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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2022-2023

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Merlyn L. Clay

v.

Charles E. Chavis

Appeal from Baldwin Circuit Court
(CV-20-901210)

MENDHEIM, Justice.

The defendant below, Merlyn L. Clay, appeals from the Baldwin Circuit Court's summary judgment in favor of the plaintiff below, Charles E. Chavis, Clay's grandfather. The dispute concerns Clay's purchase of real property from Chavis and Clay's alleged failure to fulfill certain requirements of a sale contract for the real property executed by the parties. We reverse and remand.

I. Facts

This case concerns three parcels of real property. One parcel contained a house and some other structures located at 17945 Kingway Road in Seminole, and it was generally known as "the river property." The other two parcels are located at 17988 Kingway Road and are adjacent to the river property. According to Clay, those two parcels ("the barn property") are "like two trailer lots stuck together" and contain a storage barn that is falling apart. In December 2016, Clay, her husband, and her daughter moved into the house on the river property.

On June 1, 2017, Chavis and Clay signed and executed a "Contract for the Sale of Residential Property -- Owner Financed with Provisions for Note and Purchase Money Mortgage" ("the sale contract"). The sale contract is a form contract that, according to Clay, Chavis had located on

the Internet and printed. It is undisputed that the parties did not seek legal guidance for the sale transaction. The terms of the sale contract are integral to this case, and we therefore set out its relevant provisions. Terms that are underlined were blanks spaces in the sale contract that Clay filled in with the relevant information.

"1. [Chavis], in consideration of the agreements of [Clay] in this Agreement, agrees to sell and convey to [Clay] in fee simple, by a good and sufficient deed, with covenants of warranty, free and clear from all liens, right of dower, or other encumbrances (unless specified below), all that piece or parcel of land, located at 17945 Kingway Rd., Seminole, AL. 36574, hereinafter called the Premises, and more particularly described as follows: Lot 15 Block 'A' Reserved Area 'C' Blackwater Crescent, Map Book 5, Page 33, Records of the Probate Court of Baldwin [County] AL.

"2. [Clay] agrees to purchase from [Chavis] the Premises described above, and to pay for it \$380,000 in the following manner: \$3,800 to be paid in cash on the execution of the Deed, and the remainder of the purchase money, being \$376,200 to be secured by the note and mortgage of [Clay] in the manner described below.

"3. On payment of the described sum on or before 1 June 2017, [Chavis] agrees on that day to deliver to [Clay] the Deed. [Clay] agrees concurrently to secure [Chavis] the balance of the purchase money by executing and delivering [Clay's] Promissory Note for it, with a Mortgage on the Premises duly acknowledged as collateral for it. The purchase money Mortgage shall secure the payment of \$376,200 within 30 years from 1 June 2017, with interest payable monthly at the rate of 1% per annum. Said Mortgage shall contain a power of sale in the usual form, and all such covenants and

other clauses and provisions for securing the purchase money and interest on it as [Chavis] shall reasonably require.

"4. The Deed, Note and Mortgage shall be delivered and the money paid at [Chavis's residence].

"5. [Chavis] agrees that on 1 June 2017, and on the performance by [Clay] of agreements contained in this Agreement, [Chavis] will deliver to [Clay] quiet and peaceable possession of the Premises, in as good condition as they are now, natural wear excepted.

"6. [Clay] agrees to pay all taxes and assessments that shall be paid or assessed on Premises during the term [Clay] shall have possession under this Agreement.

"7. In case [Clay] has possession of the Premises before the execution and delivery of the Deed, and in case of the failure on [Clay's] part to perform any of the covenants to be performed by [Clay] under this Agreement, [Clay] shall yield and deliver to [Chavis] quiet and peaceable possession of the Premises. [Chavis] may immediately after such failure reenter and take possession of the Premises without any previous notice to quit in reference to any legal proceedings to recover possession of the Premises.

"....

"10. No Waiver

"The failure of either party to this Agreement to insist upon the performance of any of the terms and conditions of this Agreement, or the waiver of any breach of any of the terms and conditions of this Agreement, shall not be construed as subsequently waiving any such terms and conditions, but the same shall continue and remain in force and effect as if no such forbearance or waiver had occurred.

"....

"13. Attorney's Fees

"In the event that any lawsuit is filed in relation to this Agreement, the unsuccessful party in the action shall pay the successful party, in addition to all the sums that either party may be called on to pay, a reasonable sum for the successful party's attorney fees.

"....

"15. Entire Agreement

"This Agreement shall constitute the entire agreement between the parties and any prior understanding or representation of any kind preceding the date of this Agreement shall not be binding upon either party except to the extent incorporated in this Agreement.

"16. Modification of Agreement

"Any modification of this Agreement or additional obligation assumed by either party in connection with this Agreement shall be binding only if placed in writing and signed by each party or an authorized representative of each party."

(Bold typeface in original.)

In her deposition, Clay admitted that the sale contract was the only written memorialization of an agreement between Chavis and herself. However, she simultaneously asserted that the sale contract was "one of four or five different options we had." Additionally, although the sale

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contract expressly mentions only the river property, Clay agreed with Chavis that the transaction included all three parcels of property, i.e., it also included the barn property.

"A. The agreement was -- the original agreement that Granddaddy [Chavis] gave me was \$340,000 for that river property and then \$40,000 for the other two, or if I wanted all of it, he would give it to me for \$380[,000] if I wanted all of it.

"Q. [Chavis's counsel:] Okay. And this agreement says \$380[,000]?"

"A. Right.

"Q. And you got three deeds for all of it?"

"A. Right."

On June 26, 2017, Chavis executed three deeds, one for each parcel of property purportedly included in the transaction between Chavis and Clay. On June 27, 2017, Clay recorded the three deeds in the Baldwin Probate Court. The deeds state that they were prepared by Clay, but, in her deposition, Clay denied that she had prepared them, testifying that Chavis simply had had Clay "come over [to his house] and pick [them] up. ... [Chavis] gave them -- He gave me three of these [deeds], and I took all of them down there [to the probate court to be recorded]." On June 1, 2017, Clay provided Chavis a down payment of \$3,000 and an initial

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monthly payment of \$1,210. Clay continued making monthly payments for more than 24 months, paying Chavis a total of \$32,670. Clay failed to make a monthly payment in August 2019, but she made monthly payments in September and October 2019. Clay stopped making monthly payments after October 2019. Clay testified that the reason she stopped making payments was "[b]ecause my grandfather refused to do anything that he promised to do when we purchased the house. And at that point, he finally said he is not putting any more money into it, which he hadn't put any money into it in years."

It is undisputed that, even though the sale contract stipulates that Clay would provide a promissory note and a purchase-money mortgage for the transaction, Clay never provided either document to Chavis. Clay asserted that the reason she never fulfilled those obligations was that she never would have been able to obtain a mortgage for the house on the river property because it could not pass an inspection.

"Q. [Chavis's counsel:] Do you understand that this [sale contract] required a promissory note and a mortgage for that property?

"A. No. I really didn't know anything about this. ...

"Well, the bottom line was the house wouldn't have passed an inspection, because [Chavis] and my uncle and

whoever else he had out there had rigged everything together so bad there was no way it would pass an inspection.

"There was no way I could get a mortgage. We all knew that. We [Clay and her husband] were willing to take it on and do the repairs needed for the property and pay [Chavis] for it as long as he stood by his side of the -- of the deal."

Clay maintained that Chavis's part "of the deal" was making repairs to the property. Clay stated in her responses to Chavis's interrogatories that Chavis had agreed to:

"Repair the sea wall, which was creating major issues with the house, including, but not limited to, sink holes. When I called him and asked him to do this, he said that he wasn't doing anything more with the house because it wasn't worth it. When I said that he'd agreed to do this and that this was one of the main reasons that I'd entered into the agreement to begin with, he then reiterated that he wasn't doing it anymore."

Clay further asserted that she and her husband

"never would have bought the property had we known that [Chavis] wasn't going to make those repairs. The repairs that we found were needed were what was keeping [Chavis] from selling the house to someone else, getting a mortgage on the property, etc. It's what kept the house from meeting code."

In his complaint, Chavis alleged that,

"as part of the Transaction, Clay agreed to obtain and maintain for the duration of any loan provided by Chavis to Clay certain insurance for the Property in the amount of One Hundred Eighty-Nine Thousand Four and No/100 Dollars

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(\$189,004.00), which was the insurable replacement cost of the structure on the Property."

It is undisputed that Clay purchased homeowner's insurance, flood insurance, and wind-damage insurance for the house located on the river property, but she did not list Chavis as a beneficiary on any insurance policy. However, Clay testified that she had purchased the insurance policies just because she was buying a house.

"Q. [Chavis's counsel:] As part of the agreement for purchasing the property, did you understand you had to have insurance on the property.

"A. Yes.

"Q. Okay. You understood that Mr. Chavis expected you to keep the river house insured?

"A. Yes.

"Q. Both the contents of what's inside but also the buildings?

"A. It wasn't something he expected. I lived there, and I would insure it because my things were there. It had nothing to do with him. I had -- I bought homeowner insurance, I bought flood insurance, and I bought wind damage insurance.

"Q. Did you promise to name him as an additional insured on that insurance policy?

"A. Absolutely not."

In September 2020, Clay and her family vacated the river property and the barn property because of the impending approach of Hurricane Sally. On September 15, 2020, the house on the river property and the structures on the barn property were flooded by Hurricane Sally. Clay testified that the house was underwater for a week and that the power was out for 11 days. She further stated that, on the day the power was reconnected, she and her daughter were cleaning up the house when they saw flames coming from the attic. The house burned to the ground and was a total loss. It is undisputed that, because of the flood and fire destruction, Clay received over \$200,000 in insurance payments from policies she held on the property. Clay used the insurance proceeds to make a cash purchase of a house in Milton, Florida.

On October 9, 2020, Chavis's counsel sent Clay a letter demanding that she convey the river property and the barn property back to Chavis in accordance with the terms of paragraph 7 of the sale contract. Clay refused the demand. On October 27, 2020, Chavis commenced this action against Clay in the Baldwin Circuit Court, asserting claims of breach of contract, exploitation of the elderly/fraud, conversion, and unjust enrichment, and seeking, among other remedies, rescission of the sale

contract or specific performance of the sale contract. On November 30, 2020, Clay answered the complaint.

On July 14, 2021, Chavis filed a summary-judgment motion in which he contended that the terms of the sale contract are clear, that there was no dispute that Clay had failed to perform obligations under the sale contract, and that, under the terms of the sale contract, Chavis was entitled to possession of the river property and the barn property and was entitled to the amount of the insurance proceeds Clay had received after the structures on the properties were destroyed. On October 22, 2021, Clay filed her response in opposition to the summary-judgment motion. Clay argued, among other things, that there existed several issues of fact that precluded a summary judgment in this dispute. On October 26, 2021, the circuit court held a hearing on Chavis's summary-judgment motion.

On November 17, 2021, the circuit court entered a summary judgment in favor of Chavis. The circuit court ordered Clay to execute warranty deeds conveying the river property and the barn property to Chavis within 21 days of the entry of the order. The circuit court awarded damages to Chavis "in an amount to be determined based upon the

amount of insurance proceeds paid to [Clay] due to fire and/or storm loss and damage to the property." The circuit court also awarded Chavis "[r]easonable attorney's fees ... as set forth in the [Sale] Contract that is the basis of [Chavis's] Complaint." The order did not explain the circuit court's reasons for its decision.

On March 2, 2022, the circuit court entered a "Final Judgment" that provided the specific amounts of damages Clay owed to Chavis. The circuit court awarded "damages in the amount of \$332,544.02, which amount includes the amount of insurance payouts made to [Clay] for damage to the property totaling \$331,584.94, and the payment of ad valorem taxes on the real property by [Chavis] in the amount of \$959.08, as damages recoverable by [Chavis.]" The circuit court also awarded Chavis attorney's fees in the amount of \$31,734.78.

Clay filed a timely notice of appeal of the circuit court's judgment.

II. Standard of Review

"This Court's review of a summary judgment is de novo. Williams v. State Farm Mut. Auto. Ins. Co., 886 So. 2d 72, 74 (Ala. 2003). We apply the same standard of review as the trial court applied. Specifically, we must determine whether the movant has made a prima facie showing that no genuine issue of material fact exists and that the movant is entitled to a judgment as a matter of law. Rule 56(c), Ala. R. Civ. P.; Blue Cross & Blue Shield of Alabama v. Hodurski, 899 So. 2d 949,

952-53 (Ala. 2004). In making such a determination, we must review the evidence in the light most favorable to the nonmovant. Wilson v. Brown, 496 So. 2d 756, 758 (Ala. 1986). Once the movant makes a prima facie showing that there is no genuine issue of material fact, the burden then shifts to the nonmovant to produce "substantial evidence" as to the existence of a genuine issue of material fact. Bass v. SouthTrust Bank of Baldwin County, 538 So. 2d 794, 797-98 (Ala. 1989); Ala. Code 1975, § 12-21-12. "[S]ubstantial evidence is evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved." West v. Founders Life Assur. Co. of Fla., 547 So. 2d 870, 871 (Ala. 1989)."

Prince v. Poole, 935 So. 2d 431, 442 (Ala. 2006) (quoting Dow v. Alabama Democratic Party, 897 So. 2d 1035, 1038-39 (Ala. 2004)).

III. Analysis

Clay contends that the circuit court erred in entering a summary judgment in Chavis's favor. She first argues that the circuit court erred in considering the sale contract because of the doctrine of merger.

""[O]rdinarily, in the absence of fraud or mistake, when a contract to convey has been consummated by the execution and delivery of the deed, the contract becomes functus officio, and the deed becomes the sole memorial and expositor of the agreement between the parties, and upon it thereafter the rights of the parties rest exclusively....""

Teer v. Johnston, 60 So. 3d 253, 256-57 (Ala. 2010) (quoting Jones v. Dearman, 508 So. 2d 707, 709 (Ala. 1987), quoting in turn Alger-Sullivan

Lumber Co. v. Union Trust Co., 207 Ala. 138, 142, 92 So. 254, 257 (1922)) (emphasis omitted). Clay contends that Chavis provided no evidence indicating that Clay received the deeds to the river property and the barn property through fraud or a mistake. Therefore, she argues, the circuit court should not have considered the terms of the sale contract in assessing whether Chavis should prevail on the claims he asserted in this case.

However, as Chavis observes in his appellee brief, Clay did not plead the doctrine of merger as a defense in her answer to the complaint, nor did she argue the doctrine of merger in her response to Chavis's summary-judgment motion. "'Once an answer is filed, if an affirmative defense is not pleaded, it is waived.'" Pinigis v. Regions Bank, 942 So. 2d 841, 846 (Ala. 2006) (quoting Wallace v. Alabama Ass'n of Classified Sch. Emps., 463 So. 2d 135, 136 (Ala. 1984)). The doctrine of merger is an affirmative defense. See, e.g., Ritchey v. Dalgo, 514 So. 2d 808, 810 (Ala. 1987). Therefore, Clay waived the defense by failing to plead it. Moreover, "the trial court cannot be reversed on any ground or argument not presented for or against the [summary-judgment] motion." Ex parte Ryals, 773 So. 2d 1011, 1013 (Ala. 2000). Consequently, we cannot

consider Clay's argument on appeal invoking the doctrine of merger because she failed to present it to the circuit court. Accordingly, the circuit court did not err in considering the terms of the sale contract with respect to whether Chavis was entitled to a summary judgment on the claims he asserted against Clay.

Clay also contends that there exist several issues of fact that preclude a summary judgment. First, Clay notes that she testified in her deposition that the sale contract was "just what [Chavis] came up with to bring to you to try to sue me. He lost all the others, I guess. I don't know. I mean, I -- It just irritates me, because this is one of four or five different options we had." In other words, Clay asserts that the sale contract did not comprise the parties' final agreement for purchasing the river property and the barn property and that her testimony constitutes substantial evidence that such was the case.

Chavis responds that Clay admitted in her deposition that "[t]here were no documents done" other than the sale contract that the parties signed.¹ Chavis also notes that paragraph 15 of the sale contract provides

¹Clay also testified as follows:

that "[t]his Agreement shall constitute the entire agreement between the parties and any prior understanding or representation of any kind preceding the date of this Agreement shall not be binding upon either party except to the extent incorporated in this Agreement." Moreover, paragraph 16 of the sale contract states that any modifications to the sale contract "shall be binding only if placed in writing and signed by each party." Clay did not produce any documents purporting to modify the sale contract. Therefore, Chavis argues, no substantial evidence exists of any agreement between the parties aside from the sale contract Chavis produced to support his claims.

Chavis is correct that Clay did not produce any documentation to support her testimony that the sale contract did not reflect a final

"Q. [Chavis's counsel:] You mentioned that [the sale contract] -- I think you referred to it as one of several options that y'all discussed. The other options you discussed were all verbal; is that right?

"A. Correct.

"Q. There was not any written documentation other than this that we've talked about today?

"A. Correct."

agreement. It is also true that paragraphs 15 and 16 of the sale contract appear to foreclose oral modifications to the agreement. However, the problem with entering a summary judgment for Chavis based solely on the sale contract is that the record facts present several deviations by the parties from the terms of the sale contract. To begin with, the sale contract states that the down payment was supposed to be \$3,800. But according to Chavis, he actually accepted \$3,000 as a down payment from Clay.

Second, although the sale contract states the term of the loan (30 years), the purchase price for the property (\$380,000), and the interest rate for the loan (1% per annum), it does not state a payment schedule, i.e., the amount, number, and timing of payments that were supposed to be made to pay off the loan. It is true that Clay made monthly payments to Chavis of \$1,210 per month, which would have satisfied the loan amount at the stated interest rate if that monthly amount had been paid over the course of 30 years. So, Clay's record of payments for a two-year period constitutes evidence indicating that the parties had agreed that Clay would make monthly payments of \$1,210. However, because the sale contract does not state those terms, the record does not

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definitively establish that Clay had to make monthly payments of \$1,210 to be in compliance with the terms of the loan. Indeed, Clay ceased making monthly payments to Chavis from October 2019 through September 2020 -- approximately one year -- without Chavis making any demand from Clay for loan payments or Chavis taking any steps to reclaim the property.

Third, although the sale contract states that, on the closing date of June 1, 2017, Chavis was supposed to deliver to Clay the deed to the property, and Clay was supposed to execute and deliver to Chavis a promissory note and a mortgage for the amount of \$376,200, neither party performed those tasks on the closing date. Instead, Chavis provided deeds for the river property and for the barn property to Clay on June 26, 2017, and Clay never provided a promissory note or a mortgage on those properties to Chavis. Despite both parties' failures to provide required documents on the closing date as required by the sale contract, and despite Clay's failure to ever execute and deliver to Chavis a promissory note or a mortgage, Clay provided, and Chavis accepted, monthly payments for two years.

Fourth, the sale contract states that Clay was supposed to "secure [Chavis] the balance of the purchase money by executing and delivering [Clay's] Promissory Note for it, with a Mortgage on the Premises duly acknowledged as collateral for it," and it further states that "the money [was to be] paid at" Chavis's home address. However, in her deposition testimony, Clay stated that "[t]here was no way I could get a mortgage. We all knew that" because "the house wouldn't have passed an inspection." Thus, as Clay noted in her response to Chavis's summary-judgment motion, at least in Clay's mind there was confusion about "whether it was the intention of the parties to execute a mortgage agreement between themselves or through some third-party lender."

Fifth, the sale contract lists only the river property as the subject of the sale, but Chavis and Clay agree that the transaction included the river property and the barn property. Sixth, in her deposition testimony, Clay agreed with Chavis that Chavis expected her to purchase insurance for the house on the river property, but she denied that she was supposed to name Chavis as an additional insured on the insurance policy. However, the sale contract does not include any provision concerning property insurance.

In short, there are several discrepancies between the stated terms of the sale contract and the terms the parties agree were part of the transaction -- such as the inclusion of the barn property and the provision of insurance for the house on the river property -- as well as discrepancies between the stated terms of the sale contract and the performance of the parties -- such as the payment schedule and the provision of required documents. Those discrepancies are crucial to the outcome of this dispute because Chavis's claims are premised on the contention that Clay breached the sale contract by failing to provide a promissory note and a mortgage and by ceasing to make monthly loan payments to Chavis. Yet, under the terms of the sale contract, Chavis likewise did not provide the deed to the river property in a timely manner, and the sale contract does not expressly state that Clay had to make monthly loan payments. Those discrepancies are also crucial to the relief granted to Chavis by the circuit court. The circuit court ordered Clay to reconvey all three parcels of property to Chavis, presumably pursuant to paragraph 7 of the sale contract,² but the sale contract lists only the river property as the subject

²We note that, reading paragraph 7 of the sale contract in the context of the agreement as a whole suggests that paragraph 7 would be

of the transaction. Likewise, the circuit court ordered Clay to pay Chavis \$332,544.02 in damages, which amount was based primarily on the

inapplicable after Chavis had provided the deed to the river property to Clay. Paragraph 7 states:

"7. In case [Clay] has possession of the Premises before the execution and delivery of the Deed, and in case of the failure on [Clay's] part to perform any of the covenants to be performed by [Clay] under this Agreement, [Clay] shall yield and deliver to [Chavis] quiet and peaceable possession of the Premises. [Chavis] may immediately after such failure reenter and take possession of the Premises without any previous notice to quit in reference to any legal proceedings to recover possession of the Premises."

(Emphasis added.) As we have mentioned several times in this opinion, paragraph 3 of the sale contract states that, on the closing date of June 1, 2017, Clay was supposed to provide Chavis with a promissory note and a mortgage and Chavis was supposed to provide Clay with the deed to the river property. Paragraph 3 also states that the mortgage was supposed to "contain a power of sale in the usual form." Thus, paragraph 7 addresses Chavis's remedy for a breach of the sale contract before Chavis provided the deed and if Clay already had possession of the river property. The sale contract assumes that if Clay had possession of the river property and the deed to that property, Chavis would have a mortgage with a power-of-sale provision, which would provide Chavis's remedy if a breach occurred after Chavis had provided Clay the deed. In other words, under the terms of the sale contract, because Chavis had given Clay the deed to the river property, Chavis did not have an immediate right to possession of the river property under paragraph 7 upon a breach of the agreement by Clay. Instead, he would have had to exercise the power-of-sale provision in the mortgage Clay was supposed to provide to Chavis.

amount Clay received from insurance payouts resulting from the destruction of the house on the river property, but the sale contract does not contain any provision pertaining to insurance.³ Taken together, and viewing the evidence in the light most favorable to Clay, as our standard of review requires, the foregoing deviations from the sale contract, along with Clay's deposition testimony, constitute substantial evidence demonstrating that an issue of fact exists as to whether the sale contract comprised the final agreement between Chavis and Clay. Therefore, the circuit court erred in entering a summary judgment in Chavis's favor.

IV. Conclusion

The circuit court clearly entered a summary judgment in Chavis's favor based on the sale contract. However, as we have explained, there are key discrepancies between the sale contract and what the parties

³Indeed, if the sale contract does, in fact, govern the dispute between Chavis and Clay, it is unclear at this stage of the litigation why Chavis would be entitled to the proceeds from Clay's insurance policies. The sale contract lacks any reference to insurance, Chavis provided the deed to the river property to Clay without obtaining a promissory note and a mortgage from Clay, and Chavis did not make a demand for return of the river property until after the house and other structures had been destroyed by flooding and fire. Thus, the facts in the record do not clearly demonstrate why Chavis would be entitled to damages for the value of the river property before the destruction of the house.

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agree was included in the transaction and several discrepancies between the sale contract and the parties' performance. Because of those issues of fact, we reverse the circuit court's judgment and remand the cause for further proceedings.

REVERSED AND REMANDED.

Parker, C.J., and Shaw, Bryan, and Mitchell, JJ., concur.