



**IT IS ORDERED as set forth below:**

**Date: July 14, 2010**

*C. Ray Mullins*

**C. Ray Mullins  
U.S. Bankruptcy Court Judge**

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**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION**

IN RE:

MAGNOLIA BEACH, LLC,

Debtor.

CHAPTER 11

CASE NO. 07-79221-CRM

JUDGE MULLINS

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**ORDER**

**THIS MATTER** is before the Court on the Motions for Summary Judgment (the “Motions”). The Motions were filed by Shirley Pittman, Kenneth J. Kelly, CBC Investments, LLC, Charles Lewis, Chris Dupree, William Lopresti, Brian & Laura Davidenko, Charles & Susan Saenger, Gregory Grantham, Thomas & Linda Timothy, Michael Aycox, J. Michael Pons, J. Wyn & Laurie Ayers, Marilyn Ayers, Cathy Ayers, Heather Girard, McIntosh Land Company, Inc., George H. Coogle, Jr., and George H. Coogle, III, Daniel J. Fitzpatrick, Ross G. Investments, LLC, Lynn & Sharon Dorman, GP Enterprises, LLC, Southern Exposures of FWB, LLC, and Sydney Crout (the “Contract Rescission Claimants”) (Doc. Nos. 344, 345, 362, 363, and 424). The Contract Rescission

Claimants seek the following relief:

(1) a determination that the Debtor breached agreements regarding the construction of certain condominiums;

(2) a determination that the Contract Rescission Claimants have a claim in amount of their earnest money deposits; and

(3) the release of any letters of credit or funds held in escrow to the respective Contract Rescission Claimant.

*Legal Standard for Summary Judgment*

Rule 56(c) of the Federal Rules of Civil Procedure, made applicable herein by Rules 7056 and 9014(c) of the Federal Rules of Bankruptcy Procedure, provides that summary judgment is appropriate if the Court determines that the “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

An issue of fact is “material” if, under the applicable substantive law, it is a legal element of the claim that could affect the outcome of the case. *Anderson*, 477 U.S. at 248. An issue is “genuine” “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Id.* A court must decide “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” *Id.* at 251-52.

*Legal Analysis and Conclusion*

The Contract Rescission Claimants entered into agreements with the Debtor to purchase condominiums. Section 4(c) of the agreements provides that the Debtor must

“complete and tender delivery (sp) the Unit to Purchaser within not more than twenty-four (24) months from the Effective Date hereof. Provided, however, the time periods set forth herein may be extended due to delays caused by Acts of God, and the time periods do not include delays caused solely by the Purchaser.” The parties do not dispute that the Debtor failed to deliver the condominium units to the Contract Rescission Claimants within 24 months.

The Debtor contends that its failure to deliver the condominium units was excused because an “Act of God”, in particular the hurricanes of 2005, caused material and labor shortages. According to the Florida Supreme Court, an “Act of God”:

must be an act or occurrence so extraordinary and unprecedented that human foresight could not foresee or guard against it, and the effect of which could not be prevented or avoided by the exercise of reasonable prudence, diligence, and care or by the use of those means which the situation of the party renders it reasonable that he should employ. It must be the sole proximate cause of the nonperformance, without the participation of man, whether by active intervention or negligence or failure to act. When performance becomes impossible by reason of contingencies which should have been foreseen and provided against in the contract, the promisor is held answerable.

*Florida Power Corp. v. Tallahassee*, 154 Fla. 638, 646 (Fla. 1994). The burden is on the party asserting the defense to establish that an Act of God was the sole cause of the breach.

*Atlantic Coast Line R. Co. v. Hendry*, 150 So. 598, 598 (Fla. 1933); *State Road Dep't v.*

*United States*, 85 F. Supp. 489 (D. Fla. 1949). All cases addressing the Act of God defense involved natural forces that destroyed buildings, transformers, bridges or ships. *See e.g.*

*Cornish et al. v. Renaissance Hotel, et al.*, 2008 U.S. Dist. LEXIS 31080 (M.D. Fla. 2008);

*Florida Power Corp. v. Tallahassee*, 154 Fla. 638, 646 (Fla. 1994); *Atlantic Coast Line R.*

*Co. v. Hendry*, 150 So. 598, 598 (Fla. 1933); *State Road Dep't v. United States*, 85 F. Supp. 489 (D. Fla. 1949).

According to the undisputed facts, the 2005 hurricanes were not the “sole proximate

cause” of the construction delays. The Contract Rescission Claimants provided affidavits from Michael Gordon, the Building Official for the Bay County Development Services Department and Wayne Gentry, a professional meteorologist in Panama City. Mr. Gentry reviewed National Weather Service data from March 2005 to September 2007 and concluded “that no unusual weather phenomenon, hurricane, or tropical storm occurred in Bay County, Florida.” Mr. Gordon states that he is “not aware of any substantial damage to Panama City Beach or any of the construction projects on-going at that time in this area by Hurricane Katrina.”

The Debtor provides two letters from contractors in support of its claim that hurricanes in 2005 were the “sole cause” of the construction delays. According to the letters, the contractors state that their performance was delayed because they accepted contracts to work on hurricane relief projects. These letters suggest that the construction delays were the result of decisions, made by suppliers of labor and material, to direct their resources to alternative projects.

The Debtor also contends that its performance should be excused because material and labor shortages made performance impossible. The doctrine of impossibility “refers to those factual situations, too numerous to catalog, where the purposes, for which the contract was made, have, on one side, become impossible to perform.” *Crown Ice Machine Leasing Co., v. Sam Senter Farms, Inc.*, 174 So. 2d 614, 617 (Fla. Dist. Ct. App. 1965). An “unexpected difficulty, expense, or hardship” does not excuse performance. *Marshall Construction, Ltd. v. Coastal Sheet Metal & Roofing, Inc.*, 569 So.2d 845, 848 (Fla. Cir. Ct. 1990). The only Florida court that has addressed this issue held that the “unavailability of materials, strikes, and labor problems” did not excuse performance. *Arbid v. G.L. Homes of Lake Charleston Associates, Ltd.*, No. 94-17778-RL, at \*6 (Fla. Palm Beach County Ct., Feb.

7, 1995). Therefore, the Debtor's allegations of material and labor shortages do not support the defense of impossibility.

In conclusion, the Contract Rescission Claimants have established that there is no genuine issue of material fact. The Debtor breached the agreements by not delivering the condominium units to the Contract Rescission Claimants within 24 months. Accordingly,

**IT IS ORDERED** that the relief sought in the Motions be and is hereby **GRANTED**.

Judgment shall be entered against the Debtor by separate order. The Clerk's Office is directed to serve a copy of this Order upon all interested parties.

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