STATE OF VERMONT
ORANGE COUNTY, SS

George Huntington

v.

Herbert Gray and
Rebecca Gray

Orange Superior Court

Docket No. S24-93 OeC

Decision and Order Re:

Plaintiff's Motion for Writ of Attachment

Plaintiff has brought this action in order to collect on a $100,000 promissory note given him by defendants. Plaintiff included with his complaint a motion for a writ of attachment and a request for an accompanying order of approval. Plaintiff is represented by Charles Calley, Esq.

Defendants are represented by Stephen Norten, Esq., and oppose the motion for a writ of attachment. They note that the promissory note was given by them for the payment of a real estate commission in connection with a real estate transaction in which plaintiff was the broker, and point to flaws in the listing agreement between plaintiff and defendants. Defendants assert that the flaws in the listing agreement (specifically, the lack of an agreement in writing as to the amount of the commission to be paid and/or a writing setting forth all of the terms of the agreement) preclude enforcement of the promissory note. Defendants also assert that the buyer's eventual default on his obligation creates a failure of consideration on the note, thereby also precluding enforcement of the note.

Prejudgment attachment is governed by V.R.C.P. 4.1. In cases such as the present one, a plaintiff seeking a writ of attachment must demonstrate to the court that there is a "reasonable likelihood" that he will recover judgment "in an amount equal or greater than the amount of the attachment over and above

any liability insurance, bond, or other security shown by the defendant to be available to satisfy the judgment." V.R.C.P. 4.1(b)(2). In considering whether plaintiff has demonstrated a reasonable likelihood of success on the merits, the court will consider the parties' factual and legal positions.

Plaintiff possesses a $100,000 promissory note from defendants, which states that defendants, "for value received... promise to pay... [plaintiff]... $100,000... with no interest." The note does not reference any terms of the real estate transaction.

Defendants contend that plaintiff's failure to secure a complete and detailed commission agreement precludes plaintiff from collecting under the note. They argue that enforcement of the note would contravene the public policy considerations behind the requirement that a broker obtain a written agreement as to the terms and conditions surrounding the commission. They also claim that the buyer's eventual default on his obligations gives rise to a failure of consideration regarding the note.

Though a contract whose formation or performance is illegal may be held void and unenforceable, "a collateral illegality will not serve to bar a valid claim." My Sister's Place v. City of Burlington, 139 Vt. 600, 613-614 (1981). The fact that the parties had an agreement for a $100,000 commission is not at issue; therefore, any claim of an illegality as to the form of the agreement is a collateral matter. Furthermore, the note itself establishes an obligation for $100,000. "The law will presume that the parties meant, and intended to be bound by, the plain and express language of their undertakings." Dartmouth Savings Bank v. F.O.S. Assoc., 145 Vt. 62, 68 (1984). "The presence of the written contract brought into operation the rule that testimony to add to or contradict the written provisions of the contract will not be given effect.

.... The law presumes the writing to contain the whole agreement." Economou v. Vermont Electric Cooperative, Inc., 131 Vt. 636, 638 (1973). "When an instrument is clear and unambiguous, we look to its plain meaning to determine the understanding and intent of the parties." Northern Aircraft v. Reed, 154 Vt. 36, 44 (1990).

> [C]lear language may not be altered or supplemented by evidence of "understanding of the parties".... Further, when the parties embody their agreement into a writing, evidence of a prior or contemporaneous oral agreement is not admissible to vary the terms of the written agreement. ....

Northern Aircraft, at 45. The parol evidence rule prevents introduction of evidence of prior oral agreements containing additional or different terms or conditions. Id.

Upon analysis of the parties factual claims and legal positions, this court concludes that any deficiency in the parties' agreement as to the commission is a matter which is collateral to the subject and terms of the promissory note. Accordingly, even accepting, arguendo, that plaintiff did not comply with the requirements regarding a written commission agreement, this court concludes that noncompliance does not render the promissory note itself illegal.

In regard to defendants' contentions regarding the parties' purported prior oral understanding that the commission would only become due upon payment by the buyer, evidence of prior conditions not actually embodied in the note is precluded by the parol evidence rule and related concepts set forth above. Accordingly, such prior agreements do not necessarily constitute a defense on the note. Further, this argument by defendants implicitly seeks to make the plaintiff a guarantor of the obligations of the buyer. This is a rather serious obligation, and one which courts should be especially hesitant to read

into an agreement, particularly in the absence of specific terms to that effect. Promissory agreements embodying an "absolute promise to pay cannot be cut down into a conditional promise, or enlarged, varied, or contradicted by evidence of a prior or contemporaneous oral agreement." Big G. Corp. v. Henry, 148 Vt. 589, 593 (1987).

Prior to the listing agreement, and again prior to the closing when the promissory note was signed, Defendants had the opportunity to specify terms and conditions to be included in the promissory note to protect themselves from the risk of buyer's default. They did not do so, and instead at closing signed a promissory note with an unconditional promise to pay the amount of the commission. The closing was consummated. The buyer's later default does not undo the promissory obligation undertaken by Defendants under these circumstances..

For all of the foregoing reasons, this court concludes that plaintiff has shown that he has the requisite "reasonable likelihood" of eventual success. Accordingly, plaintiff's motion for a writ of attachment, in the amount of $125,000, is hereby granted. The plaintiff shall bear all responsibility for taking steps to serve and effectuate the writ of attachment.

Dated this 7th day of December, 1993, at Chelsea, Vermont.

Mary Miles Teachout

Mary Miles Teachout
Presiding Judge