No. 21-CV-0639

In the
District of Columbia Court of Appeals

THOMAS HART

Plaintiff-Appellant,

v.

KAVOOS RAD, ET AL.

Defendant-Appellee.

Appeal from the Superior Court of
D.C. Civil Division
Case No. 2020 CA 002492 B
The Honorable Fern Flanagan Saddler

BRIEF OF APPELLANT

Date: April 26, 2022

STATEMENT PURSUANT TO RULE 28(A)(2)(a)

The parties in this case are Thomas Hart, Jr. (the "Appellant"), and his former business partner, Kavoos Rad, Mr. Rad's business entity Kalmia Real Estate LLC, and Mr. Rad's business entity Capital Carpet, LLC (collectively, the "Appellees").

Mr. Hart was represented in the Superior Court of the District of Columbia by Danny Onorato of Schertler Onorato Mead & Sears LLP. He is represented in this matter before the Court of Appeals by Hilary LoCicero and Lloyd Liu of Bennett LoCicero & Liu LLP.

Mr. Rad and his business entities were represented by Steven White and Matthew Smilowitz of Stinson LLP in the Superior Court and continue to be represented by Mr. White and Mr. Smilowitz in this Court.

There are currently no intervenors or amicus curiae in this matter.

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QUESTIONS PRESENTED

Appellant entered into a series of real estate-related business transactions with Appellees in which he invested hundreds of thousands of dollars. After the parties' business relationship soured, Appellant sued Appellees in D.C. Superior Court. The parties engaged in extensive efforts to settle the lawsuit and, after many hours of active discussions spanning two days, were able to come to some terms regarding how to dissolve their business relationship and settle the claims, with a clear understanding that a settlement would be memorialized in writing thereafter. Ultimately, the efforts to reach and execute a settlement agreement fell apart. Appellees filed a motion in Superior Court seeking to enforce the parties' purported oral agreement, which the Superior Court granted.

The questions presented are:

1. When the parties to a civil lawsuit engage in settlement talks and agree on some but not all significant aspects of a resolution, can their discussions later be enforced as an oral contract?
2. When the parties to a civil lawsuit engage in settlement talks after which they take actions that reflect incompatible understandings of their tentative agreement, has there been a meeting of the minds such that contract formation occurred?

STATEMENT OF THE CASE

On May 12, 2020, Thomas Hart, Jr. sued Kavoos Rad, Kalmia Real Estate, LLC, and Capital Carpet, LLC in the Superior Court of the District of Columbia, Civil Division. *See* Complaint and Jury Demand ("Compl."), Case No. 2020 CA 002492, Appendix ("App'x.") 1a-57a.[1] The case was assigned to the Honorable Fern Flanagan Saddler. On September 24, 2021, the defendants answered the suit and filed counterclaims. Answer and Affirmative Defenses to Complaint and Counterclaims ("Answer" and "Countercl."), App'x. 58a-82a.

On June 4, 2021, Rad filed an Opposed Motion to Enforce Settlement Agreement ("Motion") in the Superior Court in which he argued that the parties had reached an enforceable oral agreement to settle this lawsuit. App'x. 92a-137a. After the motion was fully briefed, the Superior Court held a hearing on August 9, 2021, during which counsel for the parties presented oral arguments, but no evidence was presented nor testimony taken. App'x. 165a-204a. The Superior Court granted the motion four days later on August 13, 2021. Order Granting Defendants' Motion To Enforce Settlement Agreement ("Order"), App'x. 205a-215a. The Court's August 13, 2021 Order constituted a final order, disposing of all the parties' claims. Hart filed this appeal seeking review of that decision on September 10, 2021.

[1] Documents in the Appendix are cited (App'x. --) indicating the page(s) in the Appendix where the document can be found. Citations to other filings in the record in Superior Court are followed by a parenthetical indicating the date the document was filed.

STATEMENT OF FACTS

In the spring of 2018, attorney Thomas Hart and his former client Kavoos Rad agreed to participate in a joint real estate investment venture. *See* Compl. ¶¶ 6-9, App'x. 2a. The two men agreed to purchase a home located at 1633 Kalmia Road in Northwest Washington (the "Kalmia Road property") through a limited liability company called Kalmia Real Estate, LLC ("KRE") and to secure a mortgage to make the purchase. *Id.* ¶ 6, App'x. 2a. Hart and Rad agreed that they would be equal members of KRE and would each make initial capital contributions of $250,000. *Id.*, Exhibit B, App'x. 11a-21a.

On March 24, 2018, KRE purchased the Kalmia Road property for $700,000. *Id*. ¶ 6, App'x. 2a. The deal was financed through a $70,000 down payment, a $450,000 loan, and $200,000 of seller financing. *Id*. ¶ 7, App'x. 2a. Hart and Rad, who had entered into an Operating Agreement to govern their joint ownership of KRE, *see id.* ¶ 9, App'x. 2a, each contributed $35,000 for the down payment on the Kalmia Road property. KRE then secured the $450,000 mortgage from Industrial Bank, the terms of which dictated that interest-only payments would be due until the loan's maturity, at which time the balance would be due. *Id*. ¶¶ 10-11, App'x. 3a. The loan was not secured by the Kalmia Road property; instead, Industrial Bank required KRE to deposit $405,000 in its checking account with the bank to serve as collateral. *Id*. ¶ 12, App'x. 3a. Rad then deposited $215,000 and Hart deposited

$190,000 into KRE's checking account at Industrial Bank. *Id.* ¶¶ 13-14, App'x. 3a. KRE closed on the property on May 7, 2018. *Id*. ¶ 15, App'x. 3a. The loan had a maturity date of April 19, 2020. *Id*.

In August of 2018, Rad told Hart that he wanted to purchase Hart's interest in KRE so he could live in the house with his wife and son. *Id*. ¶ 16, App'x. 3a; Joint Pretrial Statement at 5 (August 2, 2021). Hart agreed to withdraw from KRE, and thereby forgo the eventual profits he was expecting to earn through his investment, in exchange for a $250,000 payment from Rad. Hart and Rad executed an Asset Purchase Agreement dated August 15, 2018. *Id.* ¶ 19, App'x. 4a. The transaction closed on August 25, 2018, *id*. ¶ 20, App'x. 4a, at which time Rad paid Hart $250,000, leaving Rad as KRE's sole owner.

The parties later engaged in further discussions about how to address the $190,000 in funds that Hart had placed in the KRE bank account to serve as loan collateral. *Id*. ¶ 22, App'x. 4a. Rad agreed to obtain a new loan to finance the property and thereafter relinquish the funds to Hart, but never did so. *Id*. ¶¶ 23-27, App'x. 4a. When the loan matured and Industrial Bank indicated that it would liquidate the funds in the KRE bank account to satisfy the debt, Hart informed the bank of the parties' dispute and asked it to freeze the funds pending resolution. *Id*. ¶ 28-29, App'x. 5a. Industrial Bank froze the funds for many months. At some point, it appears, KRE renegotiated the loan so that the maturity date was extended

to May 3, 2021. Answer ¶ 11, App'x. 60a. Rad's wife and son never moved into the house because Rad and his wife divorced, after which Rad renovated the house and listed it for sale for $1.6 million. Compl. ¶¶ 17-18, App'x. 3a.

Also in August of 2018, Hart and Rad agreed to work together to buy and renovate a second property at 214 2nd Street, SE in the Capitol Hill neighborhood (the "2nd Street property"). Joint Pretrial Statement at 3 (August 2, 2021). In October 2018, Hart and Rad formed Cap Hill Properties, LLC ("Cap Hill") in which each are 50% owners and Hart is the Managing Partner. *Id.* The purchase of the 2nd Street properly was financed through joint cash investment and a mortgage of $500,000 provided by the seller of the property. *Id.* at 14.

In May 2020, Hart filed this lawsuit against Rad, KRE, and another company owned by Rad called Capital Carpet, LLC. In the suit, Hart alleged that, although he had sold his interest in KRE to Rad in 2018, he still had an interest in the $190,000 in funds that KRE had on deposit at Industrial Bank as collateral for the KRE bank loan. Compl. ¶¶ 33, 42, App'x. 5a-6a. Specifically, Hart alleged that the Asset Purchase Agreement executed by the parties did not address his interest in the $190,000 that he had placed in KRE's bank account to serve as loan collateral and that Rad had verbally agreed to return that $190,000 to him. *Id.*

On September 24, 2020, Rad filed an Answer and Affirmative Defenses to the Complaint and Counterclaims in which he alleged that there was no such agreement

and that he had already refunded the $190,000 contribution when he paid Hart $250,000 for his entire interest in KRE in 2018. Answer ¶ 40, App'x. 74a. He claimed that the money remaining in the KRE checking account was borrowed money held as collateral, not money to which Hart had, or could have, any interest. *Id.* ¶ 25, App'x. 72a. Rad also asserted counterclaims on the basis that, prior to the parties' joint real estate investments, Hart had been Rad and Capital Carpet LLC's lawyer, and Rad understood that representation to be continuing through the months in which the two men invested in the Kalmia Road and 2nd Street properties. Countercl. ¶¶ 7-12, App'x. 67a-69a. He sought recovery for breach of fiduciary duty, professional negligence, unjust enrichment, and breach of contract. *Id.* ¶¶ 52-77, App'x. 77a-80a.

The case was to proceed to discovery. On May 3, 2021, Hart appeared for a deposition, but the parties did not start the deposition. The lawyers instead engaged in several hours of in-person negotiation. On May 5, 2021, the group reconvened, ostensibly to conduct the deposition, but Rad's counsel again engaged in settlement discussions with Hart's counsel and with Hart. Rad, however, was absent.[2] After several additional hours of discussion, the lawyers agreed to utilize the court reporter who was present (by virtue of the intended deposition) to memorialize the terms they

[2] Rad never appeared at his lawyer's office on that day, nor did he advise Hart that the disputed $190,000 would be removed from the KRE bank account at Industrial Bank on that day.

had been discussing. The court reporter took down the following:

> Mr. White: We're here for the deposition of Mr. Hart, but the parties have been working very diligently over the last few hours to try to come to some terms to settle all this litigation and the disputes between the parties here. And we have reached an agreement, and we would like to put that on the record and make sure everybody is in agreement with that so we have a record of that.
>
> There will be some terms here to be implemented over a reasonably short period of time. So here are the terms that I'm going to discuss with opposing counsel, and I'll go through those. And then opposing counsel can comment as appropriate.
>
> So the first point is that Mr. Hart is agreeing to pay the sum of $569,000 by June 14, 2021. The payment will have been deposited into the trust account of his lawyer, Richard Bianco, and disbursed from that account to my client, Kavoos Rad, on June 14th.
>
> We will be executing documents then to complete a transfer of Mr. Rad's interest, his 50 percent interest in the Cap Hill property on June 14th as well at a closing. And Mr. Hart will be assuming all obligations of the Cap Hill entity – it's Cap Hill, LLC – going forward from that point. And Mr. Rad will be out of the entity and any further obligations.
>
> He will also, before that time and at the point where we sign our final agreement, pay into Mr. Bianco's trust account the sum of $4,300, which represents the approximate amount of mortgage payments and taxes that are outstanding at this point from his share.
>
> The parties have also agreed that they will, of course, exchange mutual and complete releases among all the parties to this matter in the settlement documentation. Those parties include Mr. Rad; his entity, Capital Carpet, LLC; and his entity Kalmia Real Estate, LLC; and Mr. Hart, personally, as well as Capital Hill LLC. And, of course, those releases will extend to their representatives and agency assigns. The entity is Cap Hill Properties, LLC.
>
> Then the parties agree to dismiss all the claims and counterclaims in this litigation. Such dismissal will be by stipulation and be filed with

the court within seven days of the closing of the settlement on June 14th – that is to take place on June 14th.

Within seven days of today, the agreement being reached today, the parties will file a consent motion with the court informing the court of this settlement and asking that the court proceedings be held in abeyance.

And Mr. Bianco, do you have anything to add to that?

Mr. Bianco: No, I don't.

Mr. Hart: I want KC to stay away from the property until we get – you know, I don't want him to come in there, you know, like this weekend or anything and that that will be in the June 14th – I mean the – in the agreement that he stays – stays – stays away from the property, 214 Second Street, Southeast.

Mr. Bianco: Do you foresee that as an issue?

Mr. White: I don't foresee any reason for him to be there unless there's some property that is remaining that he needs to claim.

Mr. Hart: There is nothing there – nothing in there is his.

Mr. Bianco: Well, maybe we can just do it this way. If he needs to enter, arrangements can be made through counsel.

Mr. White: That sounds fine. I don't see that as being any real problem.

I think that's it. So that's our agreement. We will, as the lawyers, proceed with completing the documentation described, and then parties will move toward completing their obligations as well.

Thank you very much.

Motion, Exhibit C: May 5, 2021 Hart Deposition Transcript ("Tr.") at 3:2-6:18, App'x. 146a-151a. Also on May 5, 2021, at the same time that Hart and his counsel

were working with Rad's attorneys in good faith to help bring the parties toward resolution, Rad approved Industrial Bank's liquidation of $404,476.99 from KRE's bank account, an amount that included the $190,000 Hart had deposited into the account in 2018, *i.e.*, the exact funds that are the subject of Hart's claims against Rad in this lawsuit. Rad did this without notifying Hart or Hart's counsel, who had no knowledge of Rad's actions. After he learned that the monies in the KRE account had been liquidated, Hart conveyed to Rad's counsel that he was still willing to enter into a settlement with Rad, but not on the terms the parties initially had envisioned. The parties' lawyers engaged in discussion of the settlement terms for several weeks. Motion, Exhibit C, App'x. 126a-135a.

On June 4, 2021, Rad's counsel filed an Opposed Motion To Enforce Settlement Agreement in Superior Court. He argued that the words spoken into the record on May 5, 2021 constituted a "Settlement Agreement" that was "straightforward and complete" and "should be enforced." Motion ¶ 2, App'x. 92a-93a. Rad's counsel argued that the parties' May 5, 2021 discussion as memorialized by the court reporter addressed all material terms of the parties' dispute and was "sufficiently definite" as to those terms. *Id*. ¶ 33, App'x. 102a. Rad's counsel asserted that the material terms of the agreement – the amount to be paid by Hart and the release of liability – were sufficiently addressed, *Id*. ¶ 37, App'x. 104a, and noted that Hart had been personally present and given an opportunity to object had

he believed otherwise. Despite the fact that Rad was not present for the discussion, his counsel also argued that the parties' discussion evidenced a "clear intent to be bound" given that they had chosen to memorialize it by way of the court reporter, *id.* ¶ 38, App'x. 104a, and that it "satisfie[d] the mutuality of obligation element" given that the parties had made an "exchange of promises by which each party under[took] certain obligations, *id.* ¶ 39, App'x. 105a. Rad asserted that "[i]t is difficult to imagine circumstances more convincingly demonstrating a mutual understanding among the parties that a complete and enforceable agreement had been reached on May 5th than those" recounted in his motion. *Id*. ¶ 37, App'x. 104a.

On June 21, 2021, Hart filed a response in opposition to Rad's motion. Hart's counsel argued that the purported agreement was unenforceable because it did not include all of the material terms necessary to resolve the parties' dispute. Plaintiff's Response in Opposition to Defendant's Motion to Enforce Settlement Agreement at 1, App'x. 138a. Specifically, the parties had not discussed or reached agreement about Hart's claim for recoupment of the $190,000 he had deposited into KRE's bank account to serve as collateral for its loan. *Id.* at 2, 5, App'x. 139a, 142a. Further, contrary to Rad's assertions of definiteness and finality, the lawyers' remarks on the May 5, 2021 deposition transcript explicitly recognized that while the parties' settlement efforts had progressed, they had not yet been completed. *See id.* at 5 (highlighting lawyers' statement on the record that the parties intended to

prepare a written settlement agreement), App'x. 142a. Hart also argued that, in addition to the fact that the parties' negotiations had not been completed on May 5, 2021, they also were undermined by Rad's conduct on that date, when he authorized liquidation of the funds in the KRE bank account at the very same time that his lawyers were purporting to negotiate a possible resolution of the parties' claims in good faith. *Id.* at 2-3, App'x. 139a-140a.

The district court granted Rad's motion to enforce the purported settlement agreement, and this appeal followed.

STANDARD OF REVIEW

Whether an enforceable contract exists is a question of law that this Court reviews *de novo*. *United House of Prayer for All People v. Therrien Waddell, Inc.*, 112 A.3d 330, 337-38 (D.C. 2015) (citing *Rosenthal v. Nat'l Produce Co., Inc.*, 573 A.2d 365, 369 n. 9 (D.C. 1990) and *Dyer v. Bilaal*, 983 A.2d 349, 355 (D.C. 2009)).

SUMMARY OF ARGUMENT

The court below erred when it held that Hart and Rad had entered into an enforceable oral contract by way of the settlement discussions between their counsel on May 5, 2021. The deposition transcript purporting to summarize the parties' discussion expressly recognizes that the parties intended to continue their negotiations, and that those negotiations – which implicated the settlement of two sophisticated real estate transactions subject to the Statute of Frauds – would

culminate in the drafting and execution of a written settlement agreement and the parties' separate participation in a corporate closing. Appellees, as the parties seeking to enforce the so-called "Settlement Agreement," did not satisfy their onerous burden to prove that the parties intended the few minutes of verbal summary by their lawyers to be a complete recitation of all of the material terms of their ultimate agreement. The transcript of the lawyers' statements on the record fails to address a number of material terms that would have to have been negotiated by the parties prior to executing a final settlement agreement.

The lower court also erred when it failed to address the parties' conduct contemporaneous to the negotiations and how it was inconsistent with a meeting of the minds. Binding precedent from this Court holds that, when the parties to a purported oral settlement agreement act in ways that are directly contrary to the spirit of the putative settlement, this is evidence there has been no meeting of the minds. *See Brooks v. Rosebar*, 210 A.3d 747 (D.C. 2019). After the parties' meeting on May 5, 2021, they acted in ways that reflected divergent beliefs about what had transpired. There was never a meeting of the minds between Hart and Rad and to permit enforcement of this so-called "Settlement Agreement" would ignore reality.

At the very most, the parties' discussions on May 5, 2021 constituted an agreement to continue negotiating. The parties should be permitted to continue their discussions and to enter into a written agreement that addresses all material terms

and complies with the Statute of Frauds.

ARGUMENT

I. Appellees Did Not Carry Their Heavy Burden To Establish An Oral Contract

The questions presented in this appeal implicate the legal standards relevant to the interpretation of a purported oral settlement agreement. A settlement agreement, oral or otherwise, is a contract, and thus "the validity of a settlement agreement is determined according to general principles of contract law." *Boks v. Charles E. Smith Mgmt., Inc.*, 453 A.2d 113, 117 (D.C. 1982). "Generally, settlement agreements are determined according to principles of contract law." *Sims v. Westminster Investing Corp*., 648 A.2d 940, 942 (D.C. 1994). *See also Dyer*, 983 A.2d at 354 (stating that "we enforce a valid and binding settlement agreement just like any other contract") (internal quotations omitted). The determination of whether oral representations constitute an enforceable contract is a question of law that this Court reviews *de novo*. *See EastBanc v. Georgetown Park Assocs*., 940 A.2d 996, 1002 (D.C.2008) (citing *Kramer Assocs. v. Ikam, Ltd*., 888 A.2d 247, 251 (D.C. 2005)). Whether a contract is ambiguous is likewise a question of law reviewed *de novo*. *Steele Foundations, Inc. v. Clark Constr. Grp., Inc.*, 937 A.2d 148, 153 (D.C. 2007).

Under District of Columbia law, "[f]or an enforceable contract to exist, there must be both (1) agreement as to all material terms; and (2) intention of the parties

to be bound." *Georgetown Ent. Corp. v. District of Columbia*, 496 A.2d 587, 590 (D.C. 1985). The standard is similar even in the absence of a written agreement: "Enforceable oral contracts require both an agreement as to all the material terms and an objective manifestation of the parties' intent to be bound by the oral agreement." *Strauss v. NewMarket Glob. Consulting Grp., LLC*, 5 A.3d 1027, 1032 (D.C. 2010). "The two requirements are closely intertwined because even if the parties intend to be bound by an agreement, the court must be able to determine the terms of the agreement before it can enforce them." *Id*. at 1033. Put another way, "[t]he parties may be bound by their oral agreement if it meets the dual requirements of intent and completeness." *Jack Baker, Inc. v. Office Space Dev. Corp*., 664 A.2d 1236, 1238 (D.C. 1995).

An agreement as to material terms "is most clearly evidenced by the terms of a signed written agreement." *Kramer Assocs., Inc.*, 888 A.2d at 252 (internal quotation marks omitted). However, "such a signed writing is not essential to the formation of a contract." *Id*. There are some circumstances in which verbal communications between counterparties can be deemed sufficient to create a contract, because "[t]he parties' acts at the time of the making of the contract are also indicative of a meeting of the minds." *Id*. (internal quotation marks omitted).

That is not to say, however, that oral contracts are the norm or that they are easily established. To the contrary, "[w]here the parties contemplate a subsequent

written contract," the party that seeks to enforce a purported oral contract bears a burden of proof that is "particularly onerous." *New Econ. Cap., LLC v. New Markets Cap. Grp*., 881 A.2d 1087, 1094 (D.C. 2005). Unless that party "can show that the contemplated written document is to be a mere memorial of the agreement already reached, it cannot prevail." *Id.* (internal quotation marks omitted).

The record in this case shows that Hart and Rad and their respective counsel knew their May 5, 2021 discussions would be followed by additional concrete steps to memorialize an agreement in writing, as well as the preparation and execution of additional written documents to transfer Rad's 50% interest in Cap Hill to Hart.[3] *See, e.g.*, Tr. at 6:14-17, App'x. 124a ("We will, as the lawyers, proceed with completing the documentation described . . . ."). This was in accord with the parties' past practice. Thus, Rad bore a particularly heavy burden to show that, despite those yet to be accomplished steps, the parties had actually entered into an oral contract during their May 5, 2021 discussions. *New Econ. Cap.*, 881 A.2d at 1087. He did not carry that burden.

A. Appellees Did Not Carry Their Heavy Burden to Establish Agreement on All Material Terms of the Parties' Negotiations

A party that seeks to enforce an oral contract must show that the parties have

[3] A settlement involving the transfer of real estate is particularly delicate as it must address not only payment terms but also issues such as time to close, the securing of mortgages, and deed and title requirements.

addressed all of the terms which will be material to their ultimate agreement. *Amica Mut. Ins. Co. v. Karger*, No. CIV. A. 91-2070, 1991 WL 262128, at *1–2 (D.D.C. Nov. 27, 1991) ("[T]he court must determine whether material or essential terms have actually been agreed upon by the parties and if not, then no contract exists."). This is, in fact, necessary for the enforcement of *any* contract. An "enforceable contract 'must be sufficiently definite as to its material terms . . . that the promises and performance to be rendered by each party are reasonably certain[,]' such that 'the contract provides a sufficient basis for determining whether a breach has occurred and for identifying an appropriate remedy.'" *United House of Prayer,* 112 A.3d at 338 (quoting *Rosenthal*, 573 A.2d at 370); *see also Auger v. Tasea Inv. Co*., 676 A.2d 18, 23 n.6 (D.C. 1996) ("A contract will be unenforceable if its terms are so uncertain that a court cannot accurately assess damages.").

In an effort to carry their burden to show a complete agreement, Appellees relied exclusively on the transcript of the words conveyed to the court reporter on May 5, 2021. Even a cursory review of that transcript, which encompasses perhaps five minutes of dictation into the record, shows that it fails to address numerous material terms that would have been necessary for Hart and Rad to reach a complete agreement. Most notably, the "agreement" was completely silent about disposition of the $190,000 in collateral funds held in the KRE bank account. Additionally, nothing about the parties' discussions on May 5, 2021 addressed, for example,

whether Hart would be waiving any future claims against Rad related to the condition of the 2nd Street property. *Compare Garzon v. District of Columbia Comm'n on Human Rights*, 578 A.2d 1134, 1138-39 (D.C. 1990) (reversing and remanding decision enforcing settlement agreement where, among other things, there was no discussion of a "liquidated damages clause, a nondisclosure clause, or a waiver of reinstatement clause."). The purported agreement also did not address who would be responsible for the parties' respective attorney's fees; who would cover the settlement costs for the corporate transaction related to Cap Hill; or the assignment of tax liabilities. Perhaps most importantly, the parties had not even begun to address the collateral issues that would arise as a result of Hart purchasing Rad's 50% interest in Cap Hill at a time when that company held a sizeable mortgage and a change in the ownership of that company could trigger new obligations to the $500,000 loan's note holder.

While some of the unaddressed terms may not have been the most important among the many terms under discussion, that is of no moment. A party that seeks to uphold an oral contract cannot excuse the failure to address material terms by labeling them as "boilerplate." This Court explained in *Garzon* as follows:

> If, however, proffered boilerplate provisions contain what a reasonable observer would conclude are material terms of such a contract, the ruling agency or court will have to make findings as to whether the parties had agreed upon the provisions and, if they have not, whether the parties could reasonably be said to have entered into a binding agreement without them.

Id. at 1139; *see also D.C. Area Cmty. Council, Inc. v. Jackson,* 385 A.2d 185, 187 (D.C. 1978) (stating that "[i]f the document or contract that the parties agree to make is to contain any material term that is not already agreed on, no contract has yet been made; and the so-called 'contract' to make a contract is not a contract at all."). A reviewing court cannot simply conclude as a matter of law that such terms would not have been material; a factual analysis of them is required. *See and compare United House of Prayer,* 112 A.3d at 341-42 ("As UHP points out, when TWI forwarded the AIA A–201–2007 contract, it added more than two dozen other provisions to its draft contracts which were never discussed during the December 22nd meeting, which did not appear in the standard form document, and which UHP had apparently not seen before. Judge Rankin did not specifically consider whether any of these additional terms was material, *and we cannot say as a matter of law that they were not*.") (internal quotations and footnotes omitted and emphasis added).

A few brief hypotheticals highlight the insufficiency of the parties' purported agreement. If the parties had continued as planned and taken all the steps outlined in the deposition transcript, they easily could have found themselves in Superior Court fighting over legal fees or other aspects of the sale of the interest in Cap Hill (a change in the ownership of the property could trigger issues related to inspections and permits, taxes, or liens on the property, for example). This would have prompted

a dispute over whether the phrase "all the claims and counterclaims" as used by Rad's counsel in the transcript was meant to only include enumerated claims or was broad enough to encompass the request for ancillary costs and for attorney's fees as included in Hart's prayer for relief. *See* Compl. at 7, App'x. 7a. Similarly, if Rad had attempted to transfer his ownership in Cap Hill to Hart, that company's lender could have objected to the transfer. This could have caused a dispute over who bore the responsibility to obtain new financing, the timeline for such financing, and the financial impacts of doing so. The unaddressed aspects of the parties' multi-faceted business dealings would have required resolution and the text of the deposition transcript would not have provided a basis to do so. *Compare Strauss*, 5 A.3d at 1034 (holding that no contract existed because the parties' informal memorandum "mentions fees, but is silent as to whether the alleged agreement was to split brokerage commissions, finder or solicitor's fees, consulting fees, or other unspecified fees—a major point of contention among the parties").

Appellees bore the burden to show that the purported agreement encompassed all of these essential elements. The only evidence produced in this respect was the deposition transcript, which was clearly inadequate because it omitted some material terms altogether and included others that were vague and therefore subject to competing interpretations. Nothing in the record addressed these deficits, and both this Court and the D.C. Circuit have held that more is required in such circumstances.

Compare Garzon 578 A.2d, at 1136 ("By ruling on Marriott's motion for enforcement of settlement entirely on the basis of affidavits and correspondence, without a hearing, the Commission did not have sufficient data, including essential demeanor evidence or other indicia of truthfulness essential to resolving material factual disputes."); *Boks*, 453 A.2d at 117 ("In a case such as this one, where the pleadings and the other material before the court leave a doubt as to whether an agreement was actually reached between the parties, we conclude that the case is not a proper one for summary judgment treatment."); *Autera v. Robinson*, 419 F.2d 1197 (D.C. Cir 1969) (reversing district court's grant of judgment enforcing an alleged oral settlement agreement based only on the statements of the parties' attorneys, a verified motion, and appellant's affidavits).

For all of these reasons, Rad and the entity defendants certainly cannot show that the parties' "contemplated written document [was] to be a mere memorial of the agreement already reached," *New Econ. Cap.*, 881 A.2d at 1094 (internal quotations omitted), and they have failed their burden of proof on this crucial element. The Superior Court's conclusion that "the respective actions and obligations of the parties were explicitly detailed, such that each party was clear how each party was to perform," Order at 7, App'x. 211a, was erroneous and should be reversed.

B. The Parties' Subsequent Conduct Shows There Was No Meeting of the Minds

In determining whether a putative oral contract is enforceable, the court must

consider whether there was a "meeting of the minds." Whether the parties agreed to all material terms versus whether there was a meeting of the minds is a somewhat similar inquiry. However, whether there was a "meeting of the minds" depends on whether the parties had the same understanding of the terms of the agreement.

"There must thus be an honest and fair 'meeting of the minds' as to all issues in a contract." *Simon v. Circle Assocs., Inc*, 753 A.2d 1006, 1012 (D.C. 2000) (quoting *Estate of Taylor v. Lilienfield*, 744 A.2d 1032, 1035 (D.C. 2000)). "More precisely put, the parties to a putative contract must intend the words and acts which constitute their manifestation of assent." *Id.*

On this issue, *Simon* is instructive. In *Simon*, the parties had engaged in settlement discussions in the middle of trial. *Simon*, 753 A.2d at 1007-08. The parties outlined the terms of the agreement on the record before the court reporter. *Id*. at 1008. The parties also agreed that the transcript of the proceeding would control. *Id*. However, the plaintiff later moved the trial court to enforce the settlement agreement after certain terms had not been met. *Id*. at 1008-09. The defendants argued, among other things, that the settlement agreement was ambiguous as to whether it was binding on both the corporate defendant and its sole owner or just the corporation. *Id.* at 1009. The trial court granted the motion to enforce without holding an evidentiary hearing, finding "in terms of corporate structure and decisions, you Mr. Simon [the individual defendant], are Dupont Down

Under Associates [the corporate defendant], and, if there were ever a case for piercing the corporate veil, this is it." *Id*. at 1011. The defendants appealed. The Court of Appeals vacated the trial court's order and remanded it for further proceedings.

In so doing, the Court of Appeals held that the agreement was ambiguous as to whether Mr. Simon was bound by it. *Id*. While the trial court concluded that the individual owner and the corporate defendant were alter egos of one another, the Court of Appeals noted that "the trial court never held an evidentiary hearing on the issue." *Id*. at 1011. The Court of Appeals found, "Thus the tenants [the plaintiffs] never proved by affirmative evidence" the elements of alter ego. *Id*. at 1012. The court therefore held, "Absent the requisite evidentiary foundation, we cannot affirm the entry of monetary judgments against Simon based on an alter ego theory." *Id*.

The D.C. Court of Appeals reached a similar conclusion in *Brooks*, 210 A.3d at 747. In *Brooks*, the plaintiff filed a defamation claim against a husband and wife whom he believed had been making false derogatory comments about his business. The plaintiff obtained a default against Ms. Rosebar based on discovery violations. Then, during a status conference before the Superior Court, the parties reached an agreement to settle the claim for $800. *Id.* at 849. A colloquy between the plaintiff, counsel for the defendants, and the judge was recorded on the record; during the exchange, defense counsel asked the plaintiff whether an $800 payment would

"dismiss this case against both Rosebars," to which the plaintiff responded, "Yes." *Id.* at 749-50.

The plaintiff later informed the court, however, that he did not intend to go forward with the settlement because he had never intended to dismiss the claims against Ms. Rosebar. *Id.* at 750. At a subsequent status hearing, the Superior Court rejected his claim that he had been mistaken during the prior colloquy and dismissed the suit on the basis that the plaintiff had entered into an enforceable oral settlement agreement as to both defendants. *Id*. at 751.

The Court of Appeals reversed. The Court pointed out that, although the transcript of the first status hearing included Brooks's statement that he would dismiss his claims against both defendants in exchange for $800, the transcript included other remarks by the plaintiff indicating he might have been confused, a fact that was later confirmed by his subsequent actions including his remarks during the second hearing. *Id*. at 752-53. Thus, the Court of Appeals held that there was no meeting of the minds and no enforceable settlement contract. *Id.; see also Hood v. District of Columbia*, 211 F. Supp. 2d 176, 181 (D.D.C. 2002) ("In short, the course of settlement negotiations demonstrates that the parties never agreed on the same thing. Because the plaintiffs were always under the impression that any agreement would include both money and re-enrollment while the defendants always understood that the agreement only involved money, the parties never reached a

meeting of the minds.").

Here, the parties' conduct concurrent to and following the May 5, 2021 negotiation shows that there was never a meeting of the minds between Hart and Rad as a result of ambiguity of the sort in *Simon* and *Brooks*. As reflected in the May 5, 2021 deposition transcript, the parties were contemplating a resolution in which Appellant would pay to Appellees a sum of $569,000 and Rad would convey to Hart his interest in the 2nd Street property, which would resolve all of the parties' "claims." The parties did not discuss how this would impact recoupment of the $190,000 in collateral that Hart had placed in the Industrial Bank account for KRE, which related to the prior real estate transaction unrelated to the 2nd Street property. The record is silent on this point. The parties' words and actions show that the assumptions they made in order to fill that gap were irreconcilable. Rad apparently believed that he was entitled to authorize liquidation of the account. Hart, by contrast, did not believe the negotiations had addressed those issues with finality, which he later made clear in subsequent communications. *Compare Brooks*, 210 A.3d at 752-53. The parties' obvious mutual mistake on this point evidences their lack of agreement. *See id.* at 751 ("If there is a misunderstanding between the parties that goes to the very essence of the purported contract, then there is no contract to enforce."). The *Brooks* decision highlights how easily litigants can misunderstand one another in the course of oral negotiations, even in a situation involving a

relatively simple claim and an $800 settlement.

Here, where the parties were discussing the disposition of numerous causes of action related to two separate real estate deals – each of which involved its own Asset Purchase Agreement and lending requirements – and cash payments totaling nearly $800,000, the need for further negotiation and confirmation by way of written agreement is apparent. Thus, the Superior Court judge erred in failing to account for the parties' conduct and in concluding there was a meeting of the minds.

II. The Parties' Discussions Reflected An Agreement To Some Terms and Intention To Continue Negotiating In Good Faith

In reviewing Rad's motion to enforce the purported settlement agreement, the court below also analyzed the deposition transcript by analogizing it to pre-contractual term sheets and other deal documents. In a seminal line of cases adopting the reasoning of Judge Laval of the U.S. District Court for the Southern District of New York, the D.C. Court of Appeals has created a rubric for evaluating the extent to which preliminary business negotiation documents can operate as enforceable contracts. Under this rubric, such agreements are categorized as either "Type I" or "Type II," with the essential difference being the extent to which they reflect completed negotiations. *Banneker Ventures, LLC v. Graham*, 798 F.3d 1119, 1130-31 (D.C. Cir. 2015). A Type I agreement is "'preliminary only in form' because the parties have reached 'complete agreement' and need only to formalize it." *Id*. at 1130 (citing *Teachers Ins. and Annuity Ass'n of America v. Tribune Co.*, 670 F.

Supp. 491, 498 (S.D.N.Y. 1987)). A Type II agreement, by contrast, is

> one that expresses mutual commitment to a contract on agreed major terms, while recognizing the existence of open terms that remain to be negotiated. . . . . [P]arties to a Type II agreement have not reached complete agreement, but can bind themselves to a concededly incomplete agreement in the sense that they accept a mutual commitment to negotiate together in good faith in an effort to reach final agreement within the scope that has been settled in the preliminary agreement.

Id. at 1130-31 (cleaned up).

The court below determined in this case, based on the language of the deposition transcript, that "the parties clearly expressed their intent to be bound." Order at 10, App'x. 214a. However, the Superior Court's opinion provided only a cursory explanation of why the May 5, 2021 colloquy established something more than an agreement to continue negotiating in good faith in order to reach a final resolution and map out a plan for closing and settlement, which had been the parties' past practice and was reasonable given the monies and property interests at stake. As explained *supra*, Hart and Rad (by way of his lawyer) left the table on May 5, 2021 with a fundamental disconnect in understanding. At the very most, they reached agreement on a template for what would happen next: they would exchange written documentation through which they would iron out the details regarding the transfer of 50% of Cap Hill to Mr. Hart, a sale that also would raise issues related to the mortgage on the 2nd Street property, relevant taxes, and potential inspection and title issues. Hart and Rad at most entered into a Type II agreement, having settled

on some but not all material terms of their agreement.

Moreover, it was imperative for the parties' negotiations to culminate in a written agreement in order to satisfy the Statute of Frauds. The D.C. Statute of Frauds applies to "a contract or sale of real estate, of any interest in or concerning it . . . ." D.C. Code § 28–3502.

The parties in this case had a discussion centered on a planned transaction in which Hart would essentially purchase Rad's 50% interest in the 2nd Street property, and thus the Statute of Frauds applies. *See Scoville St. Corp. v. Dist. TLC Tr., 1996*, 857 A.2d 1071, 1077-78 (D.C. 2004). In *Scoville Street*, the plaintiff asked the court to enforce what he deemed a simple oral settlement agreement between the parties, but the court examined the nature of the purported agreement and found that it was more accurately described as "an oral contract for the redemption of an interest in land." *Id.* at 1077. Thus, the Court of Appeals found that even if there had been an oral agreement between the parties, it was unenforceable because it did not comply with the Statute of Frauds. *Id*. at 1078. The same is true here. On remand, the parties should be permitted to complete their negotiations and reach a written agreement that is compliant with this statutory requirement.

CONCLUSION

The lower court erred when it found the existence of a contract based on the remarks dictated into the record in less than five minutes by Rad's counsel on the

day of the parties' planned depositions. That evidence was not sufficient to carry Appellees' onerous burden to prove the existence of an oral settlement agreement. Appellees did not establish that the parties came to an agreement on all material terms during the discussions at the deposition. The parties' actions after the May 5, 2021 negotiations show that there was no meeting of the minds. The timeline agreed upon by the parties after the deposition provided a framework for them to address the various moving parts that would be necessary to fully resolve their disputes related to two real estate deals and to comply with the Statute of Frauds. To the extent the parties are bound by their good faith commitment to reach a settlement, they should be permitted to continue those efforts.

For the reasons set forth in this brief and Appendix, Appellant respectfully submits that the Court of Appeals should reverse the decision of the Superior Court and remand this case for further proceedings.

Dated: April 26, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of April 2022, I caused to be delivered a true and accurate copy of the foregoing through the electronic case filing system to:

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District of Columbia
Court of Appeals

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Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
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   - Birth date
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   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
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     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

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Signature

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