IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

KENNEDY FUNDING, INC. AS AGENT FOR CERTAIN CO-LENDERS,	)	
Plaintiff,	)	
	)	CASE NO. ST-14-CV-180
v.	)	
	)	ACTION FOR DEBT AND DECLARATORY JUDGMENT
GB PROPERTIES, LTD., and its successor in interest GAD PROPERTIES, LTD.,	)	
Defendant.	)	

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CARTY, RENÉE GUMBS, Judge

MEMORANDUM OPINION
(Filed: January 8, 2018)

THIS MATTER is before the Court on Defendant's GAD Properties, Ltd. ("GAD"), "Motion for Summary Judgment" and Defendant's Memorandum of Points and Authority in Support of its Motion for Summary Judgment" filed on July 6, 2015. Plaintiff Kennedy Funding, Inc. ("Kennedy") filed "Plaintiff's Opposition to Defendants' Motion for Summary Judgment and Plaintiff's Counter Motion for Summary Judgment" on July 30, 2015. Defendant's "Opposition to Plaintiff's Motion for Summary Judgment" was filed on August 19, 2015. This matter came on for hearing on November 3, 2017, on all outstanding motions. The Court heard oral arguments on the motion for summary judgment. For the reasons stated herein, the Court will grant summary judgment in favor of Defendant GAD.

I. PROCEDURAL AND CASE HISTORY

This case revolves around the sale and purchase of a property located at 3A Dronningens Gade, Queens Quarter, St. Thomas, U.S. Virgin Islands (the Property). The Property is a commercial building located on Main street and is presently rented and occupied by Defendant's parent company.[1] The Property, in relevant part, was subject to foreclosure by Kennedy, who foreclosed a first priority mortgage in an earlier related matter.[2] The first priority mortgage which was recorded on April 18, 2008, incorporated an Assignment of Leases and Rents.[3] Kennedy properly recorded their Assignment of Leases and Rents on April 18, 2015.[4] The foreclosure judgment, which was rendered on May 9, 2011, awarded Kennedy nine million, six hundred three thousand, six hundred forty dollars and 93/100 ($9,603,640.93) against Wintdots, the Defendant in the earlier action.[5] Within the foreclosure judgment, the presiding court recognized and enforced the assignment of rents, declaring it to be a valid first priority lien in favor of Kennedy.[6]

After the foreclosure, but prior to the U.S. Marshal sale, Defendant GAD expressed interest in purchasing the Property.[7] On November 7, 2013, the Property was sold via public auction conducted by the U.S. Marshal along with an additional property located in Estate Thomas.[8] It was during this auction that GB Properties, Ltd., successfully bid and won the Property at the price of six million, one thousand dollars and 00/100 ($6,001,000).[9] GB Properties, Ltd. subsequently assigned its rights and obligations as the successful bidder to GAD Properties, Ltd. in which GAD timely paid

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1 Pl.'s Statement of Undisputed Facts 2, Def's Statement of Undisputed Facts 1.
2 Def.'s Statement of Undisputed Facts. 1, Pl.'s Statement of Undisputed Facts. 1. Consent Judgment was rendered in Kennedy Funding, Inc. as Agent for Certain Co-lenders v. Windots Development, LLC, 3:10-CV-32
3 Pl's Statement of Undisputed Facts 4, Def's Statement of Undisputed Facts 1.
4 *Id.*
5 Pl's Statement of Undisputed Facts 1, Def's Statement of Undisputed Facts 1.
6 *Id.* at 4.
7 *Id.* at 2.
8 Def.'s Statement of Undisputed Facts 2, Pl.'s Statement of Undisputed Facts. 1.
9 *Id.*

the purchase price for the Property.[10] Michael Knafo, the Head of Purchasing & Business Development for Almod Diamonds Ltd. doing business as Diamonds International, the parent company of GAD, negotiated the sale and purchased the Property on behalf of GAD.[11]The U.S. Marshal subsequently sent an invoice to GAD requesting payment of the commission price due on sale, in the amount of fifty thousand ($50,000) dollars for the sale of the Property.[12] Upon GAD's refusal to pay the U.S. Marshal's commission, the U.S. Marshal deducted the fifty thousand dollar ($50,000) commission from the sale proceeds.[13] As a result, Kennedy received five million, nine hundred fifty-one thousand dollars and 00/100 ($5,951,000).[14]

On February 12, 2014, the sale was confirmed by the District Court of the Virgin Islands, and a redemption period of one sixty-two (162) days commenced.[15] As there were still tenants on the property, rent continued to be collected. From November 7, 2013 through January 31, 2014, Kennedy as the previous owner, was still receiving rental monies totaling forty thousand one hundred twenty dollars and 16/100 ($40,120.16) during the time period.[16] On March 27, 2014, Kennedy field a Complaint in which it asserted that GAD, not Kennedy, was responsible for the U.S. Marshal's commission price associated with the sale of the Property. They premise this argument on the assertion that the parties had a contract for the bidding of the property in question. Kennedy asserts that this is evidenced by a slew of emails exchanged between representatives on behalf of the parties which sets forth that GAD agreed to pay all costs associated with the purchase of the Property. Contrarily, GAD asserts that there was no contract, and one is unable to be inferred by the

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[10] *Id.*

[11] *Id.*

[12] Pl.'s Statement of Undisputed Facts. 2, Def. Statement of Undisputed Facts. 1.

[13] *Id.* For purposes of consistency, the Court used the total amount charged by the U.S. Marshal of $50,000, although the calculation reflects $49,000.

[14] *Id.*

[15] Def.'s Statement of Undisputed Facts 2, Pl.'s Statement of Undisputed Facts. 1.

[16] *Id.* at 3.

communications between the parties. Furthermore, that as a contract for the sale of land, lack of a writing would violate the statute of frauds. As it pertains to the rental proceeds, Kennedy contends that they are entitled to these funds as well due to the assignment of rents and leases clause addressed in the foreclosure judgment, and that it is only upon GAD's possession of the deed to the Property, representing their legal ownership, are they able to be entitled to such rents. GAD confronts this argument with the contention that it is upon the date of sale, not possession of the deed that entitles them to the collection rents, as provided by Title 5, Section 500 of the Virgin Islands Code. For the reasons on the record and set forth in this memorandum, the Court will grant summary judgment in favor of GAD.

II. SUMMARY JUDGMENT STANDARD

Summary Judgment shall be granted if the movant shows that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law.[17] Under Rule 56(c), summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, electronically stored information, stipulations, and admissions on file, together with affidavits, if any, 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.[18] Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.[19] To establish a genuine issue of material fact, the non-moving party must introduce evidence beyond the mere pleadings to create an issue of material fact on an essential element of that party's case, and on which that party will bear

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17 V. I. R. Civ. P. 56(a). *In re Adoption of Virgin Islands Rules of Civil Procedure* recently promulgated on March 31, 2017, replacing the Federal Rules of Civil Procedure. The Virgin Rules of Civil Procedure replaces federal rules by promulgation of the V. I. Supreme Court Order. Technically, Rule 56 adopts a different name, however the rule number and substance of law remain the same.

18 *Manbodh v. Hess Oil V.I. Corp. et al.* (In re Manbodh Asbestos Litigation Series), 47 V.I. 215 (V.I. Super. Ct. Nov. 23, 2005).

19 *See* V.I. R. Civ. P. 56.

the burden of proof at trial.[20] As summary judgment is a "drastic remedy", the Court should not take such motions lightly and inferences drawn "from the underlying facts, [should be viewed] in the light most favorable to the non-moving party."[21] Thus, once the non-moving party has presented more than a scintilla of evidence that may sway a jury, both parties should be granted an equal opportunity to present their facts to the jury.[22]

III. LEGAL DISCUSSION

a. Kennedy and GAD have a valid oral contract for the purpose of bidding on the Property in question, nonetheless Kennedy has failed to prove that GAD agreed to pay the U.S. Marshal's Commission as part of the agreed upon terms of the agreement.

The Plaintiff asserts a number of claims before the Court as it pertains to an alleged agreement between the parties. First, the Plaintiff asserts that there is a contract between the parties in which, among other things, Kennedy and GAD agreed that GAD would bid $6,001,000 at the U.S. Marshal sale conducted on November 7, 2013, as well as take care of all costs associated with the sale.[23] Defendant combats this argument by alleging that there was no contract, due to the lack of acceptance on behalf of GAD, but also that the email thread provided by Kennedy is not sufficient enough to constitute a writing as required by the statute of frauds. In response to GAD's assertion, Kennedy

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20 *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

21 *Williams v. United Corp.*, 50 V.I. 191, 194-95 (V.I. 2008).

22 *United Corp. v. Tutu Park*, 55 V.I. 702, 707 (V.I. 2011).

23 Pl.'s Mot. Summ. J. Ex. F. (In the email sent by Kennedy on November 2, 2013, to its counsel in which GAD was included, Kennedy outlines proposed terms of the agreement to be memorialized in writing between the parties to include: 1)Kennedy Funding would bid $6,000,000 on November 7, 2013, sale for the commercial building; 2)Diamonds International will bid $1,000 more than Kennedy's bid and continue to bid if there are any other bidders so that Diamonds International shall be the successful bidder; 3) Upon Kennedy's receipt of the winning bid proceeds, not less than $6,000,000 net to Kennedy, Kennedy agrees to refund the difference in the amount received in excess of $6,000,000 to Diamonds International; 4)Diamonds International is responsible for any costs associated with the bidding procedures, transfer of title, etc.; and 5) Diamonds International shall place $1,000,000 in Kennedy's attorney's trust account no later than Tuesday, November 5, 2013, time is of the essence. This $1,000,000 shall be released back to Diamonds International upon Kennedy's receipt of the sale proceeds. In the event Diamonds International does not bid more than $6,000,000 at the sale or Diamonds International is not the successful bidder, the $1,000,000 shall be released to Kennedy.)

contends that this issue would not fall under the statute of frauds as it was a contract for bidding and not one for the sale of land and thus the Court should find that an agreement was present.

The Supreme Court of the Virgin Islands has opined that "[a] contract is a promise that is either stated in oral or written words (express contract), or a promise that can be inferred wholly or partially by conduct (implied contract)."[24] Essential to the creation of a contract are the elements of offer and acceptance, in which acceptance may be inferred through conduct.[25] Under the Virgin Islands Code, when it comes to contracts pertaining to the sale of land, the law imposes a writing requirement in order to find a valid contract exists in accordance to the statute of frauds."[26] Here, the Court finds that there was an oral contract between Kennedy and GAD in which GAD agreed to bid $6,001,000 for the Property.

Addressing first Plaintiff's contention that a contract existed, the Court is able to find that there was an oral agreement that was executed by the two parties based upon performance. Although Defendant argues that the contract is required to be in writing because it constitutes the sale of land, this Court is inclined to disagree. The Court points towards the actual objective of the contract.[27] Here, the Court finds that the actual objective and premise of the agreement between Kennedy and GAD was not one for the sale of the land, but rather the distinct act of how each party was to perform in relation to the bidding process. The Court does not find this to be a contract for the sale of land, as there would be more of a guarantee of transfer as it pertains to the Property. Here, should GAD had been out-bid by a subsequent bidder, they would not have acquired the property in question, and

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24 *Peppertree Terrace v. Williams*, 52 V.I. 225, 241 (VI 2009).

25 *See Penn v. Mosley*, 2017 V.I. Supreme LEXIS 53 (VI 2017).

26 28 V.I.C. 241.

27 *Cornelius v. Bank of Nova Scotia*, 2017 V.I. Supreme LEXIS 50, 93 U.C.C. Rep. Serv. 2d (Callaghan) 409 (*quoting Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136-37, 3 L. Ed. 162 (1810)) ("A contract is a compact between two or more parties, and is either executory or executed. ... A contract executed is one in which the object of [the] contract is performed.).

nothing in their agreement with Kennedy would have been able to change that. With the act of bidding, and not the sale of the property, as the focus of this contract the Court finds that the statute of frauds has not been triggered.

As for the oral agreement itself, and for the proof of the terms of such, the Plaintiff leans on a string of emails as a way to show the terms of the agreement. The Court finds that the provisions in the emails asserted were not integrated or part of the oral contract Plaintiff and Defendant entered into before the commencement of the sale by the U.S. Marshal. This is shown by a very important detail overlooked by the Plaintiff found in the deposition of Kevin Wolfer, the President and CEO of Kennedy Funding, Inc., and person responsible for the negotiations of the agreement. During his deposition, Mr. Wolfer is asked by opposing counsel about a conversation that took place after the email outlining the proposed terms to the agreement was sent.[28] Specifically, opposing counsel proceeds to ask Mr. Wolfer, "[a]nd so, your testimony is during that conversation a new oral contract was created that did not incorporate the terms previously outlined in this email string?"[29] To which Wolfer replied, "Correct." Opposing counsel goes further to ask about specific points outlined in the email such as Kennedy's original proposition to refund GAD any money spent over the $6,000,000 mark in which Mr. Wolfer states that this provision also did not make it into the new oral agreement.[30] This debunks Plaintiff's initial argument that only two of the items listed in the email were not performed. Taking this into consideration, the Court finds that now a majority of the original agreed upon items were not part of the final oral agreement. Lacking a follow up email, or some type of evidence to show that the terms of the new oral agreement is the same as those found in the previous string of emails, the Court is unable to find that those previous terms apply.

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28 Wolfer Dep. 19.
29 *Id.*
30 Wolfer Dep. 21.

However, both parties agree that the discussions leading up to the agreement was straightforward, and this Court is inclined to agree. Mr. Knafo as well as Mr. Wolfer both stated that the agreement was for Kennedy to stop their bidding at $6,000,000 in which GAD would make the next incremental bid of $6,001,000 to secure their spot as the successful bidder.[31] Mr. Wolfer, in particular, stated that in the final conversation that established the oral agreement that the Defendant agreed to pay $6,001,000.[32] The Court finds as such that the breadth of the agreed upon terms was that Kennedy would stop bidding at $6,000,000 to ensure that they would receive that price for the Property and GAD would confirm the price by making the next bid at $6,001,000 in hopes that they would successfully secure the Property. The Court does not find, nor was proper evidence presented that the parties agreed on a term requiring GAD to pay the cost of the U.S. Marshal's commission, but rather should GAD successfully bid for the Property at $6,001,000, it would be theirs. As such, this Court finds that GAD is not responsible for the U.S. Marshal's commission.

b. GAD is entitled to the rental proceeds incurred during the redemption period in accordance to Title 5, Section 500 of the Virgin Islands Code.

Addressing next the issue of rents, Plaintiff asserts that they are entitled to the rents collected during the redemption period following the foreclosure of the Property. Plaintiff premises this argument on the foreclosure judgment rendered on the Property by the District Court in 2011. Plaintiff contends that the judgment recognizes and enforces an assignment of rents clause which entitled Plaintiff to collect rental monies from the Property until GAD possessed legal title of the Property. Defendant combats this argument with Title 5, Section 500 of the Virgin Islands Code in which Defendant asserts places upon them the statutory right to possession and rents from the Property as the successful purchaser of the Property. In accordance to Defendant's argument, Defendant would

31 *Id.*; Knafo Dep. 12.
32 *Id.*

be entitled to the rental monies collected pursuant to the JRT Lease currently on the Property.[33] This includes rental monies from November 7, 2013 (the date of sale), through January 31, 2014, in the amount of forty thousand, one hundred twenty dollars and 16/100 ($40,120.16), as well as the rental monies held in escrow in the amount of one hundred one thousand, five hundred eighty-nine dollars and 99/100 ($101,589.99), totaling one hundred forty-one thousand, seven hundred ten dollars and 15/100 ($141,710.15).

Lacking a dispute of material fact on the issue of rents, the Court will turn to which party is entitled to judgment as a matter of law. Under Title 5, Section 500 of the Virgin Islands Code it provides in part that "the purchaser from the day of sale until a resale or a redemption... shall be entitled to the possession of a tenant holding under an unexpired lease, and in such case shall be entitled to receive from such tenant the rents or the value of the use and occupation thereof during the same period." Inherent in this statutory provision is the right of the purchaser to utilize the property for which they paid. Section 500 expressly confers the right to possession, crops, and specifically, and most important to the case at hand, the right to rents. [34] The Plaintiff also recognizes this right, however the Plaintiff attempts to read into this statute that legal rather than equitable owner of the property is required in order for GAD to exercise its statutory right. The Court is not inclined to read such legal terms into the statute as Plaintiff suggests. In accordance with principles of statutory construction, when the language of a statute is plain and unambiguous, the plain language governs.[35] The Court finds this is the case here as it relates to title 5, section 500 and as such will not read Plaintiff's requirement of legal title into the statute.

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33 Pl.'s Statement of Undisputed Facts 3.

34 *Chase Manhattan Bank v. Robert-Surzano*, 2009 U.S. Dist. LEXIS 54520, 51 V.I. 1024, *31 (VI 2009).

35 *In re L.O.F.*, 62 V.I. 655, 661 (V.I. 2015) (internal and other citations omitted).

Alternatively, as for Plaintiff's assertion that their assignment of rents overrides the Defendant's statutory right to rents, the Court does not agree. Here, the Court turns to the issue of notice. In accordance with Virgin Islands law, it has been established that the Virgin Islands is a race-notice jurisdiction.[36] This requires encumbrances, such as the Plaintiff's assignment for rents to be recorded in order to put subsequent purchasers, ergo the world, of the property to which it is attached on notice.[37] In light of such, the Court turns to the timeline of recordings that took place in relation to the property. Kennedy recorded the original mortgage on the Property, which was subsequently the subject of foreclosure, on April 18, 2008.[38] The Property was foreclosed and an order for foreclosure was rendered on May 9, 2011.[39] The Property was sold via U.S. Marshal sale on November 7, 2013. However, it was not until April 18, 2015, that Plaintiff recorded their assignment of rents. The purpose of the recording is to put subsequent purchasers and those seeking interest in the Property on notice of any encumbrances.[40] This allows purchasers to make a fully informed decision as to the property they seek to secure. The Court finds that this is no different. Here, Plaintiff waited two years after the sale of the Property to record their assignment of rents. Although actual notice is not required,[41] Plaintiff has failed to show how Defendant even had constructive notice of the Plaintiff's assignment attached to the Property. As such and in accordance to Virgin Islands law, Kennedy's assignment of rents is unenforceable against GAD.[42]

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[36] *See Brodhurst v. Frazier*, 57 V.I. 365, 2012 V.I. Supreme LEXIS 65 ("The Supreme Court of the Virgin Islands and other Virgin Islands courts have consistently interpreted this enactment as a race-notice statute, in which the failure to record an easement or other conveyance renders it unenforceable against a subsequent purchaser, but only if that purchaser lacks notice of the encumbrance.")

[37] See Redemption Holdings, Inc. v. Gov't of the Virgin Islands, 65 V.I. 243, 2016 V.I. Supreme LEXIS 27.

[38] Pl.'s Statement of Undisputed Facts 1.

[39] Def. Mot. Sum. J. Ex. A.

[40] *See Brodhurst v. Frazier*, 57 V.I. 365, 2012 V.I. Supreme LEXIS 65

[41] *Id.* at 371.

[42] *Id.*

IV. CONCLUSION

Upon review of both sides, the Court finds that summary judgment is appropriate as there is no genuine issue of material facts, and GAD is entitled to judgment as a matter of law. The Court has found that there was a valid oral agreement between the parties. This agreement was not subject to the statute of frauds, thus requiring a writing, as it was a contract for the performance of bidding and not for that of sale. Even so, there was no evidence of a term that required GAD to pay the commission from the U.S. Marshal's sale, as such Kennedy is not entitled to reimbursement. Furthermore, although the Court recognizes that Kennedy did record an assignment of rents, this Court finds that GAD did not have proper notice of this encumbrance prior to purchasing the Property in question and further that such assignment does not override GAD's statutory right to rent as codified in the Virgin Islands Code. As such, GAD's motion for summary judgment will be granted in an appropriate order of even date.

Dated: January 8, 2018

Renée Gumbs Carty

Renée Gumbs Carty
Judge of the Superior Court
of the Virgin Islands

ATTEST:
Estrella H. George
Clerk of the Court

By: Donna D. Donovan
Donna D. Donovan
Court Clerk Supervisor 1/8/2018