An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA09-1119

NORTH CAROLINA COURT OF APPEALS

Filed: 4 January 2011

AZALEA GARDEN BOARD & CARE, INC.,

Plaintiff,

v.

Davidson County
No. 06 CVS 0948

MEREDITH DODSON VANHOY, Personal Representative of the Estate of Ricky C. Dodson, Deceased; LARRY S. GIBSON, NINA G. GIBSON, DANIEL W. TUTTLE; TIMOTHY D. SMITH; and HARVEY ALLEN, JR.,

Defendants.

Appeal by plaintiff from order entered 19 March 2009 by Judge Ben F. Tennille in Davidson County Superior Court. Heard in the Court of Appeals 9 February 2010.

Biesecker, Tripp, Sink & Fritts, L.L.P., by Joe E. Biesecker and Christopher Alan Raines, for plaintiff-appellant.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by James C. Adams, II and Benjamin R. Norman, for Allen, defendant-appellee.

Spilman, Thomas & Battle, PLLC, by Nathan B. Atkinson and Edward T. Shipley, III, for Tuttle, defendant-appellee.

JACKSON, Judge.

Azalea Garden Board & Care, Inc. ("plaintiff") appeals the trial court's 19 March 2009 orders granting summary judgment in favor of defendant Harvey Allen, Jr. ("Allen") and partial summary judgment in favor of defendant Daniel W. Tuttle ("Tuttle"). For the reasons stated herein, we affirm.

Allen is a medical doctor, who worked as a physician for a nursing home managed by Nina Gibson and Larry Gibson (collectively, "the Gibsons"). Plaintiff owned the Brookside of Winston-Salem Rest Home ("Brookside") and decided to sell it. In late 1998, Allen and the Gibsons attempted to purchase Brookside. In December 1998, Allen, Allen's wife, and the Gibsons purchased a parcel of property that adjoins Brookside. However, negotiations as to Brookside "broke down[,]" and the sale of Brookside did not take place.

On 5 May 1999, Timothy Smith ("Smith") and Nina Gibson entered into an "offer to purchase" contract with plaintiff for the purchase of Brookside. The contract included an earnest money provision, which read,

> Buyer agrees that if he should fail or refuse to complete this transaction after timely acceptance by the Seller, then any funds or deposit with the Broker will be forfeited and shall be split 50% to the Broker and 50% to the Seller.

(Original in all capital letters). The only signatories to the contract were plaintiff, Nina Gibson, Smith, and the real estate broker Ricky Dodson ("Dodson"); however, plaintiff alleges that Smith and Nina Gibson signed it on behalf of a group of buyers, including Allen and Tuttle.

Branch Banking and Trust Co. ("BB&T") handled the loan for the purchase of Brookside. Dodson provided BB&T with the names of Allen, Smith, the Gibsons, and Tuttle. BB&T reviewed several personal financial statements, including Allen's, and sent a commitment letter dated 7 May 1999 that listed Dodson, Tuttle, Smith, the Gibsons, and Allen as "Co-Makers/Guarantors" of the loan. According to Allen, BB&T had access to his personal financial statement because he had provided it in conjunction with a prior failed attempt to purchase Brookside. Allen also stated that he had not given Dodson the authority to handle or direct the use of Allen's bank documents.

In July 1999, the parties entered into a modification of the contract, which was signed by plaintiff, Nina Gibson, Smith, and Dodson. The parties were to close on Brookside on or before 31 August 1999. However, the closing never took place.

WRH Mortgage, Inc. held a secured claim of approximately $3,700,000.00 against plaintiff. According to plaintiff, on or about 7 September 1999, WRH Mortgage had agreed to accept $3,275,521.00 in satisfaction of the claim.

In a letter dated 13 September 1999, plaintiff informed Dodson, the Gibsons, Tuttle, and Allen that it "considers the buyers at this time to be in breach of their contract and requests that steps be taken to cure this breach, avoid the potential of losses on the part of the seller and schedule closing of this transaction immediately." In a letter dated 14 September 1999, an attorney for the buyer group responded that, "since there has been

no written extension and due to [plaintiff's] inability to convey good and marketable title on August 31, 1999, we have advised our clients that the contract no longer has any force or effect."

On 21 March 2006, plaintiff filed a breach of contract action against Meredith Dodson Vanhoy ("Vanhoy"), as personal representative of the estate of Ricky Dodson, deceased; the Gibsons; Tuttle; Smith; and Allen. The complaint alleged, in part, that Nina Gibson and Smith had signed the contract and subsequent modification "on their own behalf and in their capacities as co-adventurers with defendants and in the course and scope and furtherance of the joint venture or apparent joint venture." It also alleged that "plaintiff was damaged in the amount of $589,565.43, which is the net revenue plaintiff would have realized had [Brookside] been purchased as provided pursuant to the contract[.]"

On 13 August 2007, Vanhoy filed a motion for summary judgment, on which the trial court heard evidence and arguments. The trial court subsequently granted summary judgment in favor of Vanhoy on 7 March 2008 and dismissed the breach of contract claim against her. We affirmed the trial court's order in *Azalea Garden Bd. & Care, Inc. v. Vanhoy*, 196 N.C. App. 376, 675 S.E.2d 122 (2009) (*Azalea I*). Therefore, Vanhoy is no longer a party to this action.

On 28 March 2008, Allen moved for summary judgment. On 2 April 2008, Tuttle moved for summary judgment. On 19 March 2009, the trial court filed two separate orders: one granted partial summary judgment in favor of Tuttle, concluding in part that,

"[p]ursuant to [p]aragraph 12 of the [c]ontract, [p]laintiff's damages are limited to $12,500 — fifty (50) percent of the $25,000 earnest money deposited with the broker[;]" and the other granted summary judgment in favor of Allen, concluding that "[p]laintiff's claim is barred by the Statute of Frauds." Plaintiff appeals.

Initially, we address plaintiff's stated grounds for appellate review. Plaintiff contends that, notwithstanding the interlocutory nature of this appeal, we should review the merits of its case based upon the potential denial of a substantial right. Specifically, "[i]f an immediate appeal is not permitted, [plaintiff] will lose the substantial right to have common issues tried in a single trial instead of separate trials" and "will be subject to the possibility that it will be 'prejudiced by different juries in separate trials rendering inconsistent verdicts on the same factual issue.'" (Citations omitted).

"An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (citing *Johnson v. Roberson*, 171 N.C. 194, 88 S.E. 231 (1916)), *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). Ordinarily, an interlocutory order is not immediately appealable. *Goldston v. American Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). However, one exception from this rule is when "such order affects some substantial right claimed by the appellant and will work an injury to him if not corrected before an appeal

from the final judgment." *Veazey*, 231 N.C. at 362, 57 S.E.2d at 381 (citations omitted); *see also* N.C. Gen. Stat. § 1-277(a) (2007) ("An appeal may be taken from every judicial order or determination of a judge of a superior or district court, . . . which affects a substantial right claimed in any action or proceeding[.]").

Our Supreme Court has held "that the right to avoid the possibility of two trials on the same issues can be such a substantial right." *Joslyn v. Blanchard*, 149 N.C. App. 625, 627, 561 S.E.2d 534, 535–36 (2002) (quoting *Green v. Duke Power Co.*, 305 N.C. 603, 606, 290 S.E.2d 593, 595 (1982)) (internal quotation marks omitted).

> This general proposition is based on the following rationale: when common fact issues overlap the claim appealed and any remaining claims, delaying the appeal until all claims have been adjudicated creates the possibility the appellant will undergo a second trial of the same fact issues if the appeal is eventually successful. This possibility in turn "creates the possibility that a party will be prejudiced by different juries in separate trials rendering inconsistent verdicts on the same factual issue."

Id. at 627, 561 S.E.2d at 536 (quoting *Davidson v. Knauff Ins. Agency*, 93 N.C. App. 20, 25, 376 S.E.2d 488, 491, *disc. rev. denied*, 324 N.C. 577, 381 S.E.2d 772 (1989)).

Here, the trial court's orders did not dispose of the entire case, and therefore, the appeal is interlocutory. Nonetheless, if plaintiff were to succeed in its appeal, Allen would rejoin defendants as a party to the action and a jury would be permitted to consider evidence of plaintiff's damages beyond the $12,500.00 represented by its half of the earnest money deposit. As in *Azalea*

I, a subsequent trial would involve both the same key issues and "the consideration and resolution of a common set of facts." 196 N.C. App. at 385, 675 S.E.2d at 128. Because, absent an immediate appeal, there exists a possibility of two trials addressing the same issues and yet resulting in different outcomes, the instant case involves a substantial right. Therefore, we address the merits of plaintiff's contentions.

Plaintiff first argues that the trial court erred in granting summary judgment in favor of Allen, because there exists a genuine issue of material fact as to whether Allen was a participant in a joint venture. We disagree.

We review a trial court's grant of summary judgment *de novo*. *Builders Mut. Ins. Co. v. North Main Constr., Ltd.*, 361 N.C. 85, 88, 637 S.E.2d 528, 530 (2006) (citing *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004)). "Summary judgment is appropriate when 'there is no genuine issue as to any material fact' and 'any party is entitled to a judgment as a matter of law.'" *Id.* (quoting N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005)). "[A]n issue is genuine if it is supported by substantial evidence, and an issue is material if the facts alleged . . . would affect the result of the action[.]" *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002) (citations and internal quotation marks omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and means more than a scintilla or a permissible

inference[.]" *Id.* (citations and internal quotation marks omitted).

We previously have explained that "[t]he party moving for summary judgment ultimately has the burden of establishing the lack of any triable issue of fact. A defendant may show entitlement to summary judgment by . . . showing that the plaintiff cannot surmount an affirmative defense." *Wilkins v. Safran*, 185 N.C. App. 668, 672, 649 S.E.2d 658, 661 (2007) (quoting *Draughon v. Harnett Cty. Bd. of Educ.*, 158 N.C. App. 208, 212, 580 S.E.2d 732, 735 (2003), *aff'd*, 358 N.C. 131, 591 S.E.2d 521 (2004)).

Our State's statute of frauds provides that "[a]ll contracts to sell or convey any lands . . . shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized." N.C. Gen. Stat. § 22-2 (1997). If the written contract is "'signed by one who is proved or admitted by the principal to have been authorized as agent to act for him, it is a sufficient compliance with the statute if the agent sign his own name instead of that of his principal by him.'" *Fuller v. Southland Corp.*, 57 N.C. App. 1, 11, 290 S.E.2d 754, 760 (quoting *Rose v. Vulcan Materials Co.*, 282 N.C. 643, 670, 194 S.E.2d 521, 539 (1973)) (emphasis removed), *disc. rev. denied*, 306 N.C. 556, 294 S.E.2d 223 (1982). "Furthermore, the authority of an agent . . . may be shown *aliunde* or by parol." *Lewis v. Allred*, 249 N.C. 486, 489, 106 S.E.2d 689, 692 (1959) (citing *Hargrove v. Adcock*, 111 N.C. 166, 171, 16 S.E. 16, 17 (1892)).

Co-participants in a joint venture act both as agents for each other and as principals for themselves. *Pike v. Wachovia Bank & Trust Co.*, 274 N.C. 1, 8, 161 S.E.2d 453, 460 (1968). Our Supreme Court has summarized the legal principles of joint ventures:

> A joint venture is an association of persons with intent, by way of contract, express or implied, to engage in and carry out a single business adventure for joint profit, for which purpose they combine their efforts, property, money, skill, and knowledge, but without creating a partnership in the legal or technical sense of the term.
>
> . . . .
>
> Facts showing the joining of funds, property, or labor, in a common purpose to attain a result for the benefit of the parties in which each has a right in some measure to direct the conduct of the other through a necessary fiduciary relation, will justify a finding that a joint adventure exists.
>
> . . . .
>
> To constitute a joint adventure, the parties must combine their property, money, efforts, skill, or knowledge in some common undertaking. The contributions of the respective parties need not be equal or of the same character, but there must be some contribution by each coadventurer of something promotive of the enterprise.

Id. at 8-9, 161 S.E.2d at 460 (citation and internal quotation marks omitted).

Here, Allen asserts the statute of frauds as a defense to plaintiff's action, because he did not sign the contract at issue and both Nina Gibson and Smith — who plaintiff claims signed the contract partially as agents for Allen — did not include Allen as a part of the buyer group when they testified. Nonetheless,

plaintiff contends that Allen was part of a joint venture that also included "Smith, the Gibsons, Tuttle, and Dodson" and therefore, was bound by the signatures of Nina Gibson and Smith. The fact at issue — whether Smith or Nina Gibson signed the contract on behalf of a joint venture of which Allen was a part — is material, because it would affect the outcome of the case. However, plaintiff has not presented substantial evidence of a joint venture in order to create a *genuine* issue of material fact and thereby withstand a motion for summary judgment.

Plaintiff's evidence tends to show that Allen's name was included on certain bank documents and correspondence pertaining to the purchase of Brookside. However, according to Allen, he had never met or talked with Dodson; therefore, Dodson lacked any authority to act on behalf of Allen. Dodson directed BB&T to review Allen's financial statements and include his name on draft loan documents. Without any evidence that Allen authorized Dodson to act on his behalf, plaintiff has failed to present a forecast of evidence that could raise a material issue that Allen was a part of the joint venture to purchase Brookside.

Furthermore, David Wagner, plaintiff's president, testified that the "buyer group" consisted of those who attended the signing of the contract; he also testified that Allen was not present at the signing. Neither of the signatories to the contract included Allen as a part of the buyer group in their testimony, nor did the other members of the alleged joint venture.

As highlighted by Allen, no North Carolina court has found that a joint venture existed when, as in the case *sub judice*, all parties to the purported venture deny its existence. *Cf. Rhue v. Rhue*, 189 N.C. App. 299, 308–09, 658 S.E.2d 52, 59–60 (2008) (plaintiff co-habitant alleged existence of partnership with defendant co-habitant); *Cap Care Group, Inc. v. McDonald*, 149 N.C. App. 817, 821–23, 561 S.E.2d 578, 581–82 (plaintiff developer alleged existence of partnership with defendant developer), *disc. rev. denied*, 356 N.C. 611, 574 S.E.2d 676 (2002); *Davis v. Davis*, 58 N.C. App. 25, 30–31, 293 S.E.2d 268, 271–72 (plaintiff alleged existence of business partnership with defendant), *disc. rev. denied*, 307 N.C. 127, 297 S.E.2d 399 (1982); *Reddington v. Thomas*, 45 N.C. App. 236, 239, 262 S.E.2d 841, 842 (1980) (plaintiff alleged existence of partnership with defendant and two others for purpose of purchasing apartment complex). *See also Hines v. Arnold*, 103 N.C. App. 31, 37, 404 S.E.2d 179, 183 (1991) (co-venturer was not a party to the action but he testified that he and defendant were partners). Plaintiff's evidence that Allen was involved in a joint venture with the contract's signatories is neither "more than a scintilla" nor more than "a permissible inference[.]" *DeWitt*, 355 N.C. at 681, 565 S.E.2d at 146. As such, there exists no genuine issue of material fact, and the trial court's grant of summary judgment in favor of Allen was proper.

Plaintiff's second contention is that the trial court erred in granting partial summary judgment in favor of Tuttle, because forfeiture of the earnest money is not plaintiff's exclusive

remedy, paragraph twelve of the contract is not a liquidated damages clause, and any purported limitation of damages provision in the contract is void. We disagree.

We review a trial court's grant of summary judgment *de novo*, *Builders Mut. Ins. Co.*, 361 N.C. at 88, 637 S.E.2d at 530 (citation omitted), according to the standards set forth *supra*.

We have held that "'[u]nder the fundamental principle of freedom of contract, the parties to a contract have a broad right to stipulate in their agreement the amount of damages recoverable in the event of a breach, and the courts will generally enforce such an agreement . . . .'" *Seven Seventeen HB Charlotte Corp. v. Shrine Bowl of the Carolinas, Inc.*, 182 N.C. App. 128, 130-31, 641 S.E.2d 711, 713 (2007) (citations omitted). "[T]he burden falls on the party seeking to invalidate a liquidated damages provision." *Id.* at 132, 641 S.E.2d at 714.

"'[I]t is well established that a sum specified in the contract as the measure of recovery in the event of a breach will be enforced if the court determines it to be a provision for liquidated damages, but not enforced if it is determined to be a penalty.'" *Majestic Cinema Holdings, LLC v. High Point Cinema, LLC*, 191 N.C. App. 163, 167, 662 S.E.2d 20, 23 (quoting *Brenner v. Little Red School House, Ltd.*, 302 N.C. 207, 214, 274 S.E.2d 206, 211 (1981)), *disc. rev. denied*, 362 N.C. 509, 668 S.E.2d 29 (2008). "Liquidated damages are defined as a stipulated amount which the parties agree will serve as damages upon breach." *Chris v. Epstein*, 113 N.C. App. 751, 757, 440 S.E.2d 581, 584 (citing

Knutton v. Cofield, 273 N.C. 355, 361–62, 160 S.E.2d 29, 34–35 (1968)), *disc. rev. denied*, 336 N.C. 603, 447 S.E.2d 387 (1994).

> A stipulated sum is for liquidated damages only (1) where the damages which the parties reasonably anticipate are difficult to ascertain because of their indefiniteness or uncertainty and (2) where the amount stipulated is either a reasonable estimate of the damages which would probably be caused by a breach *or* is reasonably proportionate to the damages which have actually been caused by the breach.

E. Carolina Internal Med., P.A. v. Faidas, 149 N.C. App. 940, 945–46, 564 S.E.2d 53, 56 (quoting *Knutton v. Cofield*, 273 N.C. 355, 361, 160 S.E.2d 29, 34 (1968)) (internal quotation marks omitted), *aff'd*, 356 N.C. 607, 572 S.E.2d 780 (2002) (per curiam). Factors that inform whether the stipulated amount is reasonable include, *inter alia*, "the nature of the [c]ontract, the intention of the parties, [and] the sophistication of the parties[.]" *Id.* at 947, 564 S.E.2d at 57. Our Supreme Court also has noted that it

> "consider[s] that the parties, being informed as to the facts and circumstances, are better able than any one else to determine what would be a fair and reasonable compensation for a breach; but the courts have been greatly influenced by the fact that in almost all the cases the damages are uncertain and very difficult to estimate."

Knutton v. Cofield, 273 N.C. 355, 361, 160 S.E.2d 29, 34–35 (1968) (quoting *Bradshaw v. Millikin*, 173 N.C. 432, 435, 92 S.E. 161, 163 (1917)).

In the instant case, paragraph twelve of the contract reads,

> Buyer agrees that if he should fail or refuse to complete this transaction after timely acceptance by the Seller, then any funds or deposit with the Broker will be forfeited and

> shall be split 50% to the Broker and 50% to the Seller.

(Original in all capital letters). This provision clearly limits plaintiff's damages to fifty percent of the $25,000.00 deposit, or $12,500.00. Because plaintiff agreed to this provision and because plaintiff is in a better position than this Court "to determine what would be a fair and reasonable compensation for a breach[,]" *id.* (citation omitted), plaintiff's damages are limited to $12,500.00. As noted by our Supreme Court in *Kinston v. Suddreth*, 266 N.C. 618, 621, 146 S.E.2d 660, 663 (1966), "[w]hatever [plaintiff] may have intended, that was the effect of the contract which it accepted."

As part of its second argument, plaintiff contends that the earnest money provision is void because it violates a regulation that prohibits real estate brokers from including such provisions in a preprinted contract. We disagree.

North Carolina General Statutes, section 93A-4(d) provides that the "[Real Estate] Commission is expressly vested with the power and authority to make and enforce any and all such reasonable rules and regulations connected with the application for any license as shall be deemed necessary to administer and enforce the provisions of this Chapter." N.C. Gen. Stat. § 93A-4(d) (1999). Our statutes further provide that the Real Estate Commission

> shall have power to take disciplinary action. Upon its own motion, or on the verified complaint of any person, the Commission may investigate the actions of any person or entity licensed under this Chapter[.] . . .
>
> The Commission shall have power to suspend or revoke at any time a license . . . , if,

> following a hearing, the Commission adjudges the licensee to be guilty of:
>
> . . . .
>
> (15) Violating any rule or regulation promulgated by the Commission.

N.C. Gen. Stat. § 93A-6(a) (1999).

Pursuant to this authority, the Real Estate Commission adopted a rule prohibiting real estate brokers from including an earnest money provision that benefits the broker in a preprinted sales contract: "A broker or salesman acting as an agent in a real estate transaction shall not use a preprinted offer or sales contract form containing . . . any provision concerning the payment of a commission or compensation, including the forfeiture of earnest money, to any broker, salesman or firm[.]" 21 N.C. Admin. Code 58A.0112(b) (1998).

In the case *sub judice*, the real estate broker failed to comply with this rule. However, according to our statutes, plaintiff's remedy for such a violation is not to invalidate that provision of the contract, but rather, to seek redress by filing a complaint with the Commission. Therefore, the broker's violation of the Commission's rule does not affect the validity of paragraph twelve.

For the reasons stated above, we hold that no genuine issue of material fact exists as to whether Allen was a participant in the alleged joint venture. We also hold that paragraph twelve of the parties' contract limits plaintiff's damages to one-half of the $25,000.00 deposit.

Affirmed.

Judges HUNTER, Jr., Robert N. and ERVIN concur.

Report per Rule 30(e).

Judge JACKSON concurred prior to December 31, 2010.