IN THE SUPREME COURT OF THE VIRGIN ISLANDS
CASE NO. SCT-CIV-2022-0119

An Appeal From The Superior Court of The Virgin Islands
Division of St. Thomas& St. John
Case No. ST-2020-CV-00190

GEORGE FRANCIS,
Plaintiff/Appellant

v.

EDWARD A. FRANCIS and JAMES L. FRANCIS
Defendants/Appellees

BRIEF IN OPPOSITION FILED BY THE APPELLEE EDWARD A. FRANCIS

Respectfully submitted,

/s/ Darren John-Baptiste, Esq.

March 29, 2023

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The Superior Court of the Virgin Islands, had subject matter jurisdiction over this case pursuant to 4 V.I.C. § 76 and 28 V.I.C. § 451. Sections 32 and 33 of Title 4 of the Virgin Islands Code confer appellate jurisdiction on the Supreme Court of the Virgin Islands to hear appeals from final orders and decisions of the Superior Court.

STATEMENT OF STANDARD OF REVIEW

The Supreme Court's review of the trial court's application of law is *de novo* and findings of fact are reviewed for clear error. *SeeSt. Thomas–St. John Bd. of Elections v. Daniel,* 49 V.I. 322, 329 (V.I.2007).

APPELLEE'S RESPOSE TO THE STATEMENT OF THE ISSUES

The Appellant has set forth four (4) issues in his Notice of Appeal and used them as a rough guide for the Argument section of his Opening Brief. Appellee Edward A. Francis (hereinafter "Edward") responds as follows:

1. The Superior Court did not err when it granted the Motion to Enforce the Mediated Settlement Agreement Without an Analysis of George's Motion to Rescind the Mediated Settlement Agreement.
2. The provision requiring that the parties list the property with a broker was not a material term of the Mediated Settlement Agreement.

3. Edward and James did not materially breach the Mediated Settlement Agreement when they entered into a contract for purchase and sale of the property that was the subject of the Mediated Settlement Agreement.
4. The Appellant's issue asks whether Appellant **George** is entitled to rescission of the Mediated Settlement Agreement because Edward and Appellant **George** are in material breach thereof(emphasis added). This issue alone disposes of this entire appeal in favor of the Appellees because it sets forth George's admission that *Appellant* through his words and conduct modified the terms ofthe Mediated Settlement Agreement, but now wishes to re-characterize his modification as a wilfull breach by the *Appellees* that violates a material term of the Agreement. As will be demonstrated herein, such a spurious and unscrupulous argument is wholly without merit and is subject to the principles of contract waiver and invited error as set forth in Sections III and IV of the Argument.

STATEMENT OF RELATED CASES AND PROCEEDINGS

The Appellee adopts the Appellant's statement of related cases and proceedings in its Opposition and incorporates it by reference herein.

STATEMENT OF THE CASE

The Appellee incorporates the Appellant's statement of the case as if fully set forth herein.

COUNTER STATEMENT OF THE FACTS

The facts of this case are straightforward and uncomplicated. Three brothers, at odds with each other, have been engaged in a protracted dispute about the use and ownership of property located at Parcel 65 Smith Bay Remainder, for which they are joint owners and tenants in common. JA 023; JA 044. The three brothers are Edward, George, and James Francis. George is the Appellant.

On April 23, 2020, George commenced an action in the Superior Court of the Virgin Islands seeking to partition Parcel 65 Smith Bay Remainder (hereinafter "the Property"). JA 023. George's stated desire for filing the partition action was to sell the property and have the proceeds divided equitably.

The Superior Court ordered mediation on December 2, 2021. Despite the friction among the brothers, they resolved their issues as evidenced by all three executing a Mediated Settlement Agreement ("hereinafter Agreement"). The main driver of the Agreement is that the parties ultimately agreed to sell the Property and divide the proceeds.

Clause 1 of the Agreement provides that "[t]he parties will list the property with Realtor (broker) Delrease Roberts for an asking price of not less than

$650,000." George's appeal hinges on a claim that this Clause was a material part of the Agreement with which his brothers failed to comply when Edward offered to purchase the property for the agreed asking price. The irony of such a claim is that George himself agreed to forego that Clause altogether when he indicated his assent to Edward's being the purchaser and engaged in actions that underscored his assent.

On December 8, 2021, Defendant Edward Francis notified the other parties that he wished to buy out their two thirds interest at the agreed upon price of $650,000.00, which would save them the realtor's commission fee of six percent.

On December 10, 2022, Edward's counsel drafted and disseminated a purchase agreement which was acknowledged by George and James and commented on by counsel for both brothers.

On December 17, 2021, George through his Attorney Miller forwarded correspondence indicating that the parties had agreed to list the Property, but that George had authorized Attorney Miller to work towards a contract of sale with Edward prior to the holidays. *See* Opening Br. at p. 10 citing JA 054.

Evidence of George's acquiescence to the sale of the Property to Edward is found in an email correspondence sent from George's attorney to Edward's attorney on December 17, 2021. In that correspondence, George admits that Edward's offer "deviates" from the brother's Agreement in which Delrease

Roberts was supposed to list the property, but George nonetheless agreed to the deviation and authorized his attorney to work with Edward and James "to finalize a contract of sale whereby Edward will buy the property rather than to wait until after the holidays to finalize a contract. JA 054.

By February 9, 2022, Edward's counsel sent email correspondence to George's counsel and the first line states: "Good Day Counsel. Thank you Attorney Miller for reaching out yesterday. I am glad to hear your client is ready to move forward." JA 055. That February 9th email recaps the terms of Edwards offer to purchase, clarifies the allocation of the funds, and attaches a copy of the revised contract as per the brothers' understanding of Edward's purchase.

One day later, on February 10, 2022, George's attorney of record sends an email to George indicating that Attorney Magnuson, the fifth attorney in this case, had given "her blessings" to proceed with the contract of sale to Edward as drafted by Edward's attorney and modified by James' attorney with changes suggested by Attorney Magnuson. JA 056. George's attorney concludes the email by stating that he (the attorney) would like to report to the court that a contract of sale had been signed by all three brothers. *Id*. The next day, George indicated that he would not sign the contract.

By February 16, 2022, George's attorney appeared at the status conference, informed the court that he would no longer be the attorney of record, and filed his

Motion to Withdraw as counsel citing a disagreement with his client as to the resolution of the case. JA 058.

Also on February 16, 2022, Edward filed a Motion to Enforce the Settlement Agreement. The Court granted the motion on December 5, 2022. The instant appeal followed.

ARGUMENT

1. THE SUPERIOR COURT DID NOT ERR WHEN IT GRANTED THE MOTION TO ENFORCE THE MEDIATED SETTLEMENT AGREEMENT

It is so well established that it is beyond question in this jurisdiction that a mediated settlement agreement is a contract to which all the laws of contracts apply. Mediated settlement agreements are binding upon parties and are enforceable contracts governed by basic contract principles. *Boynes v. Transp. Servs. of St. John, Inc.,* 2014 WL 202027 at *3 (V.I. 2014)(internal citations omitted). Although parties reach a settlement agreement during mediation, rather than during litigation, it does not lessen the binding nature of the agreement on the parties." *Id. quotingD.R. v. East Brunswick Bd. of Educ.,* 109 F.3d 896, 901 (3d Cir.1997).

Further, the public policy of this jurisdiction also favors enforcement of mediated settlement agreements. *SeeFTC v. Actavis, Inc.,* 133 S.Ct. 2223, 2234 (2013); *Castolenia v. Crafa,* 2014 WL 239427 (V.I.Super.Ct. 2014); *Finley v.*

Mole, 2015 WL 1541126, at 3 (D.V.I. 2015). Like any other contract, a mediated settlement agreement once entered into, cannot be repudiated by either party and will be summarily enforced to reinforce the strong public policy of encouraging settlement agreements, especially when parties have assented to the terms contained therein. *Boynes*, *supra* (internal citations omitted). Thus, when parties execute a mediated settlement agreement, they were under an obligation to proceed in good faith and fair dealing in its enforcement. *Govia v. Burnett,* 2003 WL 21104925, at *3-6 (Terr. V.I. 2003) citing Restatement (Second) Contracts § 205 and *Emerson Radio Corp. v. Orion Sales, Inc.,* 253 F.3d 159, 170 (3d Cir.2001).

The trial court was correct to order enforcement of the Agreement because it was signed by all three brothers knowingly, without duress, and with the advice of counsel. An enforceable contract requires offer, acceptance, consideration (the bargained-for legal benefit and/or detriment), and a manifestation of mutual assent.*Arvidson v. Buchar,* 72 V.I. 500, 520–22 (V.I. Super.2020) (internal citations omitted). All three brothers manifested their mutual assent to the terms of the Agreement as signed on December 2, 2021, and engaged in conduct that evinced an intention to dispense with the requirement of listing the Property for sale.

In George's Opening Brief he asserts that the parties' mutual understanding is that the three brothers would sell their interest in the Property … and the

Agreement does not expressly contemplate the parameters of a sale between the parties.*See* Opening Br. at p. 13. Such an assertion belies the fact that the parties all signed the Agreement because they knew the purpose, intent, reason, and objective of the mediation. *Cf. Isidor Paiewonsky Assoc. v. Sharp Properties,* 761 F.Supp. 1231, 1233 (D.C.V.I.1991). The purpose, intent, reason, and objective of the Agreement was simply to have the Property sold and the proceeds shared among the brothers.

The requirement that someone other than the parties purchase the Property was not included in the mediated settlement agreement and was nowhere within the contemplation of the parties at the time the brothers manifested their assent to the Agreement and filed it with the trial court. George's interpretation of the contract that it was a material term that Delrease Roberts list the Property so that a stranger to the litigation could purchase it, is a new interpretation that appeared months after George actively and willingly engaged in a course of conduct that manifested his assent to have the Property sold to Edward.

When examining a contract, a court is to interpret the contracting parties' intent as objectively manifested by them.*Arvidson*, *supra*, citing *Mountaintop v. Columbia Emeralds International*, 43 V.I. 193, 201 (V.I. 2001). Likewise, where there is a question of mutual consent, a court may look outside the four corners of a written agreement because the manifestation of assent necessary to form a contract

may be by word conduct which evinces the intentions of the parties to contract.*Id*. citing *United States v. Toscano*, 799 F. Supp. 230, 240 (E D.N.Y. 2011).

As applied here, the parties manifested their objective intent to have George and James sell their 2/3 share to Edward who would tender the purchase price of $650,000 as set forth in the Agreement. Through a sustained course of conduct George accepted Edwards's offer by having two (2) attorneys review and finalize the sale and purchase documents, and caused his attorney to send email correspondence that (1) indicated an acceptance of Edward's offer, and (2) set the timing for performance as "before the holidays."

Through a post-mediation course of dealing, and set forth in his written correspondence, George accepted the sale and purchase of the Property to Edward without it being listed. During the period of negotiation over Edward's purchase of the Property, George never expressed any dissatisfaction, disagreement, or objection to the terms of sale and purchase document. To the contrary, George knowingly assented to Edward acquiring the property when he authorized his attorney to work with counsels for Edward and James to finalize a contract of sale whereby Edward would buy the property rather than to wait until after the holidays to finalize a contract. JA 054.

Finally, and most tellingly, George's specious reasoning in this regard is underscored by the fact that in his Motion to Rescind he failed to offer any

arguments to the trial court that would have necessitated an analysis, or anything more than the Order that was issued by the Court. As such, the trial court's Order should not be disturbed and the directive that George must execute the sale and purchase documents must be affirmed.

2. THE CLAUSE REQUIRING THAT THE PARTIES LIST THE PROPERTY WITH A BROKER WAS NOT A MATERIAL TERM OF THE SETTLMENT AGREEMENT

A term is "material" to an enforceable agreement when it goes to the substance of the contract such that if breached, it defeats the object of the parties in entering into the agreement. *Johnstone v. Zimmer,* 191 Or. App. 26, 34, 81 P.3d 92, 97 (2003) citing *Crain v. Siegel,* 151 Or.App. 567, 572, 950 P.2d 382 (1997). A material term is not merely a term that one of the parties views as "essential" to inducing his or her assentbut rather a term integral to the contract itself. *Boskoff v. Yano,* 217 F. Supp. 2d 1077, 1088 (D. Haw. 2001).An "essential" term isone that the parties reasonably regarded, at the time of contracting, as a vitally important ingredient in their bargain.Failure to fulfill such apromise, in other words, wouldseriouslyfrustrate the expectations of one or more of the parties as to what wouldconstitutesufficientperformance of the contract as awhole.*Cytogenix, Inc. v. Waldroff,* 213 S.W.3d 479, 485 (Tex. App. 2006).

The provision requiring that the parties list the property with a broker was not a material term of the Mediated Settlement Agreement because it does not go

to the substance of the Agreement, which was that the Property be sold and the brothers divide the proceeds equitably. George submitted a document to the trial court in which he indicated that his desired outcome for the litigation was to own the land on which his superficiary structure sits; divide the remaining land between Edward and James; and have the value of the masonry structure be divided among the three brothers. Alternatively, George proposes, the trial court should "order a partition by sale and equitably divide the proceeds of sale among the parties." JA 046.

Clause 1 of the Agreement provides that "[t]he parties will list the property with Realtor (broker) Delrease Roberts for an asking price of not less than $650,000." This is not a material part of the Agreement because it does not go to the substance of the Agreement and its breach (if any) does not defeat the objective of the parties to partition the property and have the proceeds divided equitably as requested by George. The materiality of Clause 1 is also in question given the contentious history of the brothers surrounding the property. In light of the history of litigation dating back to 2009, it is likely that even if the property had been listed by Delrease Roberts for $650,000 as per Clause 1, George might still find a way to refuse that offer so long as it was either of his brothers that was the offeror.

In the final analysis, the immaterial nature of Clause 1 is rightfully understood in George's counsel's email of December 17, 2021,in which it is noted

that the decision to bypass the listing requirement and sell the Property to Edward was a deviation from the agreement. JA 054. Despite the deviation, in the email of said date, George's counsel then goes on to note that "I just spoke with George Francis and he has authorized me to work with [opposing counsels] to finalize a contract of sale…." George was aware of his action to forego the listing requirement set forth in Clause 1 when he authorized his counsel to proceed with a contract of sale in response to Edwards offer to purchase the shares of George and James. George willingly agreed to sell to Edward because it did not undercut the objective of the Agreement, but rather, it promised a speedier performance of the Agreement as a whole and increased the final dollar amount to be equitably divided among the brothers.

The term requiring that the Property be listed prior to sale was not a material part of the Agreement and the trial court was correct to disregard George's claim to the contrary. This Court should likewise disregard this argument and affirm the trial court's Order to enforce the Mediated Settlement Agreement that was willingly execute by all the parties to the litigation.

3. EDWARD AND JAMES DID NOT MATERIALLY BREACH THE MEDIATED SETTLEMENT AGREEMENT WHEN THEY ENTERED INTOA A CONTRACT FOR PURCHASE AND SALE OF THE PROPERTY

George's arguments around the issue of having the Property listed evidences a confusion between two different concepts in the law of contracts—materiality versus condition precedent.

What George unsuccessfully attempts to argue in his Opening Brief is that Clause 1 set forth a condition precedent, the failure of which meant that no party was obligated to comply with the Mediated Settlement Agreement. But failure to comply with Clause 1 was not integral to the Agreement and would not frustrate the expectations of the parties as to what would constitute sufficient performance thereunder. This is the reason George waived the condition in the first place when he agreed to forego that requirement, accepted Edward's offer to purchase, and instructed his attorney to finalize a contract with Edward before the holidays.

A condition precedent is either an act of a party that must be performed or a certain event that must happen before a contractual right accrues or contractual duty arises. *Bank of Nova Scotia v. Herman,* 2016 WL 3007489, at *4 (V.I. Super.2016) citing Williston on Contracts § 38:7 (4th ed. 2000).A conditionprecedent is an event which must occur before there is a right to performance and a resulting breach of duty,and a non-occurrence of a condition discharges the obligor's duty under a contract. *United Corp. v. Reed, Wible & Brown, Inc.,* 626 F. Supp. 1255, 1258, 22 V.I. 201, 205 (D.V.I. 1986) (internal citations omitted).

As applied to this case, the condition precedent was that the Property would be listed by Delrease Roberts for $650,000, after which the brothers would be under an obligation to entertain potential buyers and ultimately sell their share of the Property. In his Opening Brief, George argues that the condition precedent in Clause 1 was designed to "expand the pool of eligible buyers." *See* Opening Br. at p. 15. George argues further that "the sole private offer made by Edward instead created a *defacto* ceiling on the purchase price for the Property by foreclosing the potential for offers in excess of Edward's offer, which is inconsistent with the terms of the Agreement" to list with a broker. *Id*.

What George has failed to take into account however, is the basic contract principle that a party to a contract may waive a condition precedent to its performance, by conduct manifesting a continued recognition of the contract's existence after learning of the failure of the condition. George claims that he was expecting an expanded pool of buyers but apparently that pool stopped short of including his brother Edward. Nonetheless, George readily agreed to Edward purchasing the property for the full asking price, without Clause 1 being met. By agreeing to proceed with a sale for $650,000 to Edward, without the Property being listed by Delrease Roberts, George waived the non-occurrence of the condition precedent set forth in Clause 1.

Based on foundational principles of the law of contracts, when a contract that is not fully performed is continued despite a known excuse, the right to rely on the known excuse is waived; in turn, the defense based on the excuse is lost and the party who would otherwise have been excused is liable if it subsequently fails to perform.*Rivera v. Sharp,* 2021 WL 2228492, at *10 (D.V.I.2021), aff'd, No. 21-2254, 2022 WL 2712869 (3d Cir. July 13, 2022) quoting 13 Williston on Contracts § 39:31 (4th ed. 2021). George is estopped from making the arguments that the Agreement must be rescinded for failure to list the property for sale when he affirmatively, willingly, and voluntarily accepted Edward's offer and participated in finalizing the sale and purchase document that would convey the property to Edward.

Virgin Islands law recognizes that a party may be prevented from asserting a legal right through showing of a waiver." *Abramsen v. Vince Bedminster*, 45 V.I. 3, 9-10 (V.I. Terr. Ct. 2002) (internal quotation marks omitted). A waiver of a contract right requires a manifestation of mutual assent to modified termsthrough written words, acts, and sustained course of conduct.*Arvidson*, *supra*72 V.I. 500 at 520. A waiver is a voluntary and intentional relinquishment or abandonment of a known right or privilege. *Ubiles v. People,* 66 V.I. 572, 585–86 (V.I.2017) quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Parties to an agreement may, by their words or conduct, waive contractual rights amounting to an estoppel to later rely

on that right. George has waived his right to insist on performance of Clause 1 because he engaged in words and conduct that manifested his assent **not** to have the Property listed with Delrease Roberts prior to accepting Edward's offer of $650,000.

George's actions lead to the inescapable and reasonable conclusion that he waived performance under Clause 1and therefore, there is no reason the disturb the trial court's Order directing him to execute the purchase and sale documents. The Order should be affirmed.

4. GEORGE IS NOT ENTITLED TO RESCISSION OF THE MEDIATED SETTLEMENT AGREEMENT BECAUSE HE CAUSED THE BREACH OF WHICH HE NOW COMPLAINS

George is not entitled to rescission of the Mediated Settlement Agreement because he, through his words and conduct, acquiesced in the Property being sold without being listed. The Appellant by his own conduct induced the alleged breach of the Agreement and now claims on appeal that the enforcement Order should be reversed despite his conduct.

George as the underlying plaintiff who voluntarily agreed to the Mediated Settlement Agreement, had the burden of complying with Clause 1 because he is the party seeking a partition of the property under very specific terms. George failed to list the property with Delrease Roberts, and indicated his assent to Clause 1 being modified by accepting Edward's offer to purchase the Property without

that condition being met. Based on George's express consent to the modified terms the trial court entered an Order directing him to sign the purchase and sale documents. George now complains on appeal that the trial court is in error.

Under the "invited error" doctrine the Appellant is estopped from complaining of an error by the trial court that he personally invited. *Cf*. *Engeman v. Engeman,* 64 V.I. 669, 678 (V.I.2016). The doctrine precludes anerrorcommitted by a party from forming the basis for reversal onappeal.*Williams v. People*, 59 V.I. 1024, 1033 (V.I.2013) (collecting cases). George's action of agreeing to the modified Agreement and then requesting a rescission that the trial court was forced to deny, falls within the category of cases where a party seeks to benefit from invited error.

The Appellant is bound by his representations and conduct and is precluded from maintaining this appeal. The trial court was correct to order George to execute the purchase and sale documents. In the final analysis, George willingly, knowingly, voluntarily signed the Agreement, and also modified that Agreement by his words and conduct, and the trial court was correct to direct him to perform as promised. Having committed no error in regard to the outcome of the underlying matter, the trial court's Order should be affirmed on appeal.

CONCLUSION

Accordingly, for all the reasons as more fully described in the foregoing analysis of the issues presented, Appellant, Edward A. Francis, respectfully requests that this Court affirm the decision of the Superior Court.

Respectfully submitted,
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CERTIFICATE OF BAR MEMBERSHIP

The undersigned hereby certifies and affirms pursuant to Rule 22(l) of the Rules of the Supreme Court of the Virgin Islands that the undersigned is a member in good standing of the United States Virgin Islands Bar and the Bar of the Supreme Court of the Virgin Islands.

/s/ Darren John-Baptiste

CERTIFICATE OF LENGTH

Undersigned hereby certifies that the length of this brief complies with V.I.R. App. P. 22(f). The word count for this brief is approximately 4,440 words.

/s/ Darren John-Baptiste

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that on March 29, 2023, I caused the foregoing **Brief in Opposition Filed By The Appellee Edward A. Francis** to be delivered via the Supreme Court Electronic Filing System ("VISCEFS"), which will deliver a copy of the same to the following:

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