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Jun 23 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
The Honorable Marvin H. Dukes, III, Master in Equity

Case No. 2014-CP-07-0052
Appellate Case No. 2019-001270

Lady Beaufort, LLC & Tideland Realty, Inc.....Appellants,
v.

Hird Island Investments, Inc., Sherwood N. Fender, Addison D. Fender, Martha B. Fender, William B.
Bowen, Lady Kemmerlin, LLC, Brickyard Holdings, Inc., and A&K Holding Co., LLC, Defendants,
And

William M. Bowen, Third-Party Plaintiff,
v.

James S. Kerr and Matt Trumps, Third-Party Defendants,
Of Which Hird Island Investments, Inc. and Sherwood N. Fender are the Respondents.

AND

Case No. 2014-CP-07-0052
Appellate Case No. 2018-001969

Lady Beaufort, LLC & Tideland Realty, Inc.,..... Respondents/Appellants,
v.

Hird Island Investments, Inc., Sherwood N. Fender, Addison D. Fender, Martha B. Fender, William B.
Bowen, Lady Kemmerlin, LLC, Brickyard Holdings, Inc., and A&K Holding Co., LLC, Defendants,
And

William M. Bowen, Third-Party Plaintiff,
v.

James S. Kerr and Matt Trumps, Third-Party Defendants,
Of Which Hird Island Investments, Inc. and Sherwood N. Fender are the Appellants/Respondents.

PETITION FOR REHEARING *EN BANC*
BY LADY BEAUFORT, LLC & TIDELAND REALTY, INC.

Lady Beaufort, LLC (“Lady Beaufort”) and Tideland Realty, Inc. (“Tideland”) (hereafter, collectively referred to as “Lady Beaufort”) petition this Court for rehearing of the issues raised in two appeals decided by this Court on June 8, 2022.

I. INTRODUCTION

Regarding a failed commercial real estate transaction between Lady Beaufort (the buyer) and Hird Island Investments (“Hird”) (the seller), this Court ruled that certain issues discovered immediately prior to closing (i) did not prevent the passage of good and marketable title free of liens and encumbrances and (ii) did not constitute “unsatisfied contingencies” per the terms of the contract for sale that would extend the closing date by five business days. Accordingly, the Court found Hird did not breach the contract nor commit a fraudulent act by failing to close and instead selling the property to a third party during the five-business-day window after the original closing date.

Specifically, the issues discovered by Lady Beaufort were: (i) an undisclosed tax lien, (ii) the lack of the proper documentation allowing Hird, a dissolved Georgia entity, to sell property, and (iii) the lack of a certificate of tax compliance as required by South Carolina law. Prior to and on the day of closing, Lady Beaufort suggested reasonable, non-burdensome solutions to each of these issues that would allow the deal to close and permit Lady Beaufort to verify it was receiving good and marketable title as required under the contract. In furtherance of that end, Lady Beaufort sought title insurance, but the insurers took the same view as Lady Beaufort and would not issue title insurance without resolution of these issues.

In spite of these circumstances, and in spite of the unrefuted evidence in the record that the issues precluded passage of good and marketable title, this Court found (i) that Hird was able and prepared to convey good and marketable title free of liens and encumbrances on the day of

closing, (ii) that the issues raised by Lady Beaufort were not “unsatisfied contingencies” per the contract, and that (iii) the absence of any “unsatisfied contingency” meant that Hird was not liable to Lady Beaufort for selling the property to a third party.

The Court overlooked and/or misapprehended that, because the term “unsatisfied contingencies” is undefined and is not clear and unambiguous, the parties’ intention as to that contractual term is a question of fact, and the Master’s finding that the issues discovered by Lady Beaufort were intended to be encompassed by the term “unsatisfied contingencies” is supported by ample evidence. The Court further misapprehended the intention of the contractual term that would extend the closing date of the contract for “unsatisfied contingencies” – namely, unforeseen events that would create doubt about the marketability of title and prevent a reasonable party from closing. Finally, the Court’s ruling overlooks policy considerations relating to commercial real estate deals.

For these reasons, Lady Beaufort submits this matter is proper for rehearing *en banc*.

II. FACTUAL BACKGROUND

On August 19, 2013, Lady Beaufort entered into a contract with Hird for the purchase of a 2.99-acre parcel of real estate located in Beaufort County. Tideland Realty was the broker. **R. p. 076.** The contract provided a due diligence period ending on October 1, 2013, with closing to occur within 7 days of that time. The closing date would be extended by five business days if there were any “unsatisfied contingencies.” Hird was required to convey good and marketable title to Lady Beaufort free and clear of any liens or encumbrances.

Following completion of the due diligence period, closing was scheduled for October 7, 2013. However, certain irregularities then came to light:

- (i) a tax lien was discovered shortly before closing that had been filed after Respondents conducted their title search;

- (ii) by statute, because the property being conveyed constituted more than 50% of the assets of the entity selling it, any taxes owed would constitute a lien against the assets of the buyer unless a certificate of tax compliance was provided to the buyer. This did not occur.
- (iii) As the seller was a dissolved entity, a question arose as to whether it could properly transfer title.

These issues remained outstanding on the scheduled closing date and prevented the closing. They also prevented the issuance of title insurance. The transaction did not close on October 7, and the parties' attorneys continued thereafter to work together to resolve these issues and close the deal.

On October 10, 2013, while the parties' counsel still attempted to close, Hird hired new counsel and sold the property to a third party, Inverness LLC ("Inverness"). The transaction with Inverness included an additional property, meaning that Mr. Fender received an additional \$60,000 in proceeds, which was important to Mr. Fender as he had pending tax debts. Upon learning of the sale to Inverness, Lady Beaufort filed a *lis pendens* on the property and sued to undo the sale.

III. PROCEDURAL BACKGROUND

Lady Beaufort filed suit against Inverness and Hird on January 7, 2014, alleging breach of contract and fraudulent conveyance relating to the sale of the property to Inverness while Hird remained under contract for the sale of that property with Lady Beaufort. **R. p. 039.** On May 30, 2014, Lady Beaufort settled with Inverness and acquired the subject property for \$25,000.00 more than the price agreed with Hird. The complaint was amended to name Sherwood N. Fender ("Fender"), the principal of Hird, as a defendant (hereafter, Hird and Fender will be collectively referred to as "Hird"). 2nd Amd. Compl., **R. p. 060.** The Second Amended Complaint included claims for breach of contract against Hird and breach of contract accompanied by a fraudulent

act and negligent misrepresentation against both Hird and Sherwood Fender individually.

A bench trial was held on March 1, 2017. On May 11, 2017, judgment was entered in favor of Lady Beaufort for \$33,654.15 in actual damages and prejudgment interest, in favor of Tideland Realty for \$17,500.17 in actual damages and prejudgment interest, and for \$53,924.41 in attorneys' fees and costs. **R. p. 018.**

Hird moved for reconsideration on May 19, 2017 (**R. p. 070**), and the Court conducted a hearing on that motion on November 13, 2017. On February 14, 2018, Hird's motion was denied as to reconsideration of Hird's liability and Lady Beaufort's actual damages, but the court allowed additional evidence as to the award of attorneys' fees. **R. p. 013.** A hearing on the amount of fees was held July 23, 2018.

On October 26, 2018, the trial court entered an order reducing Lady Beaufort's attorneys' fee award from \$53,924.41 to \$17,857.00. **R. p. 001.** On November 5, 2018, Hird filed a notice of appeal of both the underlying judgment and the amended judgment. **R. p. 037.** On November 15, 2018, Lady Beaufort cross-appealed with regard to the amended judgment's reduction of attorneys' fees. **R. p. 035.**

Subsequently, Lady Beaufort learned that Mr. Fender had engaged in seemingly fraudulent transfers of property immediately before and on the day of trial, transferring property to family and business partners for no consideration. Concerned about its ability to recover its judgment, Lady Beaufort sought to undo the transfers pursuant to the Statute of Elizabeth. Mr. Fender instead sought to obtain a bond from the trial court that would remove the judgment lien from his remaining assets and allow him to post a bond that would not protect the attorneys' fee award that in Lady Beaufort's estimation it was entitled to. The trial court granted Mr. Fender's motion to post a bond, and Lady Beaufort appealed on July 31, 2019.

Both appeals were heard by the Court of Appeals on April 7, 2022, and a ruling followed on June 8, 2022 in favor of Hird. This Petition for Rehearing follows.

IV. ARGUMENT

The purchase and sale contract provided for a five-day extension to the closing date for any “unsatisfied contingencies,” an undefined term in the contract. In concluding that the issues that delayed the closing did not constitute “unsatisfied contingencies,” the Court of Appeals overlooked that the evidence establishing the intent of the parties with regard to that term, which is a question of fact. Further, it misapprehended the intent of the contract and overlooked policy considerations relating to commercial real estate transactions.

A. The Master Properly Considered Parol Evidence in Interpreting the Contract, and this Court Overlooked the Evidence Relied Upon by the Master Regarding the Intent of the Parties

The interpretation of a contractual provision is a question of law; however, if a provision is not clear and unambiguous, interpreting the provision requires determining the intention of the parties, and the parties’ intentions are questions of fact. *See, e.g., HK New Plan Exch. Prop. Owner I, LLC v. Coker*, 375 S.C. 18, 23, 649 S.E.2d 181,184 (Ct. App. 2007). Factual findings are to be affirmed on appeal unless they are without any evidence reasonably supporting them. *E.g., Carjow, LLC v. Simmons*, 349 S.C. 514, 563 S.E.2d 359 (Ct. App. 2002). Parol evidence is admissible for the purpose of determining the parties’ intentions. *HK New Plan*, 375 S.C. at 23–24, 649 S.E.2d at 184.

The term “unsatisfied contingencies” is not defined in the contract. In the context of a real estate deal, a “contingency” is something a party must do before the other party is required to perform. *Desmear Sys. Inc. v. Vines*, 305 Ga. App. 730, 732, 700 S.E.2d 711, 713 (2010). Accordingly and appropriately, Lady Beaufort adduced testimony regarding what is customary in

commercial real estate transactions to assist the Court in its interpretation of the term, and in understanding what is meant by “good and marketable title.” **R. p. 200–01.**

For example, Mr. Rogers testified that the tax lien would prevent the passage of good and marketable title, especially in conjunction with the lack of a certificate of tax compliance:

And the problem is if, in fact, we were to close, ‘we’ meaning Lady Beaufort, on this purchase and didn’t follow these steps [to obtain a certificate of tax compliance] and the Department of Revenue was to file a tax lien against Hird Island post-closing, that that would be a lien against the property that the buyer would be required to pay. Okay? Which would be, you know, a lien or encumbrance on the property which is contrary to good and marketable title.

R. p. 101:4–13. He further testified:

Q. Was this tax lien disclosed to you?

A. No.

Q. Was it disclosed by Mr. Fender?

A. No.

Q. Okay. And so if everything had gone to plan and the documents had been transferred and then, like you said, you updated title and found this lien, would you have been able to close on October 7th?

A. No.

R. p. 186:20–187:5. Mr. Roger’s understanding is in keeping with the legal definition of “good and marketable title,” which is:

[title] acceptable to a reasonable purchaser, informed as to the facts and their legal meaning, willing to perform his contract in the exercise of that prudence which business men usually bring to bear on such transactions.

Black’s Law Dictionary (rev. 4th ed. 1968).

As a title insurance company refused to write title insurance on the property given the issues discovered by Lady Beaufort, it is fair to say a reasonable purchaser would not find it prudent to perform the contract and, therefore, that title is not good and marketable. The trial

court, based in part on Mr. Rogers’ testimony about what is customary in commercial real estate transactions, agreed and found that the issues raised by Lady Beaufort reflected necessary actions by Hird in order to convey marketable title. Finding that those actions were not taken prior to or on the closing deadline, the Master ruled that the contract was automatically extended by five business days per the terms of the contract. Further, it weighed the testimony of the respective parties and determined that the deal failed to close because Mr. Fender grew paranoid, stopped cooperating, and sold the property to Inverness in a transaction that yielded him more money, while his closing attorney was still trying to close the deal with Lady Beaufort.

The Court of Appeals concluded differently, ruling that the issues were *not* unsatisfied contingencies. However, what the parties intended regarding the term “unsatisfied contingencies” and whether a particular contingency is satisfied are questions of fact, and the Master’s findings can only be reversed if they are without evidence to support them. They are not. The trial court properly found, based on the evidence including Mr. Rogers’ testimony, that the undefined term “unsatisfied contingencies” encompassed the issues raised by Lady Beaufort. And as only five business days were allotted by the contract for the resolution of any unsatisfied contingencies, the Master properly concluded that these issues—which could be resolved in that timeframe—were issues of the nature contemplated by the parties when referring to “unsatisfied contingencies” (*see infra*).

It was error to reverse the trial court’s finding of the defendants’ liability.

B. The Parties’ Intent

The contract between Lady Beaufort and Hird required the seller to convey good and marketable title at closing, free and clear of any liens or encumbrances. After the end of the due diligence period but prior to closing, an undisclosed tax lien was discovered on the property. It was also discovered that Hird was a dissolved Georgia entity, raising doubt as to whether it was

permitted to transfer the property. Finally, because Hird was selling more than 50% of its assets, a certificate of tax compliance was required under South Carolina law; otherwise, any tax generated and due on or before the date of closing would constitute a lien in the hands of the purchase — in other words, title would not be free from all liens and encumbrances.

The contract provided a short extension of time to allow the parties the opportunity to solve exactly these sorts of issues and allow the buyer to verify that good and marketable title would pass, extending the closing date by five days for any “unsatisfied contingencies.” Prior to closing, at closing, and after the attempted closing, Lady Beaufort’s closing attorney, Carl Rogers, provided options of non-burdensome steps that Hird could take to solve all of these issues at closing, namely (i) signing an affidavit that the sale was part of Hird’s winding up process, (ii) submitting a form prepared by Mr. Rogers requesting a certificate of tax compliance, (iii) reinstating the corporation with the Georgia Secretary of State, (iv) indemnifying Lady Beaufort, or (v) obtaining title insurance. **R. pp. 189–95.**

Hird refused to take any of these steps. As Hird’s principal testified at trial, he had grown paranoid that Lady Beaufort was trying to back out of the deal, and so he sought another buyer. **R. p. 256–57.** However, Hird’s closing attorney, Derek Gilbert, evidently believed that the contract remained in force, as he continued to work with Mr. Rogers to close the deal, unaware that Hird had sold the property to Inverness.

The short duration of the extension for unsatisfied contingencies is illustrative of the intent behind the inclusion of this term in the contract. It contemplated issues that could jeopardize the closing but that could be solved within a short period of time. That these three issues were sufficiently material such that they could jeopardize the transaction is demonstrated by the fact that Lady Beaufort was unable to obtain title insurance. That they could be solved

within the allotted five business days is demonstrated by the options presented to Hird by Mr. Rogers, options that would simply require a signature from its principal.

The trial court recognized that the spirit and intent of the contract was to further the mutual goal of closing the deal by allowing additional time to solve unexpected issues. The trial court recognized that Lady Beaufort acted in good faith and, while still working in good faith with Hird's counsel to close the deal, had the property sold out from under them and without forewarning. This Court overlooked or misapprehended these elements, and this Court should grant rehearing and affirm the trial court with regard to the Defendants' liability.

C. Policy Considerations

Parties purchasing commercial real estate for millions of dollars must be able to verify that the property they purchase is free of liens and encumbrances and ensure they are protected in the event an undisclosed issue becomes a problem in the future. To this end, buyers hire closing attorneys and seek title insurance as a matter of course.

In holding that the existence of a tax lien, the non-existence of the seller as an entity, the lack of a certificate of tax compliance, and the unwillingness of any title insurance company to insure the title to this piece of property do not constitute "unsatisfied contingencies" and do not prevent passage of clear and marketable title, this Court signals a radical sea change in the heavily regulated real estate market in South Carolina. In effect, this Court's holding means that a prospective buyer's inability to verify that title is good and marketable and free and clear of encumbrances does not matter, even in the face of a contractual requirement that good and marketable title be conveyed.

When a title insurance company will not insure title to a property, it invariably raises title concerns in the mind of a reasonable buyer. By definition then, title would not be marketable, as the definition is tied to what a reasonable buyer would due in the customary exercise of

prudence. As a matter of public policy, a party cannot be forced to close a transaction in such a circumstance or penalized for requesting that the seller address the problems.

Hird has argued that such assurances are unnecessary because other means of adequate assurance exist, such as the provision of a general warranty deed. However, a warranty deed does not protect a buyer from being sued; it only provides the buyer an indemnity claim against the seller, whose solvency and ability to defend and indemnify the buyer are not guaranteed.

The better policy is to ensure buyers are able to verify that good and marketable title is being passed and, if necessary, work with the seller to solve any defects in title so that the transaction may proceed. The trial court's ruling on liability furthered such a policy, and it should be affirmed.

V. CONCLUSION

Lady Beaufort requests this Court grant this Petition for Rehearing *En Banc*, affirm the Master's ruling as to the Defendants' liability, and reverse the Master's reduction the amount of attorneys' fees awarded to Lady Beaufort.

Respectfully submitted,

EPTING & RANNIK, LLC

This 23rd day of June, 2022
Charleston, South Carolina

/s/ Jaan Rannik
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THE STATE OF SOUTH CAROLINA
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APPEAL FROM BEAUFORT COUNTY
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The Honorable Marvin H. Dukes, III, Master in Equity

Case No. 2014-CP-07-0052
Appellate Case No. 2019-001270

Lady Beaufort, LLC & Tideland Realty, Inc. Realty, Inc. Appellants,

v.

Hird Island Investments, Inc., Sherwood N. Fender, Addison D. Fender, Martha B. Fender, William B. Bowen, Lady Kemmerlin, LLC, Brickyard Holdings, Inc., and A&K Holding Co., LLC, Defendants,

And

William M. Bowen, Third-Party Plaintiff,

v.

James S. Kerr and Matt Trumps, Third-Party Defendants,

Of Which Hird Island Investments, Inc. and Sherwood N. Fender are the Respondents.

AND

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And

William M. Bowen, Third-Party Plaintiff,

v.

James S. Kerr and Matt Trumps, Third-Party Defendants,

Of Which Hird Island Investments, Inc. and Sherwood N. Fender are the Appellants/Respondents.

PROOF OF SERVICE
PETITION FOR REHEARING EN BANC BY LADY BEAUFORT, LLC & TIDELAND
REALTY, INC.

I certify that I have served the Petition for Rehearing *En Banc* by Lady Beaufort, LLC & Tideland Realty, Inc. dated June 23, 2022, on opposing counsel via e-mail, on June 23, 2022, addressed to Respondents' attorney of record as follows:

H. Fred Kuhn, Jr., Esquire
P.O. Drawer 507
Beaufort, SC 29901
fred@mossandkuhn.com

A copy of the email is attached to this Proof of Service as Exhibit A.

By /s/ Angela Gross
Angela Gross
Legal Assistant to Jaan G. Rannik, Esq.
EPTING & RANNIK, LLC
46A State Street, Charleston, SC 29401

Angela Gross

From: Angela Gross
Sent: Thursday, June 23, 2022 4:53 PM
To: fred@mossandkuhn.com
Cc: sue@mossandkuhn.com; Jaan Rannik; Andrew K. Epting; Angela Gross
Subject: Lady Beaufort, LLC v. v. Hird Island Investments, 2018-001969 & 2019-001270
Attachments: 2022 06 23 - Ltr to Ct. App enclosing fee for Petition for Rehearing.pdf; 2022 06 23 - Petition for Rehearing by Lady Beaufort & Tideland Realty.pdf

Mr. Kuhn,

Attached for service is the Petition for Rehearing by Lady Beaufort, LLC and Tideland Realty, Inc. in the above appeals.

A Proof of Service of the Petition will follow under separate cover email.

With kindest regards,



Angela Gross
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RECEIVED

Jun 23 2022

SC Court of Appeals

June 23, 2022

The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: *Lady Beaufort, LLC & Tidelands Realty, Inc. v. Hird Island Investments, Inc. and
Sherwood Fender*
Case No.: 2014-CP-07-0052
Appellate Case No.(s): 2019-001270 & 2018-001969

Dear Ms. Kitchings:

Enclosed please find our firm's check in the amount of \$50.00 to cover the filing fee associated with the Petition for Rehearing *En Banc* by Lady Beaufort, LLC and Tidelands Realty, Inc. which was electronically filed, along with the Proof of Service, using the AIS e-filing system on June 23, 2022 in the above appeal.

With kindest regards,

EPTING & RANNIK, LLC

/s/ *Angela*

Angela Gross
Legal Assistnt to Jaan G. Rannik

/agg

Enclosure

cc: Fred Kuhn, Esq.