The State of South Carolina
In the Supreme Court

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S.C. 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 the Respondents.

PETITIONERS' REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Petitioners Lady Beaufort, LLC and Tideland Realty, Inc. (collectively "Lady Beaufort" or "Petitioners") submit this brief reply in support of their Petition for a Writ of *Certiorari* filed August 26, 2022.

Respondents Hird Island and Sherwood Fender (collectively "Hird" or "Respondents") characterize the Court of Appeals' decision as an isolated contractual dispute not worthy of this Court's attention. This characterization is belied by the extraordinary impact on the real estate bar and on title insurers in this State that will result from the opinion's recasting of the bedrock concept of "good and marketable title." Petitioners request this Court grant this Writ and seize the opportunity to confirm the meaning of "good and marketable title" under South Carolina law, for the benefit of the Courts, real estate practitioners, and title insurers of this State.

I. Respondents' Contentions

Respondents appear to agree that whether something is an "unsatisfied contingency" pursuant to the contract between the parties to this dispute depends on whether it would prevent passage of good and marketable title. Opp. at 8. Respondents also agree that the definition of "good and marketable title" depends on (i) the title being free from encumbrances and (ii) whether a reasonably prudent and well-informed buyer would proceed with the transaction. *Id.* (citing *Gibbs v. G.K.H., Inc.*, 311 S.C. 103, 105, 427 S.E.2d 701, 702 (Ct. App. 1993).

Respondents dispute, however, that the issues discovered by Lady Beaufort in the instant case prevented the passage of good and marketable title, and the Court of Appeals agreed with Respondents. This was not only error, but error that—if permitted to stand—would recast how that concept is understood under South Carolina law.

A. Undisclosed Tax Lien

Respondents posit that "[t]here 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." Opp. at 2. It may indeed be that (i) a *property tax* lien or a mortgage (ii) that is is disclosed prior to closing is not uncommon, and that parties often agree to satisfy such liens from the settlement proceeds. This would give a buyer adequate assurances and thus would not prevent the passage of marketable title.

However, what is *not* common or innocuous is the discovery, not of a property tax lien, but of an undisclosed *Department of Revenue* lien, the pay-off terms of which cannot be confirmed without the cooperation of the seller or within the time left prior to closing, as was the situation in this case. This would, and did, give a reasonably prudent buyer pause about closing the transaction absent some assurance from the seller, for example, in the form of a certificate of tax compliance that would shift the liability and any other tax liabilities discovered after closing from the buyer to the seller. *Infra* Part I.B.

Further, whether a tax lien *could* be satisfied from the closing proceeds is not the pertinent question, because the fact of closing a deal does not itself transform unmarketable title to marketable title. A buyer *could* always complete a transaction in which he knows he will not receive the benefit of his bargain; but that does not mean he is required to accept less than what has been contracted for, else contracts would cease to have meaning.

B. Certificate of Tax Compliance

Respondent posits that a certificate of tax compliance "is not a prerequisite to good and marketable title." Removed from the context of the transaction and taken purely literally, this may be true. But whether title is "good and marketable" depends on whether a reasonable buyer would be sufficiently free of doubts as to the validity of title such that he would close the transaction; and a seller's refusal to provide such a certificate as an assurance following the discovery of an undisclosed SCDOR lien was yet another red flag creating such a doubt. In that

situation, the absence of the certificate of tax compliance *is* an obstacle to the passage of good and marketable title.

Respondents contend it is the buyer's responsibility to obtain such a certificate. However, the certificate can only be obtained by the seller or with the seller's consent — a buyer cannot do so without the cooperation of the seller, as if the request is made by anyone other than the seller, a power of attorney is required. Here, Hird refused to do so. The refusal to prove that all taxes have been paid—when any unpaid taxes would constitute a lien against the property in the hands of the purchaser—must create substantial doubt as to whether to go through with the transaction.

C. Status of Seller Entity

When it became known to Lady Beaufort shortly before the closing that the seller was an administratively dissolved Georgia entity, it raised the question of whether such an entity is able to convey title. And, in connection with the other undisclosed red flags discovered at the 11th hour, this question contributed to reasonable doubt as to the validity of title. In addition, the administrative dissolution of the seller suggested the possibility of further unpaid tax obligations, obligations that could become the obligation of the buyer.

True, the question of whether the administratively dissolved entity was able to transfer title was resolved to the satisfaction of the title insurance company by the date of the attempted closing. Whether additional tax obligations existed that could or would transfer with that title was not. In any event, this irregularity was yet another red flag to cast doubt in the mind of a seller as to whether *good and marketable* title could be conveyed.

II. Questions of Fact

Respondents' brief contends that Petitioners "fail[] to point out. . . any 'fact' set forth in

the Master's ruling which the Court of Appeals ignored or set aside." Opp. at 12. In pages 13–14 of the Petition, Petitioners contend the Court of Appeals overlooked the Master's factual findings that:

(i) Respondents were at fault for the failure of the deal to close (Order (May 11, 2017) at ¶ 23);

(ii) Respondents benefitted by selling the property to a third party, because the third party was required to also purchase a second piece of property for an additional $60,000 (*id.* at ¶ 22 (as amended by the Order dated February 14, 2018)); and

(iii) Respondents' closing attorney continued to work with Petitioners' closing attorney to resolve the issues and close the deal after the date Respondents claim the contract terminated (*id.* at ¶ 18), belying Respondents' contention that the contract was not extended due to unsatisfied contingencies.[1]

In addition to the items discussed in pages 13–14 of the Petition, the Court of Appeals overlooked the Master's determinations that:

(i) Respondents did not act in good faith (*id.* at Part II.A);

(ii) Title insurers refused to issue title insurance given the issues described herein (*id.* at ¶ 8)[2]; and

(iii) Respondents failed to adhere to the contractual requirements of passing good and marketable title and of complying "with all local, state, federal laws, and any rules" (*id.* at Part II.A).

These factual determinations informed the trial court's understanding of the parties' intent with regard to the meaning of the term "unsatisfied contingencies," leading to a finding that the contract was extended by five days and that Respondents breached the contract by selling it to a third party during the five-day extension. The findings were supported by ample

[1] Respondents are bound by their attorney's acts and omissions in this regard. *See Koutsogiannis v. BB & T*, 365 S.C. 145, 149, 616 S.E.2d 425, 428 (2005) ("clients are generally bound by their attorneys' acts or omissions during the course of the legal representation that fall within the apparent scope of their attorneys' authority").

[2] Which alone would create a doubt in the mind of any reasonable buyer about the validity of the title.

evidence and should not have been reversed.

III. Conclusion

The importance of the Court of Appeals decision goes well beyond its importance to these parties. If doubt in the mind of a reasonable buyer as to the validity of title is not created by the confluence of (i) the discovery of an undisclosed SCDOR tax lien, (ii) the seller's failure to provide or cooperate in obtaining a certificate of tax compliance, (iii) the administratively dissolved status of the foreign seller entity, and (iv) title insurers' refusal to issue title insurance based upon the foregoing three issues, then there has been a sea change in the law regarding the interpretation of "good and marketable title." Such a sea change is not warranted and will be extraordinarily disruptive to real estate practitioners and title insurers in South Carolina and beyond. These are the kinds of "special and important reasons" envisioned by Rule 242(b), SCACR.

Accordingly, Petitioners respectfully request this Court grant their Petition and issue a Writ of *Certiorari*.

Respectfully submitted,

EPTING & RANNIK, LLC

This 10th day of October, 2022
Charleston, South Carolina

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