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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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 Nos. 2018-001969, 2019-001270

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

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 Respondents.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR THE RESPONDENTS

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether the South Carolina Court of Appeals correctly held:

    a. That the existence of a $514.01 tax lien does not prevent the conveyance of good and marketable title where the lien is to be paid in full and satisfied at closing;

    b. That the absence of a Certificate of Tax Compliance, as referenced in S.C. Code Ann. §12-54-124 (2014) does not prevent the conveyance of good and marketable title, particularly where the provision of a Certificate of Tax Compliance is not a contractual requirement;

    c. That the administrative dissolution of the corporate seller does not prevent the passage of good and marketable title where the applicable statutes expressly authorize an administratively dissolved corporation to continue its corporate existence for the purpose of liquidating its assets;

    d. That the seller was capable of conveying good and marketable title to the buyer;

    e. That the seller did not breach any contractual requirements and there were no "unsatisfied contingencies" that prevented closing within the strict time deadlines set by the contract;

    f. That the transaction between these parties was not contingent upon the ability of the buyer to obtain title insurance; and

    g. That the Trial Court's rulings were controlled by errors of law.

2. The Court of Appeals correctly reversed the Trial Court's finding of seller's liability.

3. The Court of Appeals correctly declined to award Petitioner (the buyer) its attorneys' fees.

COUNTER-STATEMENT OF INTRODUCTION

There is nothing earth shattering about the decision of the Court of Appeals in this case. The decision is *per curiam*. There are no novel questions of law. The decision does not conflict with any prior decisions of this Court, but rather, extensively relies upon prior decisions of this Court. There are no substantial constitutional issues directly involved, nor are there any federal questions. In short, there are no "special and important reasons" justifying the granting of a Writ of Certiorari. Rule 242, SCACR.

This is a simple alleged breach of contract case, to which well established contract law has been applied.

There is nothing unusual about a pre-existing lien, whether it be a tax lien or a mortgage, being paid and satisfied in full at the time of closing.

The Certificate of Tax Compliance referenced in S.C. Code Ann. §12-54-124 (2014) is not a prerequisite to good and marketable title, particularly when neither party asked for such in the contract.

Finally, both Georgia law and South Carolina law are crystal clear that a corporation that has been administratively dissolved continues its corporate existence in order to wind up and liquidate its business and its affairs. Georgia Code Ann. §14-2-1405, 1421(c) (2020) and S.C. Code Ann. §33-14-105(a)(2), 210(d) (2006).

In short, the South Carolina Court of Appeals applied well established law to a relatively simple set of facts to conclude that the buyer did not breach its contract with the seller.

COUNTER-STATEMENT OF THE CASE

This action arises out of the alleged breach of an Agreement to Buy and Sell Real Estate dated August 19, 2013 wherein the Petitioner Lady Beaufort, LLC ("Lady Beaufort") contracted to buy and the Respondent Hird Island Investments, Inc. ("Hird Island") contracted to sell a 2.99 acre parcel of unimproved real property located in Beaufort County, South Carolina (the "Property"). ROA, pg. 76.

Sherwood Fender, the President of Hird Island, needed to sell this property quickly because he was in dire financial straits or, as he put it, he had "gotten crosswise financially, personally." ROA, pg. 159. Fender approached Matt Trumps, a realtor with Tideland Realty, and asked Mr. Trumps to approach James Kerr about purchasing the parcel. Mr. Kerr was a real estate developer and the sole owner of Lady Beaufort. *Id.,* pp. 100 and 102. Mr. Kerr had previously created Lady Beaufort to acquire from Mr. Fender a .34 acre parcel of property that was adjacent to the subject property. Since Lady Beaufort already owned the adjacent property, Mr. Fender asked Mr. Trumps to approach Mr. Kerr to see if he was interested in purchasing the subject property. *Id.,* pp. 103 - 104.

Mr. Trumps subsequently approached Mr. Kerr and told him that Mr. Fender "needs to sell" the subject property. Mr. Kerr desired to purchase the property and, on August 19, 2013 he executed, on behalf of Lady Beaufort, an Agreement/Contract to Buy and Sell Real Estate which was presented to him by Mr. Trumps, which had been executed by Mr. Fender on behalf of Hird Island the day before, August 18, 2013. *Id.*, pp. 106 and pg. 269. This Contract has a purchase price of $260,000.00. It does not contain a financing contingency. *Id.*

The "Effective Date" for the contract was August 19, 2013. ROA, pg. 117.

The Contract provided for a "Due Diligence Period", ending no later than 30 "Business Days" after the "Effective Date." *Id.*, Tab 1, Section 12.

When first presented with the proposed Contract, Mr. Fender questioned the need for 30 days of due diligence, stating "The man who is buying it already owns the other half. He knows more about this property than I do.", but he agreed to this clause none the less. He stressed, however, that "time has got to be of the essence" because of his pressing financial needs. *Id.*, pg. 223.

With respect to the closing deadline, the parties deviated from the standard, pre-printed form of the contract, and instead inserted the following special clause:

> "Closing **shall** take place within seven (7) days of the end of the due diligence period."

ROA, pg. 275 (emphasis added). In recognition of the fact that the above closing deadline references simply "days" (as opposed to "Business Days" utilized in calculating the Due Diligence Period) Lady Beaufort agreed that the last day to close under a "worse case" scenario was October 8, 2013. ROA, pg. 199. Accordingly, the closing of the transaction was scheduled for October 7, 2013. *Id.,* pg. 199 and 141.

With respect to the closing date, the contract provides for "an automatic extension of 5 business days for an unsatisfied contingency through no fault of either party." ROA, pg. 269, ¶4. The contract does not define what constitutes an "unsatisfied contingency."

Finally, the Contract contains the following provision which is emphasized and underlined, set forth in the first paragraph on the first page of the Contract:

> "Time is of the essence with respect to all provisions of this Contract stipulating time, deadline, or performance periods."

ROA, pg. 269, ¶1(G).

Lady Beaufort hired attorney Carl Rogers of Charleston to represent it in connection with the closing. ROA, pg. 168. Hird Island hired attorney Derek Gilbert of Beaufort to represent it.

On October 4th Mr. Fender, on behalf of Hird Island, signed all of the "closing documents" and delivered them to his attorney, Mr. Gilbert, in anticipation of closing on October 7th. These documents included the Deed to Lady Beaufort, the Seller's Affidavit, a 1099-S, a Corporate Resolution authorizing the sale, and a Power of Attorney authorizing Mr. Gilbert and his real estate paralegal to execute any documents on behalf of Hird Island necessary to close the transaction. *Id.,* pg. 261 – 262 and pg. 357. On that same date, these documents were forwarded by Mr. Gilbert's office to Carl Rogers by email, with a short cover note stating:

> "Carl, in accordance with the contract, please find attached a signed deed and various affidavits. Our fee for the HUD Statement will be $350. Please forward a proposed HUD for our review **we are ready to exchange when you are**. Thanks, Christina Wilson, Real Estate Paralegal, Gilbert Law Firm, LLC."

ROA, pg. 358 (emphasis added).

Lady Beaufort, however, refused to tender the purchase price or to close the transaction. In his Order of May 11, 2017 Judge Dukes recites three (3) reasons for Lady Beaufort's refusal to close, as follows:

First, Hird Island had been administratively dissolved in its state of incorporation, Georgia. ROA, pg. 18, Finding of Fact #8.

Second, a Certificate of Tax Compliance referenced in §12-54-124 of the South Carolina Code of Laws had not been obtained. *Id.,* Finding of Fact #11.

Third, the State of South Carolina had filed a tax lien on the property on September 27, 2013. *Id.*, Finding of Fact #12.

Judge Dukes concluded that the above three (3) facts constituted "unsatisfied contingencies" within the meaning of the Contract, thereby extending the deadline for closing by five (5) business days, from October 8 to October 15, 2013. ROA, pg. 21.

Lady Beaufort's own attorney, Mr. Rogers, testified that by the scheduled closing date the issue regarding the administrative dissolution of Hird Island had been resolved, ROA, pp. 181 - 182, and the tax lien could have been paid and satisfied at closing, ROA, pp. 201 - 204, but he still had an issue with the lack of a certificate of compliance. ROA, pp. 183 – 185.

Mr. Fender testified that he wanted the closing with Lady Beaufort to go through, and that he wished it would have closed. As he stated:

> "I got no reason to not want to sell. . . . It served me no useful purpose to not close. As a matter of fact, I was very upset that it wouldn't."

Id., pg. 224, lines 16 – 22. When it still hadn't closed by October 8th Mr. Fender let another prospective buyer, Inverness, know that the closing had fallen through. Inverness was still interested in buying the property, as well as an additional piece of property and indicated it could have the money in two (2) days. On October 10th the closing with Inverness occurred, with Inverness purchasing the subject property for $245,000.00[1], as well as a second piece of property for $60,000.00 which was $40,000 to $50,000 under its market value. ROA, pp. 224, 251, 253, 254 and 259. None of the "unsatisfied contingencies" referenced by Judge Dukes in his Order were impediments to the Inverness closing. ROA, pg. 229. The tax lien was resolved by simply paying it out of the sales proceeds at closing. ROA, pg. 378, line 1303. The tax lien was for $480.01, plus $34.00 in court costs. ROA, pp. 202 and 339.

[1] The $245,000.00 sale to Inverness did not involve a real estate commission, while the $260,000.00 contract with Lady Beaufort would have involved a $13,000.00 real estate commission being paid to Tideland Realty.

When Lady Beaufort learned of the sale to Inverness it promptly filed a lis pendens on the subject property and commenced this lawsuit against Hird Island and Inverness. Lady Beaufort subsequently settled its claim against Inverness by purchasing the subject property from Inverness for $285,000.00. ROA, pp. 187, 197 and 317.

I. THE COURT OF APPEALS PROPERLY CONCLUDED THAT HIRD ISLAND DID NOT BREACH ITS CONTRACT WITH LADY BEAUFORT, WHERE LADY BEAUFORT WAS THE ONE WHO REFUSED TO CLOSE THE TRANSACTION PRIOR TO THE CLOSING DATE DEADLINE.[2]

Hird Island was not the party who refused to close this subject transaction. It was Lady Beaufort who refused to close prior to October 8th deadline, claiming that "there was some issues of title." ROA, pg. 109, lines 4 – 8. The evidence is uncontroverted that the purchase price was never tendered by Lady Beaufort to Hird Island and, indeed, Palmetto State Bank never released the funds. ROA, pg. 200. Lady Beaufort attempts to justify its refusal to close this transaction by claiming that there were unsatisfied "contingencies" that prevented closing by October 8th, thereby triggering an automatic extension of five (5) business days to October 15, 2013, so that the sale on October 10th to Inverness occurred while the Contract was still in effect, thereby constituting a breach of the contract. ROA, pg. 19 – 20, Finding of Fact # 9, 11, 12, 13, and 20, and pg. 21. Lady Beaufort claims that these unsatisfied contingencies were: (1) The administrative dissolution of Hird Island, (2) The provision of a Certificate of Tax Compliance, and (3) The tax lien. *Id.*, pg. 21.

[2] The Petition for Writ of Certiorari is inherently confusing, inasmuch as the three (3) "Questions Presented" enumerated on pg. 1 of the Petition do not align with the five (5) "Arguments" set forth in the body of the Petition on pp. 5 – 16. The Respondent has organized this Return so as to reply to the "Arguments," as opposed to the "Questions Presented," inasmuch as a question which is not argued is deemed abandoned. See, *Bean v. South Carolina Central Railroad Company, Inc.*, 392 S.C. 532, 559, 709 S.E.2d 99, 113 (Ct. App. 2011).

Initially, it must be noted that a "contingency" is not defined in the Contract. ROA, pg. 269, 134 and 201. The Master in Equity, noting that "contingency" is not a defined term in the contract, ROA, pg. 21, does not expressly set forth his definition or interpretation of what constitutes an unsatisfied "contingency." At the hearing on the Motion to Reconsider, Lady Beaufort and Tideland Realty's counsel agreed that an unsatisfied contingency is something that would have "prevented the passage of marketable title". Transcript of November 13, 2017, pg. 24, line 20 to pg. 25, line 19. In South Carolina, "marketable title is one free from encumbrances and any reasonable doubt to its validity." *Gibbs v. G.K.H., Inc.*, 311 S.C. 103, 105, 427 S.E.2d 701, 702 (Ct. App. 1993). "It is a title which a reasonable purchaser well-informed as to the facts and their legal significance, is ready and willing to accept." *Id.*

In its Petition, Lady Beaufort claims that the administrative dissolution of Hird Island in its state of incorporation, Georgia, constitutes an unsatisfied contingency. Petition for Writ of Certiorari, pp. 6 – 7.

Hird Island is a Georgia corporation authorized to do business in South Carolina. Its corporate charter was administratively forfeited by the Georgia Secretary of State. ROA, pp. 171 – 172 and 281. This information was publicly available online. *Id.,* pg. 173, lines 15 – 17. Initially, this fact was of concern to Lady Beaufort's closing attorney Mr. Rogers. *Id.,* pg. 174, lines 16 – 22. Upon doing further research, however, Mr. Rogers and his title insurance company discovered that this was not an impediment to closing or the passage of marketable title. Specifically, Georgia has a statute which provides that a corporation that is administratively dissolved continues its corporate existence for the purpose of any business necessary to wind up and liquidate its business and affairs. Georgia Code Ann. §14-2-1421(c). South Carolina has a nearly identical statute. See S.C. Code Ann. §33-14-210(d). According to Lady Beaufort's closing

attorney, Carl Rogers, these statutes resolved this issue and satisfied the title insurance company. ROA, pp. 181 – 182. Georgia Code Ann. §§14-2-1405, 1421(c) (2020) ("A corporation administratively dissolved continues its corporate existence but may not carry on any business except that necessary to wind up and liquidate its business affairs [including '[d]isposing of its properties that will not be distributed in kind to its shareholders'.]"); S.C. Code Ann. §§33-14-105(a)(2), 201(d) (2006) ("A corporation dissolved administratively continues its corporate existence but may not carry on any business except that necessary to wind up and liquidate its business and affairs [, including 'disposing of its properties that will not be distributed in kind to its shareholders'.]").

The second unsatisfied "contingency" now asserted by Lady Beaufort involves the absence of the Certificate of Tax Compliance referenced in S.C. Code Ann. §12-54-124, which provides as follows:

> "In the case of the transfer of a majority of the assets of a business . . . any tax generated by the business which was due on or before the date of any part of the transfer constitutes a lien against the assets in the hands of a purchaser, or any other transferee, until the taxes are paid. . . . This section does not apply if the **purchaser** receives a Certificate of Compliance from the Department stating that all tax returns have been filed and all taxes generated by the business have been paid. The Certificate of Compliance is valid if it is obtained in no more than thirty days before the sale or transfer."

S.C. Code Ann. §12-54-124 (emphasis added). According to the plain language of the statute, the absence of a Certificate of Compliance does not prevent a closing or prevent the passage of marketable title. In other words, nothing in S.C. Code Ann. §12-54-124 requires the seller to obtain a certificate of tax compliance in order to convey the majority of its assets.

It is worth noting that, if a Certificate of Tax Compliance was important to Lady Beaufort, and Lady Beaufort wanted to impose the duty of obtaining a Certificate on Hird Island, it would

have been very easy for Lady Beaufort to have inserted such a clause into the Contract. Lady Beaufort failed to do so.

The third and final unsatisfied "contingency" relied upon by Lady Beaufort was the tax lien filed by the State of South Carolina on September 27, 2013. This lien was filed after the Contract was executed on August 19th and before the closing deadline of October 8th. The lien is for $480.01, plus court costs of $34.00. It was a matter of public record and discovered by Lady Beaufort's closing attorney, Mr. Rogers, when, as a matter of routine, he checked the title prior to closing. ROA, pp. 85 – 101 to 102. At trial, he testified that this is something that could have been taken care of by simply paying it at closing out of the closing proceeds. *Id.*, pg. 203 - 204. In fact, this is what was done when the property was sold on October 10th to Inverness. ROA, pg. 378, line 1303. In short, the tax lien was handled in the same way that any other lien, such as an existing mortgage or line of credit is routinely handled, by simply satisfying it at closing.

In sum, the administrative dissolution of Hird Island did not prevent the passage of marketable title, inasmuch as the statutes of both Georgia and South Carolina expressly authorize the continued corporate existence of Hird Island for the purpose of disposing of its assets. Lady Beaufort's closing attorney expressly conceded that this issue, initially of concern, was completely resolved prior to the closing deadline.

Likewise, a Certificate of Compliance is not a requirement to the passage of marketable title. If Lady Beaufort wanted it, Lady Beaufort could have obtained it. If Lady Beaufort wanted to put the burden on Hird Island of obtaining it, it could have so provided in the Contract. In any event, its absence did not prevent the passage of marketable title.

Finally, the small tax lien did not prevent the passage of marketable title inasmuch as this lien, like any other lien that exists on a piece of property, is the type of lien routinely paid and

satisfied at closing, which, in fact, is what was ultimately done when the property was sold to Inverness.

II. THE REQUIREMENT OF PRESENTING GOOD AND MARKETABLE TITLE AS A MATERIAL CONTIGENCY IN ALL REAL ESTATE TRANSACTION.

Hird Island agrees with Lady Beaufort that the passage of good and marketable title was required under the contract in this case. The South Carolina Court of Appeals in its Opinion, expressly found "that the contract unambiguously required conveyance of marketable title." Opinion, pg. 5. The Court of Appeals defined "marketable title" in accordance with long recognized and well established South Carolina law. See, e.g., *Gibbs v. G.K.H.,* 311 S.C. 103, 105, 427 S.E.2d 701, 702 (Ct. App. 1993). There is simply nothing about this finding that justifies the issuance of a Writ of Certiorari.

III. THE COURT OF APPEALS DID NOT MISCONSTRUE THE PARTIES' CONTRACTUAL INTENT.

Lady Beaufort argues that the Court of Appeals somehow "misconstrued the parties' contractual intent." Petition for Writ of Certiorari, pp. 11 – 13. This is not so. The Court of Appeals simply examined the Trial Court's conclusion that Lady Beaufort was justified in refusing to close this transaction because the administrative dissolution, the absence of a Certificate of Tax Compliance, and the tax lien, prevented the passage of marketable title, and concluded that these three items, as a matter of law, did not prevent the passage of marketable title.

IV. THE COURT OF APPEALS DID NOT ERR IN FAILING TO RECOGNIZE THAT THE MASTER'S RULINGS WERE AS TO QUESTIONS OF FACT AND WERE AMPLY SUPPORTED BY EVIDENCE.

Lady Beaufort argues that the Court of Appeals erred in failing to recognize that the Master's rulings were as to questions of fact and were amply supported by evidence. Petition for

Writ of Certiorari, pp. 13 – 14. Lady Beaufort fails to point out, however, any "fact" set forth in the Master's ruling which the Court of Appeals ignored or set aside.

The Decision by the Court of Appeals in this case is governed strictly by errors of law, to wit: Both Georgia and South Carolina law expressly allows an administratively dissolved corporation to sell its assets, liens can be paid at closing, and a Certificate of Tax Compliance is not a prerequisite to the passage of marketable title. These are all matters of law.

V. THE COURT OF APPEALS PROPERLY REVERSED THE TRIAL COURT'S AWARD OF ATTORNEYS' FEES TO LADY BEAUFORT.

Since Hird Island did not breach the contract, the Court of Appeals properly reversed the Trial Court's award of attorneys' fees against Hird Island in favor of Lady Beaufort.

CONCLUSION

"A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons." Rule 242(b), SCACR. This case involves a simple real estate transaction which was governed by a standard real estate contract. There are no novel questions of law and the decision of the Court of Appeals was unanimous and consistent with well established precedent from both this Court and the Court of Appeals. The statutes involved, regarding administrative dissolution of a corporation and a Certificate of Tax Compliance, are clear and unambiguous. Neither statute prevents the passage of marketable title. Liens, whether for taxes, mortgages, or otherwise, are routinely paid at closing. The Petitioner's own closing attorney testified at trial that the administrative dissolution was not a concern, and liens are commonly paid at closing.

It is, accordingly, respectfully requested that the Petition for Writ of Certiorari be denied.

Respectfully Submitted,

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