sale order said nothing about this alleged contingency and the contingency had been expressly rejected at the sale hearing. Id. at 356. [11] The purchaser argued that the Assets Purchase Agreement "provide[d] the actual terms of the sale." Id. The court disagreed, recognizing that "[t]he Court's decree of sale specifically describes the property to be sold and once entered, it is controlling upon the parties; their rights and obligations are fixed thereby, and they have no authority to deviate from the provisions of the Order. Accordingly, the purchaser is bound by the language of the Order." Id. (citations omitted).

In the present case the hearing transcript reflects no attempts by Defendants to preserve the written acceptance provision or any other contingency; rather, they urged the court to immediately bind Plaintiffs to the contract. "If there is any ambiguity in the stated terms of sale the bidder has the obligation to bring that matter up for clarification before the call of the sale or the bidder will otherwise be strictly bound to the terms of the sale as called." In re Silver Bros. Co., Inc., 179 B.R. 986, 1007 (Bankr. D.N.H. 1995) (citing In re Dartmouth Audio, Inc., 42 B.R. 871, 875 (Bankr. D.N.H. 1984) and In re Oyster Bay Cove, Ltd., 161 B.R. 338, 342 (Bankr. E.D.N.Y. 1993)).

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defaulting bidder forfeits his earnest money deposit, such a term is enforced. Such terms are binding even if the buyer is unaware of them." (footnotes and citations omitted)) and the cases cited therein.

[11] Also similar in that case was the fact that the Assets Purchase Agreement, which was attached to the debtor's "complaint to sell," was never signed by the parties; however, this had no effect regarding whether the parties were bound by that court's sale order.

Defendants' Motion for Summary Judgment is denied for the following reasons: (1) There is a genuine issue of material fact as to whether Defendants waived the written acceptance provision; and/or (2) as a matter of law the court can bind the parties to the contract on the undisputed facts of this case.

Plaintiffs' Motion for Summary Judgment

Plaintiffs request a summary judgment finding that there was a contract binding Defendants, that the contract was breached by Defendants, and that Plaintiffs are therefore entitled to a judgment in the amount of $1 million as a matter of law. The Court agrees that under the undisputed facts, there is a contract as a matter of law. The contract was formed by the court's order. In re Pizazz Disco, 114 B.R. at 108; In re Rosecrest, 80 B.R. at 356 (in a bankruptcy sale, "the purchaser is bound by the language of the order"); In re Silver Bros., 179 B.R. at 1007 ("The successful bidder at a bankruptcy sale is bound by the offer as stated and as embodied in an approval order unless the order is successfully appealed or the court which confirmed the sale vacates the confirming order." (citing In re Oyster Bay Cove, Ltd., 161 B.R. 338, 342 (Bankr. E.D.N.Y. 1993)). It is not disputed that Defendants did not purchase the property as required by the contract. Such conduct is clearly a material breach. In re Oyster Bay, 161 B.R. at 345.

Defendants argue that the court mistakenly formed the contract with its order when it relied on evidence of Washington Mutual's commitment to fund the loan necessary to close the sale. For the purpose of discussion, the court will assume that the alleged mistake was a mutual mistake of all parties to this proceeding. The law allows courts to reform contracts or excuse performance under an otherwise enforceable contract due to mutual mistake:

> A contract may be rescinded for mistake, if justice so requires, in the following circumstances: (1) where the mistake is mutual and is in reference to the

> facts or supposed facts upon which the contract is based; [and] (2) where the mistake is mutual and consists in the omission or insertion of some material element affecting the subject matter or the terms and stipulations of the contract, inconsistent with the true agreement of the parties.

King v. Oxford, 282 S.C. 307, 313, 318 S.E.2d 125, 128 (S.C. Ct. App. 1984) (citing Jumper v. Queen Mab Lumber Co., 115 S.C. 452, 106 S.E. 473 (1921)).[12] See also Belin v. Stikeleather, 232 S.C. 116, 101 S.E.2d 185, 188 (1957) (a mutual mistake is one where both parties intended a certain thing and by mistake in the drafting did not get what both parties intended. Before equity will reform an instrument, it must be shown by evidence which is most clear and convincing not simply that it was a mistake on the part of one of the parties); George v. Empire Fire and Marine Ins. Co., 336 S.C. 206, 218, 519 S.E.2d 107, 113 (S.C. Ct. App. 1999) (same).

The contract in question is for the sale of real property. There is no evidence that it is not accurate in property description, sales price and essential terms reflecting what the parties intended. The offer to purchase did disclose that a loan was to be part of the purchase price, and the court found that Defendants had demonstrated to its satisfaction their ability to obtain the loan and close the sale. However, even if this was inaccurate, the evidence before the court is that there was no financing contingency intended as a term of the contract and therefore any such "mistake" does not affect the essential terms of the contract.

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[12] A contract can be reformed due to unilateral mistake only "under strong and extraordinary circumstances showing imbecility or something which would make it a great wrong to enforce the agreement. These circumstances must be shown by competent testimony of the clearest kind." Sims v. Tyler, 276 S.C. 640, 643, 281 S.E.2d 229, 230 (S.C. 1981) (citing Belin v. Stikeleather, 232 S.C. 116, 101 S.E.2d 185 (S.C. 1957)); see also King v. Oxford, 282 S.C. 307, 313, 318 S.E.2d 125, 128 (S.C. Ct. App. 1984) (rescission for unilateral mistake available only if "induced by the fraud, deceit, misrepresentation, concealment, or imposition of the party opposed to the rescission, without negligence on the part of the party claiming rescission; or . . . where . . . accompanied by very strong and extraordinary circumstances which would make it a great wrong to enforce the agreement, sustained by competent evidence of the clearest kind."); L-J, Inc. v. S.C. Hwy. Dept., 270 S.C. 413, 431, 242 S.E.2d 656, 664 (S.C. 1978) (contract will not be reformed where mistake as to quantity of things to be sold was not mutual).

Defendants further claim that they should be excused from performance based on equitable estoppel which "inhibits a party from asserting a right because of 'mischief' caused by that party's own fault":

> [T]he doctrine may arise even though the estopped party did not intend to relinquish or change any existing right. Equitable estoppel has been used in instances where representations have been by words, conduct, or silence, and its use is designed to work as a protection or shield, not to bring a positive gain to a party.

In re Burris, No. 01-00776-W, 2001 WL 1806982, at *2 (Bankr. D.S.C. Aug. 31, 2001) (citations omitted). See also Glover v. Saunders Inc. of Hilton Head (In re Glover), No. 05-80098-jw, slip op. at 15 (Bankr. D.S.C. May 31, 2006). Defendants also pled the doctrine of "impossibility of performance" as a defense. The Fourth Circuit has set out the required elements of this defense as follows: "(1) the unexpected occurrence of an intervening act, (2) such occurrence was of such a character that its non-occurrence was a basic assumption of the agreement of the parties, and (3) that occurrence made performance impracticable." Opera Co. of Boston, Inc. v. Wolf Trap Found. for the Performing Arts, 817 F.2d 1094, 1102 (4th Cir. 1987).

Based on this record, after resolving all factual disputes and any competing, rational inferences in the light most favorable to Defendants, a reasonable jury could find that Defendants' ability to consummate the sale was negatively impacted by unexpected circumstances or mischief. Relevant facts and evidence from which inferences can be drawn include the following: (1) Debtors expressly stated that they did not want the court to bind the parties to the sale on April 18, 2005 as they were hoping for a better offer; (2) Debtors did not sign any document purporting to be the contract with Defendants until at least May 5, and at that time altered the terms thereof; (3) Debtors submitted a competing proposed sale order contrary to the court's docket instructions; (4) A written sale order was

not available to Defendants until May 16, almost a month after the hearing, for a contract that required a closing date of May 30; (6) The foreclosure sale occurred on June 6; (5) Mr. Whisnant's Affidavit states that carpet and fixtures were missing from the property shortly before the proposed closing date; (6) the court entered an order on May 20 that ordered the Debtors to execute documents necessary to close the transaction and ordered that they would be in contempt if they failed to do so.

From these facts the Court can find support for, or at least issues of material fact impacting, Defendants' claims of equitable estoppel or impossibility of performance. It is noted that evidence and allegations exist that are contrary to these defenses, yet any conclusive finding to the contrary would require the Court to consider unsupported allegations, judge the credibility of the witnesses' testimony or weigh the evidence – all forbidden on summary judgment. French, 499 F.3d at 352 & 357 n.10. Therefore, an issue of material, disputed fact remains as to whether or not Defendants' breach is excused or mitigated in any way.

IT IS THEREFORE, ORDERED:

1. **That Defendants' Motion for Summary Judgment is DENIED;**
2. **That Plaintiffs' Motion for Summary Judgment is DENIED.**