No. 21-CV-0639

In the
District of Columbia Court of Appeals

THOMAS HART

Plaintiff-Appellant,

v.

KAVOOS RAD, ET AL.

Defendants-Appellees

REPLY BRIEF OF APPELLANT

Date: July 15, 2022

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INTRODUCTION AND SUMMARY

Appellee Kavoos Rad[1] agrees that "a settlement agreement is enforceable where . . . there is an agreement to all material terms and an intention of the parties to be bound." Appellee's Brief at 23 (internal quotations omitted). In an effort to prove both of those requirements are satisfied here, however, Rad's brief misrepresents the language of the May 5, 2021 transcript, emphasizing words taken out of context to insinuate that he and Thomas Hart entered into a comprehensive settlement agreement on that day. In his slanted retelling of the parties' communications, Rad emphasizes portions of the May 5, 2021 transcript (which comprise only part of that already short conversation) that suggest the agreement was complete, *see id*. at 13-14, while ignoring many portions that show that the parties always understood additional steps needed to be taken before any final settlement would be accomplished. These include the following:

- Mr. White: "*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";

- Mr. White: "[Rad] 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";

- Mr. White: "*We will, as the lawyers, proceed with completing the documentation described*, and [] then [the] parties will move toward completing their obligations as well."

[1] For convenience, this brief refers to the lead appellee Kavoos Rad, but all arguments attributed to him here are also attributable to the other appellees.

- 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 . . . agreement . . . .*"

May 5, 2021 Tr. at 3:22-4:3, 4:8-10; 6:14-17; 5:16-20, App'x. at 148a-151a (emphasis added). The Court should reject Rad's attempt to gain an advantage by providing an incomplete summary of the record.

Rad argues that the discussion between Hart's counsel and Rad's counsel on May 5, 2021, which lasted no more than five minutes, serves as a complete written contract that addresses, among other things, ownership of two properties each valued at more than $1 million, simply by virtue of its being transcribed by a court reporter. However, no one signed a transcription that day and the parties never completed a term sheet. The transcript itself shows that the skeletal discussion between the parties, while it addressed some of the major terms of the intended agreement, also left out a great deal. Rad's self-serving claim that all material terms were addressed via the discussion is based on nothing more than his opinion of the discussion.

In addition, the parties' conduct following the May 5, 2021 discussion shows that they did not end with a mutual understanding of what was to happen next. When Hart left the parties' meeting on May 5, 2021, he did not believe the parties had entered into an enforceable contractual agreement. He thought that the lawyers had made substantial progress towards resolving their dispute. This was the beginning, not the end, of settlement discussions. But over the days that followed, they did not

iron out the details and reduce the settlement to writing, as they had planned to do and as was their past practice.

At most, the Superior Court should have instructed the parties to continue their negotiations so that they could arrive at a comprehensive and enforceable written contract that complied with the Statute of Frauds' requirements for contracts concerning the purchase of real property.

ARGUMENT

A. The Single Available Transcript Is Not A Written Contract

As a threshold matter, Defendant-Appellee argues that the law governing oral contracts is not applicable here because the transcript effectively serves as a written contract between the parties. Brief at 24 (stating that the transcript created by the court reporter essentially became the parties' written contract and that "no 'subsequent written contract' was needed here"). This is an effort to evade the "onerous" burden that a proponent of an oral contract must satisfy under District of Columbia law. *See New Econ. Cap., LLC v. New Mkts. Cap. Grp*., 881 A.2d 1087, 1094 (D.C. 2005) (stating that the party seeking to enforce a purported oral contract bears a burden of proof that is "particularly onerous").

Specifically, Rad cites *New Economy Capital* and another case, *Jack Baker, Inc. v. Office Space Dev. Corp.*, 664 A.2d 1236, 1238 (D.C. 1995), for the proposition that this onerous burden only exists when the parties are involved in

"detailed commercial relationships," whereas the negotiations between the parties in this case addressed a "simple settlement agreement[]." Brief at 23, n. 6. However, those two cases made no such distinction. In fact, *New Economy Capital* involved a simple proposal for an individual to provide consulting services to a private equity fund. 881 A.2d at 1089-91. In addition to the fact that this attempted dichotomy is not supported by case law, the settlement negotiations in this case are not nearly as elementary as Rad makes them sound. In this negotiation, the parties were addressing claims that involved large sums of money (*e.g.*, $569,000) and aspects of two real estate transactions each of which involved property valued in excess of $1 million. Rad's brief acknowledges this complexity, as it notes that the proposed deal ultimately was going to require the transfer of his proportional interest in Cap Hill Properties, LLC ("Cap Hill"), the entity that serves as a corporate vehicle to hold the interest in the 214 2nd Street, SE property. Brief at 34.

Rad cannot satisfy the requisite burden to establish an oral contract on these facts. *See Jack Baker*, 664 A.2d at 1238 ("Where the parties contemplate a subsequent written contract, this burden is particularly onerous"). The law in this jurisdiction is "well-settled" that

> [P]arties [may] make an enforceable contract binding them to prepare and execute a subsequent documentary agreement. In order that such may be the effect, it is necessary that agreement shall have been expressed on all essential terms that are to be incorporated in the document. That document is understood to be a mere memorial of the agreement already reached. If 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.

Id. at 1239 (quoting *D.C. Area Community Council v. Jackson*, 385 A.2d 185, 187 (D.C. 1978) (per curiam)). The parties' discussion on May 5, 2021 expressly included an understanding that formal documents would have to be drafted between them on a later date. May 5, 2021 Tr. at 6:14-15, App'x. at 151a (statement by Rad's counsel that "[w]e will, as the lawyers, proceed with completing the documentation described"). Rad's lawyer argues that "[a]l of the subsequent documentation contemplated for drafting by the attorneys was simply to implement the terms of the settlement" and "was a routine drafting exercise." Brief at 24. By appellees' own admission, however, this supposedly routine process was to include the creation and execution of at least four independent documents, among them a proper written settlement agreement with a set of releases and a separate contract through which Rad would transfer his 50% interest in Cap Hill to Hart. Those documents would not have been a "mere memorial" of the parties' previous discussions. *See Jack Baker*, 664 A.2d at 1239. An effort to characterize the process of drafting, executing, and filing such documents as "routine" is belied by the events that unfolded between the parties after the May 5, 2021 negotiation session, during which their divergent understandings of the intended settlement became clear. *See* Section C, *infra.* Additionally, a subsequent written contract was necessary to comply with the Statute

of Frauds, which applies to "a contract or sale of real estate, *of any interest in or concerning it* . . . ." D.C. Code § 28–3502 (emphasis added). Rad's counsel attempts to draw a distinction between contracts for the disposition of property and the purchase of shares in an LLC that holds property, but the Statute of Frauds' own language indicates that its application is broad enough to encompass such a purchase.[2] While Rad contends any consideration of the Statute of Frauds has been waived, the argument presents a question of law that the Court of Appeals has the discretion to consider, particularly where, as here, there will be no prejudice to the opposing party in doing so. *See D.C. v. Helen Dwight Reid Educ. Found*., 766 A.2d 28, 33, n. 3 (D.C. 2001) (stating that "[w]e perceive no risk of unfair prejudice to the Foundation from our consideration of the legal question presented in light of the undisputed facts of record"). The relevant facts here are largely settled and the parties agreed on May 5, 2021 that written documents would be created. There is no basis to contend that the record below is insufficiently developed for the Court to consider this issue properly.

[2] Such is the law in other jurisdictions. *See Jeranek v. Gritzer*, 51 Misc.3d 1201(A), 36 N.Y.S.3d 47 (N.Y. Sup. 2016) (stating that "[i]t is well established that where a claim involves the sale of stock of a corporation whose only asset is an interest in realty, the Statute of Frauds is applicable to any transfer of the stock" (internal quotation omitted).

Rad also asks this Court to credit the parties' prior dealings and customary way of interacting with one another as proof that the drafting of the above-referenced documents would have been "routine." Specifically, he points to an Asset Purchase Agreement that Hart and Rad used in a prior transaction related to the 1633 Kalmia Road, NW property and suggests that the parties simply would have "cut and paste[d]" that document to create the Asset Purchase Agreement related to Cap Hill. Brief at 24. This is pure supposition and is not sufficient to carry Rad's burden, especially given the nature of the intended agreement, which dealt with property encumbered by a sizeable mortgage. Moreover, if the Court considers the parties' prior dealings and usual course of conduct, then it should give due accord to their established practice of reducing agreements to writing before deeming one another to be bound, which shows that Appellant was reasonable in his belief that the parties' discussion on May 5, 2021 was non-binding.

B. Various Material Terms Were Unaddressed in the Transcript

In response to Hart's argument that the May 5, 2021 transcript fails to address all material terms of the parties' purported agreement, Appellee argues first that the Court is limited in its ability to consider that argument. According to Rad, the Court of Appeals must affirm the Superior Court's determination that all material terms were addressed in the transcript, because "the determination of what the parties consider to be the material terms of their agreement is a question of fact" which the

Court of Appeals may reject "only if they are clearly and manifestly wrong or without evidence to support them." Brief at 22 (quoting *United House of Prayer for All People v. Therrien Waddell, Inc*., 112 A.3d 330, 338 (D.C. 2015) (internal quotation marks omitted). Appellees argue "the Superior Court's determination based on the credible evidence of the transcript may not be overturned unless manifestly wrong, which it clearly was not." *Id.* at 28.

Rad has correctly recited the applicable legal standard, but his attempt to bolster the Superior Court's determination is nothing more than smoke and mirrors. Hart has identified several key issues that were not addressed during the May 5, 2021 discussions. In an attempt to show that those material terms were, in fact, addressed by the parties on that day, Rad's brief provides details about the relevant issues as he wishes and assumes them to be. *See* Brief at 29-30. While Rad claims that the parties' failure to talk about legal fees, tax liabilities, and lender requirements means that somehow everyone knew how those issues were to be addressed, the answers he has supplied on those issues are nowhere on the record.

For example, in response to Hart's point that the parties had not agreed on whether the envisioned releases would encompass claims related to the condition of the 2nd Street property, Rad claims that "the releases are 'comprehensive,' and a release from Cap Hill was expressly included," and therefore it is clear the envisioned releases were to cover such claims. *Id*. at 29. But Hart had not even filed

suit against Cap Hill regarding Rad's performance failures during the 2nd Street renovation project at the time of the parties' negotiations. Further, the transcript reflects a statement by Rad's counsel that the parties would exchange "mutual and complete releases," but that phrase is vague and there is no evidence in the record that the parties intended it to include future claims. May 5, 2021 Tr. at 4:15-16, App'x. at 149a.

Rad also argues that, regardless of the materiality of these terms that were not addressed on May 5, 2021, the Court cannot consider them now because Hart did not raise them in Superior Court. But Appellant certainly argued in the court below that the discussions did not encompass all material terms.[3] In his opening brief, Hart provided additional details and examples to support the argument, but the argument itself was not new. Hart raised this issue in Superior Court with "sufficient precision" to put Appellees on notice of his position. *See Television Cap. Corp. of Mobile v. Paxson Commc'ns Corp.*, 894 A.2d 461, 470 (D.C. 2006), as amended on

[3] Hart has argued from the outset that disposition of the $190,000 held in the Kalmia Real Estate, LLC ("KRE") bank account was not addressed in the settlement negotiations on May 5, 2021. The disposition of the $190,000 constitutes a material term. Defendants state that the claim regarding the $190,000 was encompassed by the language "[t]hen the parties agree to dismiss all the claims and counterclaims in this litigation." Brief at 29. However, Hart understood otherwise and, in any event, also believed that the dismissal of all claims and counterclaims depended on the finalization of a settlement agreement. Hart did not agree to finalize the agreement on May 5, 2021, hence the statement by Rad's counsel that the lawyers would draft settlement documents in the future.

reh'g in part (July 5, 2006) ("Questions not properly raised and preserved during the proceedings under examination, and points not asserted with sufficient precision to indicate distinctly the party's thesis, will normally be spurned on appeal." (internal quotation omitted)).

Finally, Rad cites *Dyer v. Bilaal*, 983 A.2d 349 (D.C. 2009), for the proposition that, when parties do not address a term in their negotiations, the Court can assume that term was immaterial. This is an overbroad enunciation of the principal announced in *Dyer*. In that case, the Court explained that when parties have been silent about a term *unrelated to how they are to perform their agreement*, immateriality can be assumed. In *Dyer*, the contract term at issue was a confidentiality clause, which had no bearing on contract performance, and thus the Court rejected the appellant's claim that the agreement was unenforceable because it did not include an agreement as to confidentiality:

> Mr. Dyer also argues that there is no contract because the agreement omits the material term of a confidentiality clause. However, provisions that are "not necessary for the parties to understand how they are expected to perform the contract itself" are not material and do "not undermine the binding nature of the agreement." A case clearly may be settled without a confidentiality clause.

983 A.2d at 358 (quoting *Tauber v. Quan,* 938 A.2d 724, 730 (D.C. 2007)). Here, by contrast, there are issues critical to contract performance that must be resolved before the parties can reach a final agreement. Among other things, the parties must agree upon a legal document transferring Rad's 50% interest in the Cap Hill property

to Hart. They also must determine how and by whom any new obligations owed to the Cap Hill noteholder will be satisfied. These are analogous to payment terms. *See id*. at 356-57 (describing payment terms as a category of material terms). The absence of agreement on these terms is fatal. Without agreement on how performance is to be executed, the parties and the court would, in the event of a breach, face a virtually impossible task in evaluating whether a party complied with its obligations.

C. The Parties' Undisputed Actions Demonstrate A Lack of Mutuality

Rad argues that Hart demonstrated his intent to be bound on May 5, 2021 by acquiescing in Rad's counsel's summarizing of the parties' discussion on the record. Viewed in isolation, the fact that Hart did not object at that time could be treated as evidence of agreement. However, this does not answer the more difficult and more pertinent question of *what* the parties believed they were agreeing to on May 5, 2021 and whether there was a meeting of the minds. As the Court explained in *Strauss v. NewMarket Glob. Consulting Grp., LLC*, 5 A.3d 1027, 1033 (D.C. 2010), "[t]he 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."

The events that occurred after May 5, 2021 show there was no mutuality in the parties' understandings. For his part, Hart believed that the group was going to

continue negotiations in the coming days in order to work out the remaining material items and reduce their agreement to writing. There are several well supported reasons for this belief, including the fact that this had been their prior practice and that Rad himself was not present during the negotiations on May 5, 2021.[4] When Rad allowed KRE's bank account to be liquidated, Hart was surprised and the progress the parties had made towards settlement was stymied. This is evidence the parties had never had a true meeting of the minds.[5] Rad argues that the record was silent on what would happen to the money in the KRE bank account and that "[s]ince the rights of Rad and Industrial Bank to use the funds for the loan payoff was not a term of the settlement agreement, the payoff of the loan cannot be considered evidence of an absence of meeting of minds on the terms of the agreement." Brief

[4] Rad also argues that, in deciding this issue, the Court should not rely on its prior decisions in which purported contracts were deemed invalid due to the parties' misunderstanding. Appellee believes those cases are irrelevant because Hart is a sophisticated attorney who should not be given such leeway. Rad is correct that Hart is an accomplished appellate lawyer who graduated from Georgetown Law School in 1980 and clerked on the U.S. Court of Appeals for the Eighth Circuit. However, as a communications law specialist who handled matters before the Federal Communications Commission, Hart's prior background is not particularly relevant to this contract dispute.

[5] Rad attempts to distinguish *Brooks v. Rosebar*, 210 A.3d 747 (D.C. 2019) and *Simon v. Circle Assocs., Inc.*, 753 A.2d 1006 (D.C. 2000) on the grounds that in those cases, the Court dealt with the parties' fundamental misunderstanding of who and/or what entities would be bound by their oral agreement, whereas here there is no such uncertainty. Rad is correct that there is no such disagreement here, but the holdings of *Brooks* and *Circle Associates* are not so limited. The rule enunciated in those cases applies to *any* material term of a purported agreement.

at 35-36. Rad's argument that Hart was mistaken in his belief about the status of the money in that bank account further reflects the parties' failure to arrive at a true meeting of the minds.

Finally, Rad objects to Hart's point that, at most, the May 5, 2021 transcript should be treated as a "Type II" agreement under the rubric outlined in *Banneker Ventures, LLC v. Graham*, 798 F.3d 1119, 1130-31 (D.C. Cir. 2015). Brief at 38. Rad argues that Hart must not have thought that he had a Type II agreement with Rad after the May 5, 2021 negotiations ended because, if he had, he would not have filed a separate lawsuit against Cap Hill on June 2, 2021. On the first point, Rad is correct. As Hart explained in the Superior Court and in his opening brief, he did not think the parties had reached an agreement on May 5, 2021, because there were additional terms that had to be addressed and everyone understood that formal settlement documents still had to be drafted.[6] To the extent the Court determines that through his actions Hart evinced some intent to be bound as a legal matter, this should be limited to a Type II agreement such that the parties can continue their negotiations and memorialize their agreement in writing as required under law.

[6] Additionally, Hart's filing of the lawsuit against Cap Hill in June 2021 was not contrary to the spirit of the parties' negotiations because there had never been any agreement that he would waive future claims against Cap Hill.

CONCLUSION

The Court should reject Rad's effort to characterize the transcribed discussion of May 5, 2021 as a written contract and to use portions of the parties' discussion, taken out of context, to support his points. The parties' discussion on the record, lasting all of five minutes, did not address all material terms necessary to a settlement between them and the transcript created on that day explicitly states that the parties agreed they would finalize the agreement in a written instrument at a later date. All material terms, as evidenced by the cases referenced, must be present to constitute a settlement agreement. Numerous courts have held in a variety of circumstances that, if all material terms were not agreed upon by parties, there was no settlement agreement. The Court of Appeals should reverse and remand the lower court's ruling that the transcript created that day is an enforceable contract.

Dated: July 15, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of July 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

REDACTION CERTIFICATE DISCLOSURE FORM

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
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - 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;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (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.

/s/ Hilary LoCicero
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21-CV-0639
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