

Amy Eddy, District Judge
Department No. 1
Flathead County Justice Center
920 South Main Street, Suite 310
Kalispell, Montana 59901
(406) 758-5906

THE MONTANA ELEVENTH JUDICIAL DISTRICT COURT
FLATHEAD COUNTY

DANIEL PERL and SANDRA PERL,
Individually, and as Trustees and Settlers of
the D & S. Perl Family Trust Dated August
24th, 1998,

Plaintiffs,

vs.

CHRISTOPHER GRANT, Individually and as
Trustee and Settlor of the Grant Revocable
Trust Dated July 18, 2007, the GRANT
REVOCABLE TRUST DATED JULY 17,
2008, and GRANT CONSTRUCTION, LLP,

Defendants.

CHRISTOPHER GRANT, Individually and as
Trustee and Settlor of the Grant Revocable
Trust Dated July 18, 2007, the GRANT
REVOCABLE TRUST DATED JULY 17,
2008, and GRANT CONSTRUCTION, LLP,

Third-Party Plaintiffs,

vs.

GENERAL ONE, INC.; W.I.N.
CONSTRUCTION, INC.; MONTANA
INSULATION CONTRACTORS, INC.;
RILEY LANDSCAPE CONSTRUCTION;
and JOHN DOES 1-5,

Third-Party Defendants.

Cause No. DV-21-126(A)

ORDER

Pending before the Court are cross-motions for summary judgment. Defendants Grant, Grant Revocable Trust, and Grant Construction, LLP, filed their *Motion for Summary Judgment* June 18, 2021. (Docs. 15–16.) Plaintiffs Daniel and Sandra Perl filed their combined *Response* and *Cross-Motion for Partial Summary Judgment* on July 16, 2021. (Docs. 19–20.) Defendants filed their combined *Response* and *Reply* on August 12, 2021. (Doc. 24.) Plaintiffs filed their *Reply* on September 3, 2021. (Doc. 31.) The matter came before the Court for oral argument on November 16, 2021. Having reviewed the file, and being fully apprised, the Court hereby finds as follows:

ORDER

Defendants Grant, Grant Revocable Trust, and Grant Construction, LLP’s *Motion for Summary Judgment* is GRANTED in part and DENIED in part. Plaintiffs Perl’s *Cross-Motion for Summary Judgment* is DENIED.

I. BACKGROUND

Daniel (“Dan”) and Sandra Perl are co-trustees and settlors of the D & S Perl Family Trust dated August 24, 1998. Christopher (“Chris”) and Rachelle Grant are co-trustees and settlors of the Christopher Grant and Rachelle Grant Revocable Trust dated July 18, 2002. Grant Construction, LLP, is a Montana limited liability partnership; Chris is a partner. The Grant Revocable Trust owned real property in Flathead County, Montana known as 149 S. Shooting Star Circle, Whitefish, Montana. Both parties, while lay individuals, are sophisticated in the areas of real estate, business and lending.

In early 2019, the Grant Revocable Trust entered into a contract for the sale of 149 S. Shooting Star Circle with the Perls. The property was ultimately conveyed to the Perls via the D & S Perl Family Trust by warranty deed. Following this sale, the Perls and Grant Construction entered into separate contracts to perform home improvement work, including work upon the home itself and an attached deck. Grant Construction performed the work requested but to a level unsatisfactory to the Perls.¹

The Perls contacted Chris to discuss the problems with his company’s work on their new home. Both parties agree they tried to work out a solution, but when communication broke down, Jason (“Jay”) Grant took over communication with the Perls. Throughout September and October 2020, Dan Perl reached out to Jay to communicate an offer of settlement. (Doc. 31 at 2: ¶¶3–4.) Dan’s unilateral offer was for Grants to buy back the home for \$2.8 million (they had originally sold it to the Perls for \$1.775 million) in exchange for settling all outstanding claims the Perls had against the Grants personally, the Grant Revocable Trust, and/or Grant Construction. Jay communicated this offer to the Grants who countered with a \$2.5 million purchase price. Dan rejected this counteroffer and the Grants agreed to pay \$2.8 million. (Doc. 16, Aff. of Jason Grant, Ex. A.)

¹ The extent, liability, and level of unsatisfaction is at the center of this litigation.

On October 19, 2020, at 11:12 p.m., Jay Grant responded as such:

Hi Dan, I have talked with Chris and Rachelle (MacKenzie says hi) and we are happy with all the terms you laid out (built in TVs, appliances, window coverings, and ELF's stay, everything else goes, Jan 15 close, deposit paid on signing and remainder paid on close in cash). But 2.8 is a stretch for us

(Doc. 16, Aff. of Jason Grant, Ex. A.)

On October 20, 2020, at 11:23 a.m., Dan Perl responded:

Jay:

Glad we could reach agreement. What is the name and contact points for your attorney? Ours is Karl Rudbach at Ramlow & Rudbach in Whitefish.

(*Id.*, Aff. of Jason Grant, Ex. B.)

Jay replied:

Me too. Her name is Samantha Travis at Ogle, Worm and Travis.

(*Id.*)

At the direction of their clients, counsel for both parties spoke about the settlement terms and agreed Samantha Travis, counsel for the Grants, would draft a *Buy-Sell Agreement* for the purchase of the property and a separate *MDTL Release* to resolve any putative claims. (Doc. 16, Ex. B: *Aff. Samantha Travis*, ¶6.) On October 30, 2020, Travis emailed these documents to Rudbach, counsel for the Perls. (*Id.*, ¶7). These writings memorialize the agreement contained in the text messages, and include further details.

Upon receipt, the Perls reviewed the *Buy-Sell Agreement* and *MDTL Release* with Rudbach. (Doc. 20: Ex. A: *Aff. Daniel Perl*, ¶¶18-20.) The Perls rejected several provisions in the *Buy-Sell Agreement* and *MDTL Release* and sent a counteroffer to Travis. (*Id.*) Other than Daniel Perls' *Affidavit* contained in the briefing of these motions, there is no other evidence of any counteroffer, rejection, etc.

The Perls filed their *Complaint and Demand for Jury Trial* on February 9, 2021, alleging negligence, breach of warranty, breach of implied covenant of good faith and fair dealing, unfair and deceptive trade practices, unjust enrichment, and residential construction defect. The Grants have denied all allegations of wrongdoing and assert they had an enforceable settlement

agreement. In addition, the Grants filed a third-party complaint against several subcontractors for indemnification and contribution.

The Defendant have filed this *Motion for Summary Judgment* arguing the parties entered into an enforceable settlement agreement and the Plaintiffs' claims should be dismissed with prejudice. The Plaintiffs filed a *Cross-Motion for Summary Judgment* arguing the parties never entered into an enforceable settlement agreement, and it would be barred by the Statute of Frauds in any event.

II. LEGAL STANDARD

Summary judgment is appropriate when the pleadings, affidavits, or discovery on file demonstrate there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. M. R. Civ. P. 56(c)(3). A fact is "material" if it depends on the elements of the cause of action or defenses at issue. *Broadwater Development, L.L.C. v. Nelson*, 2009 MT 317, ¶15, 352 Mont. 401, 219 P.3d 492. A dispute is "genuine" if the evidence could lead a reasonable fact finder to return a verdict for the nonmoving party. *Id.* Only "genuine disputes over facts that might affect the outcome of the suit under the governing law will properly preclude an entry of summary judgment." *Id.* Where there are undisputed material facts, the Court must simply identify the applicable law, apply it to those facts, and determine which party prevails. *Id.* The Montana Supreme Court reviews a district court's ruling on a motion for summary judgment de novo. *Id.*

Where there are cross-motions for summary judgment, a district court must evaluate each party's motion on its own merits. *Kilby Butte Colony, Inc. v. State Farm Mut. Auto. Ins. Co.*, 2017 MT 246, ¶ 7, 398 Mont. 48, 403 P.3d 664. On cross-motions for summary judgment, if the district court is not called to resolve factual disputes and only draw conclusions of law, the district court's conclusions of law are reviewed de novo for correctness. *Bud-Kal v. City of Kalispell*, 2009 MT 93, ¶ 15, 350 Mont. 25, 204 P.3d 738.

Finally, determining if a contract exists is a combined question of law and fact. *Jarussi v. Sandra L. Farber Trust*, 2019 MT 181, ¶13, 396 Mont. 488, 445 P.3d 1226 (citations omitted). The Montana Supreme Court reviews the factual findings of a district court sitting without a jury under the clearly erroneous standard. *Id.* The Court reviews a district court's conclusions of law for correctness. *Id.*

IV. LEGAL ANALYSIS

A. Is the Statute of Frauds satisfied?

The Perls argue that because any settlement agreement involved the purchase of real property, it had to satisfy the Statute of Frauds to be enforceable:

An estate or interest in real property, other than an estate at will or for a term not exceeding 1 year, may not be created, granted, assigned, surrendered, or declared otherwise than by operation of law or a conveyance or other instrument in writing,

subscribed by the party creating, granting, assigning, surrendering, or declaring it or by the party's lawful agent authorized by writing.

Mont. Code Ann. §70-20-101.

Similarly, provisions of contract law provide:

The following agreements are invalid unless the agreement or some note or memorandum of the agreement is in writing and subscribed by the party to be charged or the party's agent . . . an agreement for . . . the sale of real property . . . The agreement, if made by an agent of the party sought to be charged, is invalid unless the authority of the agent is in writing and subscribed by the party sought to be charged.

Mont. Code Ann. §28-2-903(1).

However, the Statute of Frauds "may not be construed to . . . abridge the power of any court to compel the specific performance of an agreement, in case of partial performance of the agreement." Mont. Code Ann. §70-20-102(3); *see also* Mont. Code Ann. §30-11-111. It is for this reason that in the face of an enforceable contract, the Montana Supreme Court "will not allow the state of frauds, the object of which is to prevent fraud, to be used to accomplish fraudulent purposes." *Hays v. Hartelius*, 215 Mont. 391, 396, 697 P.2d 1349, 1353 (1985) (enforcing oral contract for sale of real property); *see also Ryckman v. Wildwood, Inc.*, 197 Mont. 154, 641 P.2d 467 (1982) (finding that when a contract is admitted, "the statute of frauds [is construed] less technically, refusing to allow the statute to be used so as to defeat its purpose to prevent the commission of a fraud.").

Consistent with the purpose behind the Statute of Frauds, the Montana Supreme Court has found:

that the note or memorandum may consist of several writings, and that it need not be in any particular form, or contain the entire contract. As long as the writing or writings include all the material terms, even if such terms are stated generally, the contract is valid. *Olsen v. Johnston*, 2013 MT 25, ¶20, 368 Mont. 347, 301 P.3d 791 (citing *Johnson v. Ogle*, 120 Mont. 176, 181-82, 181 P.2d 789, 791 (1947); *Hughes v. Melby*, 135 Mont. 415, 421, 340 P.2d 511, 515 (1958); *Kluver v. PPL Mont., LLC*, 2012 MT 321, ¶ 38, 368 Mont. 101, 293 P.3d 817; *Dineen v. Sullivan*, 123 Mont. 195, 199, 213 P.2d 241, 243 (1949)). "The material terms of a contract for the sale of real property will include the parties, the subject matter, a reasonably certain description of the property affected, the purchase price or the criteria for determining the purchase price, and some indication of mutual assent." *Olsen*, ¶21.

Wood v. Anderson, 2017 MT 180, ¶10, 388 Mont. 166, 399 P.3d 304.

Olsen is instructive. In *Olsen*, one sister offered to sell her interest in the property for a certain price, or purchase the other sister's interest for a certain price. The other sister was to

respond by a certain date to the sister's attorney. The other sister timely responded by agreeing to purchase the sister's interest, but responded to the sister, not the attorney. The sister then attempted to get out of the agreement by arguing that the other sister had not properly accepted the offer through the attorney. *Olsen*, ¶¶4-8. The Montana Supreme Court affirmed the district court's award of specific performance of the contract. *Olsen*, ¶22. Relevant to this case, *Olsen* found that all material terms of the contract were established, even though there were numerous other terms the parties would obviously have to negotiate.

In the present case the text messages between the parties satisfies the Statute of Frauds as they contain all of the material terms. First, the parties to the contract were identified. The text message from Jay clearly states, "Hi Dan, I have talked with Chris and Rachelle (MacKenzie says hi) and *we* are happy with all the terms you laid out . . ." (Doc. 16, *Aff. of Jason Grant*, Ex. A.) (emphasis added). A plain reading of this language identifies the parties to the contract as the Perls, Grants and Jay Grant. Second, there is no dispute as to the identification of the property. Third, the text messages clearly state the purchase price, to which there is no dispute. Finally, Dan Perls' response, "Glad we could reach agreement," indicates mutual assent. (*Id.*, *Aff. of Jason Grant*, Ex. B.)² Moreover, these writings were confirmed in writing by counsel for the parties—whose agency has not been contested. The Court does apply the Statute of Frauds in a more flexible manner as there appears to be no real dispute between the parties as to this portion of the agreement.

There is no genuine issue of material fact the State of Frauds is satisfied.

B. Did the parties enter into an enforceable settlement agreement?

As established above, all material terms for the sale of the real property were established in writing. The question remains however, whether the parties entered into an enforceable settlement agreement to not only purchase the property but resolve all putative claims. The Perls claim that they did not agree to some of the terms that were ultimately included in the *Buy-Sell Agreement* and *MDTL Release*. However, as demonstrated below, the Perls and Grants agreement was not contingent on a formal written and signed agreement.

Settlement agreements are contracts subject to contract law. *Murphy v. Home Depot*, 2012 MT 23, ¶8, 364 Mont. 27, 270 P.3d 72. A contract requires (1) identifiable parties; (2) the parties' consent; (3) a lawful object; and (4) a sufficient cause or consideration. A contract must contain all of the essential terms. Mont. Code Ann. §28-2-102. There must be a mutual agreement or a meeting of the minds on all essential elements or terms to form a binding contract. *Jarussi v. Sandra L. Farber Trust*, 2019 MT 181, ¶17, 393 Mont. 488, 445 P.3d 1226.

In *Hetherington v. Ford Motor Co.*, Kathryn Hetherington tragically died in an automobile accident. 257 Mont. 395, 397, 849 P.2d 1039, 1041 (1993). Hetherington's estate

² The names and numbers associated with these text messages, as well as the follow up emails of counsel, satisfy any subscription requirement. *Kluver*, ¶¶24, 26, 29.

subsequently brought a claim against the Ford Motor Company and Ronan Auto Body Sales. *Id.* Prior to the case being filed, the Estate and both defendants reached a settlement agreement. Counsel for the Estate contacted Ford's negotiating agent:

Please be advised that my clients have decided to accept your client's combined offer of settlement in the amount of \$185,000. Of the total amount, \$10,000 will be contributed by Ronan Auto Body and \$175,000 will be contributed by Ford Motor Company. . . . [E]ach of you will be sending me settlement drafts and the appropriate releases.

Id.

The Hetheringtons asserted that they did not consent to this agreement and fired their counsel shortly after this agreement was reached. *Hetherington*, 257 Mont. at 397-98, 849 P.2d at 1041. The Hetheringtons retained new counsel who subsequently filed suit against both Ford and Ronan Auto. *Id.* It was the Hetheringtons' understanding that, until they signed the settlement agreement, there was no enforceable agreement, and since they had not signed the agreement, the option open to file suit remained open. *Id.*

Ford moved for summary judgment on the affirmative defense of compromise and settlement and the counterclaim for specific performance of the settlement agreement. *Id.* The district court denied Ford's motion, finding that a question of fact remained as to whether the parties intended to be bound in the absence of a signed agreement. *Id.*

The Montana Supreme Court reversed, holding that the Hetheringtons unconditionally accepted the defendant's settlement offer. *Id.*, 257 Mont. at 399, 849 P.2d at 1042. The communication above by the Hetheringtons' former counsel did not include conditional language indicating that their agreement was contingent on a formal written and signed agreement. *Id.* Thus, the Hetheringtons' latent intent to not be bound by the settlement until they signed a written agreement did not prevent the formation of a binding contract. *Id.* For such a condition to prevent formation of a contract, it must be part of the agreement between the parties. *Id.* Therefore, the district court improperly denied summary judgment.

Likewise, *Kluver v. PPL Mont. LLC*, 2012 MT 321, 368 Mont. 101, 293 P.3d 817, is also instructive. In *Kluver*, adjoining property owners to the Colstrip power facility in Colstrip, Montana, sued the power facility for its alleged contamination of groundwater. *Kluver*, ¶2. The parties met in Billings to try and reach a negotiated settlement. *Id.* ¶3. After an all-day mediation, the parties reached an agreement. *Id.* The mediation produced a *Memorandum of Understanding*, which outlined the basic terms of the agreement. *Id.* ¶¶3-4. Included in the *Memorandum* were the terms for PPL's buyback of portions of Plaintiffs' property, including the amount of the sale and specific sections of property to be bought back. *Id.* ¶4. In addition to the basic sale terms, there included an option to purchase back the land conveyed to PPL by the Plaintiffs. *Id.* One of the attorneys who represented the Plaintiffs drafted the *Memorandum* in an email and sent it to all of the parties and their respective attorneys. *Id.* The *Memorandum* contained the following line: "[t]his Memorandum has been reviewed and approved by the

parties and their counsel copied herein.” *Id.* Ultimately, the Kluvers challenged enforceability of the MOU on various grounds.

Relevant to this case, *Kluser* found the MOU enforceable and specifically found it was not invalid because the documents which were to facilitate a land transaction were to be prepared at a later date. *Id.* ¶38. In essence, when parties agree to general terms of settlement, courts will not invalidate the agreement unless a party manifests an intent not to be bound by the settlement. *Id.* (citing *Hetherington*). In *Kluser*, the MOU was not contingent on the terms of the formal documents which were to be entered into a later date. Instead, the formal documents simply could not contradict the material terms outline in the MOU.

Similarly, in the present case there is no genuine issue of material fact the agreement between the parties contained all of the essential elements of the contract. The Grants, including Jay, were to purchase the property for \$2.8 million, which was a stretch, and in exchange the Perls would release the Grants from all future claims related to the property.

CONCLUSION

The parties entered into an enforceable settlement agreement whereby in exchange for the Grants, including Jay, purchasing the property located at 149 South Shooting Star Circle, Whitefish, Montana from the Perls for \$2.8 million, the Perls would release any claims related to the property located at 149 South Shooting Star Circle, Whitefish, Montana. The Defendant’s *Motion for Summary Judgment* is GRANTED as to this issue.

However, the Court will not dismiss the Plaintiffs claims as requested at this juncture as there is no evidence before it that the property has been purchased as agreed. Accordingly, the parties have 120 days to finalize their agreement for the purchase of the property and to stipulate to the dismissal of this matter. Otherwise, the parties shall appear before the Court on **Tuesday, May 31, 2022, at 8:30 a.m.** to show cause as to why this has not been completed. If the parties have not reached agreement, the Court will be prepared at that time to order immediate specific performance of the agreement, subject to commercially reasonable terms.

DATED AND ELECTRONICALLY SIGNED AS NOTED BELOW.