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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM BEAUFORT COUNTY
The Honorable Donald B. Hocker, Circuit Court Judge
Beaufort County
Trial Court Case No. 2020-CP-07-1064

APPELLATE CASE NO. 2022-001547

Turner's Marina LLC,

Respondent-Appellant,

vs.

Paige Lorberbaum, Jeffrey Klapper, and Diane L. Klapper,

Defendants,

Of whom Paige Lorberbaum is the Appellant-Respondent and Jeffrey A. Klapper and Diane L. Klapper are Respondents.

INITIAL BRIEF OF RESPONDENT-APPELLANT TURNER'S MARINA LLC

s/Thomas C. Taylor

Thomas C. Taylor, Esq.

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Bluffton, South Carolina
December 5, 2022

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Runyon v. Wright, 322 S.C. 15, 19, 471 S.E.2d 160, 162 (1996)

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STATUTES - None

RULES - S.C.R. Civ. P. 59 (e)

STATEMENT OF ISSUES ON APPEAL

1. Did Judge Hocker err in failing to award the Plaintiff Turner's Marina LLC costs and attorneys' fees?

2. Did Judge Hocker err in failing to reduce the purchase price that Turner's Marina LLC is required to pay Ms. Lorberbaum at conveyance of Lot 158 by an amount commensurate with the damages Turner's Marina incurred by not owning the lot, and having it available for rental to third parties, between May 2, 2019 and the date of trial?

STATEMENT OF THE CASE

This appeal arises out of a breach of contract. Specifically, in April of 2019, the Plaintiff Turner's Marina LLC was (and still is) the owner of certain "Declarant" or "Developer" rights emanating from a June 12, 1981 recorded Declaration of Condominium entitled "Declaration of Covenants and Restrictions for Outdoor Resorts RV Resort and Yacht Club and Provisions for the RV Resort and Yacht Club Owner's Association, Inc." (hereinafter sometimes referred to as the "R.V. Resort Covenants"), as is recorded in the Office of the Beaufort County Register of Mesne Conveyances at Book 325, Page 920. See Plaintiff's Exhibit 3 in the Record on Appeal at p. _____. The R.V. Resort Covenants apply to 200 individually owned "lots" in the RV Resort, of which one lot, Lot 158, is the subject of this case.

Within the R.V. Resort Covenants are two provisions relevant to this appeal. First, the R.V. Covenants at page 18, specifically Paragraph 12.9, contain a Right of Repurchase to the Developer, which specifically provides:

12.9 In the event the Unit Owner desires to sell his Lot, then said Lot shall be offered for sale to the Developer at the same price at which the property is about

to be sold, and the said Developer shall have thirty (30) days within which to exercise its option to purchase said property; and should the Developer fail or refuse (within thirty (30) days after the receipt of notice of the price and terms) to exercise its option to purchase said property at the price at which it is about to be sold, then the Owner of said property shall have the right to sell said property subject to all covenants and limitations herein contained.

This right of repurchase is sometimes referred to herein as the “R.V. Covenants Right of Repurchase.” See Plaintiff’s Exhibit 3, p. ___ in the Record on Appeal.

The second provision relevant to this appeal, is found at Paragraph “X” in the R.V. Resort Covenants, which provides as follows:

X (c) In any proceeding arising because of an alleged failure of a Low Owner to comply with the terms of this Declaration, By-Laws, rules and regulations adopted pursuant thereto, and said documents as they may be amended from time to time, the prevailing party shall be entitled to recover the costs of the proceeding, including reasonable attorneys’ fees, as they may be awarded by the court, including in actions brought by the Developer to enforce such documents.

See Plaintiff’s Exhibit 3, p. ___ in the Record on Appeal.

Defendants Jeffrey A. Klapper and Diane L. Klapper purchased Lot 158 in 2007 (Record on Appeal at p. ____, and put it on the market for sale for \$60,000 in or around late 2017 (Record on Appeal at p. ____.) Defendant Paige Lorberbaum entered into a contract of purchase and sale with the Klappers to acquire Lot 158 for \$54,500 on or about April 2, 2019. See Plaintiff’s Exhibit 4, Record of Appeal at p. _____. On April 19, 2019, Chester Williams, counsel for Turner’s Marina LLC, advised D. Thomas Johnson, as counsel for the both the Klappers and Ms. Lorberbaum, that Turner’s Marina had elected to exercise its right of repurchase. See Plaintiff’s Exhibit 14 and Mr. Williams’ testimony in the Record on Appeal at p. _____. On April 22, 2019, notwithstanding that notice, the Klapper to Lorberbaum conveyance of Lot 158 was closed by Mr. Johnson, and title conveyed to Ms. Lorberbaum. See Plaintiff’s Exhibit 9, Record on Appeal at p. ____.

On May 13, 2020, Turner's Marina filed its Summons and Complaint alleging breach of contract and seeking monetary damages or specific performance of its right of repurchase, and attorney's fees as are allowed under the R.V. Resort Covenants. Record on Appeal at p. _____. The Klapper Defendants answered on June 10, 2020, alleging that Turner's Marina did not have any "Right of First Refusal" in April 2019 because allegedly Turner's Marina's assignor, Billybob's Marinas, Inc., had retained "the right of repurchase acquired from Property Research Holdings, Inc." for a certain time period that Billybob's had extended partial owner financing. Record on Appeal at p. _____.

Defendant Lorberbaum answered on June 12, 2020, and also alleged that Turner's Marina did not have the right of repurchase in April 2019 because "the assignment of right of first refusal did not take effect until the later of several events." Record on Appeal at p. _____. Defendant Coastal States Bank answered on June 12, 2020 also, but a settlement was reached with the Bank, they were dismissed from the case and have no interest in this appeal. Record on Appeal at pp. _____.

Although the Plaintiff initially requested a jury trial, the Honorable Bentley Price, serving as the Chief Administrative Judge for the 14th Judicial Circuit, strongly suggested that the case be tried non-jury after the Plaintiff subpoenaed Mr. Johnson as a witness and Mr. Johnson filed a Motion in Limine to block his testimony. The parties agreed to try the case non-jury and trial was held on June 30, 2022 before the Hon. Donald B. Hocker in Beaufort County. At trial, the Plaintiff requested that Ms. Lorberbaum be ordered to convey Lot 158 to Turner's Marina, for \$54,500 less the three years of lost rental revenues, or that Turner's Marina be awarded damages of \$252,997.50 as the lost revenue it suffered as a result of not having Lot 158 to rent out over the next 61 years.

On August 4, 2022, Judge Hocker entered a final Order in the case, finding that the failure of the Klappers and Ms. Lorberbaum to allow Turner's Marina to purchase Lot 158 was a material breach of the R.V. Resort Covenants, and ordered Defendant Lorberbaum to convey Lot 158 to Turner's Marina for \$54,500 within ninety (90) days of August 4, 2022, or by November 2, 2022. He declined to award Turner's Marina attorney's fees. See Record on Appeal at p._____.

On August 15, 2022, Turner's Marina filed its SCRCP 59(e) Motion to Alter or Amend the August 4, 2022 Order (Record on Appeal at p. _____) and Ms. Lorberbaum's new counsel Russell Patterson filed her Motion to Alter or Amend the Order on August 16, 2022. (Record of Appeal at p._____.) On September 21, 2022, Turner's Marina filed its Petition for Reformation of Right of Repurchase. Record on Appeal at p. _____.

On September 27, 2022, Judge Hocker entered his Order denying both motions to alter or amend the August 4, 2022 final Order. Record on Appeal at p. _____.Ms. Lorberbaum's counsel then apparently filed her Notice of Appeal by mail on October 27, 2022, which was received by Turner's Marina's counsel on November 2, 2022. On November 3, 2022, Turner's Marina filed this cross-appeal. Record on Appeal at p. _____.

STANDARD OF REVIEW

An action for breach of contract seeking money damages is an action at law. Branche Builders, Inc. v. Coggins, 386 S.C. 43, 47, 686 S.E.2d 200, 202 (Ct. App. 2009) (quoting McCall v. IKON, 380 S.C. 649, 658, 670 S.E.2d 695, 700 (Ct. App. 2008.)) In an action at law, this Court should affirm the trial Judge's factual findings if there is any evidence in the record which reasonably supports them. Query v. Burgess, 371 S.C. 407, 410, 639 S.E.2d 455, 456 (Ct. App. 2006)(quoting Lowcountry Open Land Tr. V. State, 347 S.C. 96, 101-02, 552 S.E.2d 778,781 (Ct.

App. 2001)). “In an action at law, tried without a jury, the appellate court standard of review extends only to the correction of errors of law. Pope v. Gordon, 369 S.C. 469, 474, 633 S.E.2d 148, 151 (2006). *See also* Temple v. Tee-Fab, Inc., 381 S.C. 597, 599-600, 675 S.E.2d 414, 415 (2009). “The [c]ourt will not disturb the trial court findings unless they are found to be without evidence that reasonably supports those findings.” *Id.* at 600, 675 S.E.2d at 415.

ARGUMENT

1. Judge Hocker erred by failing to award Turner’s Marina LLC its costs of the trial, including reasonable attorney’s fees, from the Klapper Defendants. As is quoted above, Article X of the R.V. Resort Covenants provides that “In any proceeding arising because of an alleged failure of a Lot Owner to comply with the terms of this Declaration, By-Laws, rules and regulations adopted pursuant thereto, and said documents as they may be amended from time to time, the prevailing party shall be entitled to recover the costs of the proceeding, including reasonable attorney’s fees, as they may be awarded by the court, including actions brought by the Developer to enforce such documents.”

The R.V. Resort Covenants were filed of record in Beaufort County in 1981. See Plaintiffs Exhibit 3 at p. ____ Record on Appeal. The Klapper Defendants purchased Lot 158 originally in 2007. See p. ____ of Record on Appeal. Mr. Klapper testified at trial that he was aware of the Covenants and knew that a waiver of a valid right of repurchase was necessary before the sale of their lot. (See transcript at p. 166 in Record on Appeal at p. ____.) Mr. Klapper knew that Turner’s Marina was attempting to exercise its right of repurchase prior to the closing with Defendant Lorberbaum. See Transcript at p. 167 in Record on Appeal at p. _____. Notwithstanding Turner’s Marina’s written demand of April 19, 2019 to exercise its right of repurchase (See Exhibit ____

and testimony of Chester Williams at pp. ____ of Record on Appeal), the Klappers went forward with the closing and denied Turner's Marina the opportunity to purchase Lot 158 at the matching price of \$54,500.

Judge Hocker, trying the case without a jury, found the failure of the Klappers and Lorberbaum to allow Turner's Marina to purchase Lot 158 to be a material breach of the R.V. Resort Covenants, specifically paragraph 12.9. See Order of August 4, 2022, p. 6 at Record on Appeal p. _____. Thus, Judge Hocker found Turner's Marina to be the "prevailing party" as described in Article X, and thereunder he should have awarded costs and attorney's fees against the Klappers because they were the Lot Owners who failed to comply with the terms of the R.V. Resort Covenants that specifically allowed Turner's Marina to purchase the lot within 30 days of being advised of the Klappers/Lorberbaum contract to buy/sell. Turner's Marina and its counsel did all they could to enforce and act upon Turner's Marina's right of purchase. (Record on Appeal p. ____) "Restrictive covenants are contractual in nature." Hoffman v. Cohen, 262 S.C. 71, 75, 202 S.E.2d 363,365 (1974). "Restrictive covenants are contractual in nature and bind the parties thereto in the same manner as any other contract." Seabrook Island Property Owners Ass'n v. Pelzer, 292 S.C. 343, 347, 356 S.E.2d 411, 414 (Ct. App. 1987). The failure to award attorney's fees was in error.

Judge Hocker declined to award attorney's fees in his August 4, 2022 Order, stating that "Although there is a provision with the R.V. Resort Covenants providing for attorney's fees in certain situations to prevailing litigants, there was no specific proof offered during trial as to the amount of attorney's fees expended by the Plaintiff, and thus I award no attorney's fees to the Plaintiff." See p. ____ Record on Appeal. The Plaintiff timely filed its Motion to Alter or Amend and asked the Court to award attorney's fees in an amount to be determined at a subsequent post

trial hearing or by submission of Affidavits. See p. ____ Record on Appeal. That Motion to Alter or Amend was denied and this cross appeal followed.

Judge Hocker was presented uncontradicted evidence from Neil Turner, President of Turner's Marina LLC, that the Klappers' failure to honor Turner's Marina's right of repurchase demand resulted in Turner's Marina's having to hire the undersigned counsel to file this suit and litigate the hotly contested matter through numerous motions and a complex trial involving the presentation of two expert witnesses. Mr. Turner further testified that he was paying his lawyer \$325 an hour and that he knew that was a comparable legal fee in the Lowcountry for a litigation attorney of Mr. Taylor's experience and background. See transcript p. 50 at Record on Appeal p. _____. "Where there is a contract, the award of attorney's fees is left to the discretion of the trial judge and not be disturbed unless an abuse of discretion is shown." Baron Data Sys., Inc. v. Loter, 297 S.C. 382, 384, 377 S.E.2d 296, 297 (1989). Plaintiff respectfully suggests that the record makes it clear that attorney's fees were clearly warranted in this matter and that Judge Hocker's failure to award them was an abuse of discretion.

The term "abuse of discretion has no opprobrious implication and may be found if the conclusions reached by the lower court are without reasonable factual support." Runyon v. Wright, 322 S.C. 15, 19, 471 S.E.2d 160, 162 (1996). See also South Carolina State Highway Dep't v. Sharpe, 242 S.C. 397, 402, 131 S.E.2d 257, 259 (1963). Judge Hocker's denial of an award of attorneys' fees in light of Paragraph X of the R.V. Resort Covenants, was without reasonable factual support, and thus was an abuse of discretion in these circumstances.

As was recognized in Seabrook Island Property Owners' Association v. Berger, 365 S.C. 234, 616 S.E.2d 431 (2005), it is standard practice in the Lowcountry of South Carolina to reserve

a hearing on attorney's fees until after a final court decision, and then have the trial judge consider either Affidavits or hold a hearing. That would have been the appropriate time for Judge Hocker to have examined the request for attorney's fees and apply the standards set forth in Blumberg v. Nealco, Inc., 310 S.C. 492, 493, 427 S.E.2d 659, 660 (1993) and its progeny.

2. Judge Hocker erred in failing to reduce the purchase price Turner's Marina is required to pay Ms. Lorberbaum at conveyance of Lot 158 by an amount commensurate with the damages Turner's Marina incurred by not owning the lot, and having it available for rental to third parties, between April 19, 2019 and the date of trial.

In his Order of August 4, 2022, Judge Hocker specifically held that "[t]here shall be no reduction in the \$54,500 price paid by the Plaintiff based upon a claimed loss of rental revenues over the period since the conveyance to Defendant Lorberbaum, because the Plaintiff failed to prove those damages with specificity." See Order, p. 6, at p. ____ in the Record on Appeal. Given the testimony and exhibits admitted, as described below, this was an error of law.

"The general rule is that for a breach of contract[,] the [breaching party] is liable for whatever damages follow as a natural consequence and a proximate result of such breach." Johnson v. Little, 426 S.C. 423, 827 S.E.2d 207 (S.C. App. 2019) citing Hotel & Motel Holdings LLC v. BJC Enterprises, LLC, 414 S.C. 635, 780 S.E.2d 263 (Ct. App. 2015). "In a breach of contract action, damages serve to place the nonbreaching party in the position he would have enjoyed had the contract been performed." Branche Builders, id., 386 S.C. at 48, 686 S.E.2d at 202. Here, the evidence shows that Turner's Marina suffered a minimum specific dollar loss as a result of not acquiring Lot 158 on April 19, 2019, and that an award of damages in the form of a reduction in the purchase price required to obtain Lot 158, was appropriate.

At trial, uncontradicted evidence was presented by Turner’s Marina that Lot 158 had been available for rental only one full year in recent history, prior to the April 2019 conveyance—that during 2018 when Lot 158 produced \$4,147.50 in annual rental revenue. (The Klappers had been using the Lot personally or had a guest on Lot 158 during 2015, 2016 and 2017.) See trial transcript, pp. 47-50 and Plaintiff’s Exhibits 7 and 8.) Thus, Mr. Turner’s conservative calculation of lost rental revenue from April 19, 2019 through the trial date, was \$12,442.50, based upon the \$4,147.50 annual rental revenues of 2018. See Mr. Turner’s trial testimony at pp. 49-50 and Plaintiff’s exhibits 7 and 8 in the Record on Appeal at pp._____. Proof of the amount of loss with absolute or mathematical certainty is not required. Damages simply must be susceptible of ascertainment with a reasonable degree of certainty, and may not be left to conjecture, guess or speculation. See, e.g., Piggy Park Enters., Inc. v. Schofield, 251 S.C. 385, 162 S.E.2d 705 (1968) and Proctor v. Dep’t Health & Envtl. Control, 368 S.C. 279, 628 S.E.2d 496 (Ct. App. 2006).

Judge Hocker heard the testimony and received the evidence from trial on June 30, 2022, and thereafter exercising the Court’s equitable authority, entered his Order of August 4, 2022 compelling the Defendant Lorberbaum to convey Lot 158 to the Plaintiff promptly. Historically our South Carolina courts have adopted equitable maxims as guidelines for fashioning equitable remedies, including “Equity will not suffer a wrong without a remedy” and “Equity regards and treats that as done which in good conscience ought to be done.” Taff v. Smith, 114 S.C. 306, 103 S.E.2d 551 (1920). More recently, this Court of Appels has noted in Regions Bank v. Wingard Properties, Inc., 394 S.C. 241, 715 S.E.2d 348 (Ct. App. 2011), that “[t]he notion ‘equity looks to substance rather than form’ evolved out of judicial regard for that which ought to be done. This maxim applies by dispensing with pure formalities which would otherwise defeat the equity.” Regions Bank, *id.*, 394 S.C. at 245. Applying these maxims to the evidence and testimony, Judge

Hocker erred when he failed to reduce the purchase price of \$54,500 by at least \$12,442.50 to account for the damages Turner's Marina incurred during the period of April 19, 2019 through the June 30, 2022 trial date (and beyond as Ms. Lorberbaum failed and refused to convey Lot 158 by the November 2, 2022 required conveyance date).

This Court should revise the amount of money that Turner's Marina must pay at the conveyance from Lorberbaum to Turner's Marina, from \$54,500 to \$42,057.50. See Plaintiff's Memorandum in Support of Plaintiff's Motion to Alter or Amend Order as filed on September 2, 2022, p.3, Record on Appeal at P. _____.

CONCLUSION

For the reasons set forth above, this Court should enter its Order granting the Plaintiff as the prevailing party at trial, an appropriate award of costs and attorney's fees from the Klapper Defendants and instruct the trial court to hold a further hearing to establish a reasonable amount of attorney's fees to be added to the judgment based upon the six factors of Blumberg v. Nealco, Inc., id. 310 S.C. at 494, 427 S.E.2d at 660. Further, this Court should revise the purchase price that must be paid by Turner's Marina at the conveyance of Lot 158, to, at most, \$42,057.50, to properly recognize the continuing damages Turner's Marina incurred after it was denied its right to exercise its Right of Repurchase.

Respectfully Submitted,

s/Thomas C. Taylor

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Bluffton, South Carolina
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APPELLATE CASE NO. 2022-001547

Turner's Marina LLC,

Respondent-Appellant,

vs.

Paige Lorberbaum, Jeffrey Klapper, and Diane L. Klapper,

Defendants,

Of whom Paige Lorberbaum is the Appellant-Respondent and Jeffrey A. Klapper and Diane L. Klapper are Respondents.

PROOF OF SERVICE

I hereby certify that this law firm represents the Respondent-Appellant Turner's Marina LLC in the above-captioned matter and that on the date below, in Bluffton, South Carolina, a copy of the foregoing was served on the following persons via electronic mail to their AIS E-mail address:

**Documents Served: INITIAL BRIEF OF RESPONDENT-APPELLANT
TURNER'S MARINA LLC; and,**

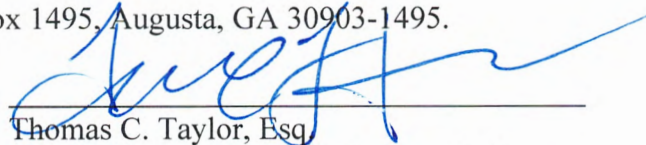
**RESPONDENT-APPELLANT TURNER'S MARINA LLC'S
DESIGNATION OF MATTER TO BE INCLUDED IN
RECORD ON APPEAL**

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Additionally, I hereby certify that copies of the documents were deposited in the United States Mail on this date, with sufficient First-Class postage pre-paid, addressed to Mr. Patterson at Post Office Box 8047, Hilton Head Island, South Carolina, 29938, and to Mr. Murray at Post Office Box 1495, Augusta, GA 30903-1495.



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December 5, 2022

Via E-Mail Attachment to: ctappfilings@sccourts.org and tpclark@sccourts.org

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Dec 05 2022

SC Court of Appeals

Re: Turner's Marina LLC vs. Paige Lorberbaum, Jeffrey Klapper and Diane L. Klapper; Appellate Case No.: 2022-001547; Respondent-Appellant's Initial Brief, Designation of Matter and Proof of Service

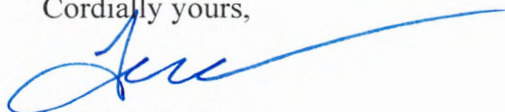
Dear Mr. Clark,

As your file indicates, I represent the Respondent-Appellant Turner's Marina LLC in this appeal. On behalf of Turner's Marina LLC, I attach hereto for electronic filing the following:

- a. Respondent-Appellant's Initial Brief;
- b. Respondent-Appellant's Designation of Matter; and,
- c. Proof of Service of a copy of the documents upon Paige Lorberbaum's counsel Russell Patterson and the Klappers' counsel, James Murray.

I am one of the thousands of businesses who have lost their email ability because of the Rackspace crash, and am sending this from my personal email address. Would you please be so kind as to confirm your receipt of these documents today by return email to bramspoint@outlook.com? Thank you as always for your professionalism in these matters, and please let me know if you have any questions.

Cordially yours,



Thomas C. Taylor

TCT/dpt

Enclosures

cc: Russell Patterson, Esq., via email and US Mail
James Murray, Esq., via email and US Mail
Neil Turner via email