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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Donald B. Hocker, Circuit Court Judge

Case No. 2022-001547

Turner's Marina, LLC,

Respondent-Appellant,

v.

Paige Lorberbaum, Jeffrey A. 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 RESPONDENT'S BRIEF OF PAIGE N. LORBERBAUM, APPELLANT-
RESPONDENT

Russell P. Patterson, Esquire
Russell P. Patterson, P.A.
P.O. Box 8047
Hilton Head, South Carolina 29938
(843) 341-9300
Attorneys for the Appellant-Respondent
Paige N. Lorberbaum

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STATEMENT OF ISSUES ON APPEAL

1. That the Trial Court properly denied Plaintiff Turner's Marina, LLC's request to set-off, or reduce the required purchase price for Lot 158 of \$54,500 by the amount of its claimed loss of rental revenues.

STATEMENT OF THE CASE

This is an appeal of the Trial Court's decision to enforce a right of repurchase held by the Respondent, Turner's Marina, LLC ("Turner") on a lot in a recreational vehicle ("RV") development. On June 18, 1981, Outdoor Resorts R.V. Resort and Yacht Club ("Developer") recorded that certain Declaration of Covenants and Restrictions at Deed Book 325 at Page 920 in the Beaufort County Register of Deeds ("1981 Covenants") (Tr. Turner Ex. 3) as part of its development of a seventeen (17) acre parcel located near the entrance to the Town of Hilton Head Island. The development consisted of 200 RV lots, marina, fuel dock, and related amenities (collectively "RV Resort"). Paragraph 12.9 of the 1981 Covenants created a right of repurchase ("Right of Repurchase") in favor of the Developer under the following language

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 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.

On May 18, 2007, the Respondents, Jeffrey A. Klapper and Diane L. Klapper (collectively "Klapper") purchased Lot 158, an RV lot which was subject to the 1981 Covenants. On or about

December 21, 2017, Turner acquired certain assets and rights at the RV Resort, including the Right of Repurchase under § 12.9 under the 1981 Covenants.

In late 2017, Klapper agreed to sell Lot 158 to Paige N. Lorberbaum (“Lorberbaum”) for a price of \$54,500. Turner timely sought to exercise its claimed Right of Repurchase. Despite said efforts, Klapper on April 22, 2019, closed on its sale to Lorberbaum (Tr. Turner Ex. 10 – Deed/HUD). On May 13, 2020, Turner filed suit against Lorberbaum and Klapper for breach of contract, seeking damages in excess of \$100,000, specific performance, and recovery of attorney fees and costs. (Turner Complaint). Lorberbaum timely filed an Answer and Counterclaim on June 12, 2020. (Lorberbaum Answer and Counterclaim). Turner timely responded to Lorberbaum’s Counterclaim on June 22, 2020. (Turner Answer to Counterclaim).

After a non-jury trial, the Trial Court issued an Order on August 4, 2022, finding Turner properly held the Right of Repurchase, timely exercised same, and ordered Lorberbaum to convey Lot 158 to Turner for \$54,500. The Trial Court declined to award attorney fees to any party. The Trial Court also denied Turner’s request for a reduction or setoff of the \$54,500 purchase price based on its claim of loss rental revenues. (Order dated August 3, 2022, P. 6) Turner filed a Motion to Alter or Amend on August 15, 2022, under Rule 59(e), SCRC. The Trial Court on September 26, 2022, denied said motion.

Turner timely filed its Notice of Appeal, raising two issues. The first issue on appeal seeks to modify the Trial Court’s denial of its award of attorney fees against the Respondent, Klapper. In this brief, Lorberbaum only addresses the second issue raised by Turner seeking a set-off or reduction of the purchase price of \$54,500 due Lorberbaum for the property, since no attorney fees are sought against Lorberbaum by Turner in its appeal.

STANDARD OF REVIEW

“An action for breach of contract is an action at law.” *Electro-Lab of Aiken, Inc. v. Sharp Constr. Co. of Sumter*, 357 S.C. 363, 367, 593 S.E.2d 170, 172 (Ct. App. 2004). “In an action at law, on appeal of a case tried without a jury, the appellate court’s standard of review extends only to the correction of errors of law.” *Id.* “The trial [court’s] findings of fact will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge’s findings.” *Id.* “The trial court’s findings are equivalent to a jury’s findings in a law action.” *Branche Builders, Inc. v. Coggins*, 386 S.C. 43, 47, 686 S.E.2d 200, 202 (Ct. App. 2009).

ARGUMENT

I. THAT THE TRIAL COURT PROPERLY DENIED PLAINTIFF TURNER’S MARINA, LLC’S REQUEST TO SET-OFF OR REDUCE THE REQUIRED PURCHASE PRICE FOR LOT 158 OF \$54,500 BY THE AMOUNT OF ITS CLAIMED LOSS OF RENTAL REVENUES.

The Trial Court properly denied Turner’s claim that it was entitled to set-off, or reduce the purchase price of \$54,500 for Lot 158 by any claimed loss rental income because Turner failed to prove its damages with specificity at trial. There are three (3) reasons why the Trial Court’s Order not awarding loss rental income should remain in place.

First, as the Trial Court concluded, the evidence as to the loss of rentals for Lot 158 was vague, speculative and weak. Speculative damages are not recoverable under South Carolina law. *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991). Lorberbaum testified at length as to the significant number of vacant lots in the RV Park during her three (3) years of living there, including the fact the lot next to hers was only rented about three (3) weeks during the last three (3) years (Tr. P. 177 lines 8 – 19). She further testified her lot flooded frequently and was very difficult to access, and thus would not have been a sought after rental property. (Tr. P. 177 line 11 to P. 178 line 9). She further testified that through the actions of

Turner, the rental demand for all lots has substantially decreased. (Tr. P. 178 line 10 to P. 180 line 8)

Turner's loss rental projection or estimate is based entirely on historical use for only 2018 (Tr. P. 47 line 23 to P. 48 line 7; Plaintiff. Exs. 7 , 8). The uncontradicted testimony of Lorberbaum was that rentals over the last three (3) years were substantially less than historical rentals due to Turner's actions. Any extrapolation of loss rentals based on 2018 rentals is speculative, at best, and is not logical or supported by the evidence. The Trial Judge was in the best position to judge the credibility of the witnesses and properly and fairly reached the conclusion the evidence did not support Turner's claims of loss of rental revenue.

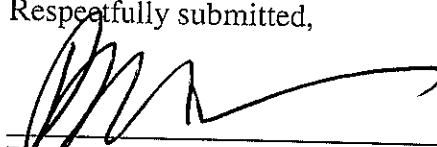
Under Rules 208(b)(2) and 220(c) SCACR. the final two reasons the Trial Court reached the correct conclusion are not discussed in this Order, but are fully supported by the evidence at trial. Turner is in essence is seeking the benefits of ownership of Lot 158 (i.e. income from rentals) before it has paid any money for said property. It would be inequitable and illogical to allow Turner the benefit of any estimated or projected rental income without Turner actually paying the owner of the property, Lorberbaum, the purchase price.

The second reason the Trial Court's decision should be affirmed is that during trial Turner specifically made an election of remedies, requesting the Trial Court grant specific performance by requiring Lorberbaum to convey Lot 158 pursuant to the claimed right of repurchase (Tr. P. 50 lines 1 – 10). The award of loss rentals is a damages remedy under Turner's breach of contract cause of action, which it abandoned at trial.

CONCLUSION

The Trial Court properly found that Turner was not entitled to set-off or reduce from the purchase price of Lot 158 of \$54,500 based on any claimed loss rentals. Said decision should be affirmed.

Respectfully submitted,



Russell P. Patterson (SC Bar No. 4375)
Russell P. Patterson, P.A.
P.O. Box 8047
Hilton Head Island, SC 29938
(843) 341-9300
Russell@russellpattersonlaw.com
Attorney for the Appellant-Respondent,
Paige N. Lorberbaum

Hilton Head Island, South Carolina
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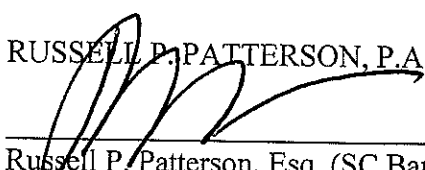
CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date indicated below, counsel for Respondent was served with a copy of the Respondent's Brief of Paige Lorberbaum, Appellant-Respondent, and its Designation of the Matter to be Included in the Record on Appeal by U.S. Mail on the date set forth below.

Thomas C. Taylor
Law Office of Thomas C. Taylor, LLC
P.O. Box 1808
Bluffton, SC 29910-1808

James S. Murry
Turner Padgett Graham & Laney, PA
P.O. Box 1495
Augusta, GA 20903-1495

RUSSELL P. PATTERSON, P.A.



Russell P. Patterson, Esq. (SC Bar No.: 4375)
Russell P. Patterson, P.A.
P.O. Box 8047
Hilton Head Island, SC 29938
(843) 341-9300
Russell@russellpattersonlaw.com
lauren@russellpattersonlaw.com

*Attorneys for the Appellant-Respondent,
Paige N. Lorberbaum*

Hilton Head Island, South Carolina
December 30, 2022

Russell P. Patterson, P.A.
Serving the Lowcountry for over 35 years



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Physical Address

19 Shelter Cove Ln., Ste. 107
Hilton Head, SC 29928

Russell P. Patterson

russell@russellpattersonlaw.com

Lauren P. Williams

lauren@russellpattersonlaw.com

Mailing Address:

P.O. Box 804;
Hilton Head, SC 29938
(843) 341-9300
(843) 341-9301 fax

December 30, 2022

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

E-mail & US Mail ctappfilings@sccourts.org

Re: Paige N. Lorberbaum, Appellant v. Turner's Marina LLC, Jeffrey A. Klapper,
Diane L. Klapper, Respondents
Case No.: 2022-001547

Dear Ms. Kitchings:

Please find enclosed Respondent's Initial Brief of Appellant-Respondent Paige N. Lorberbaum and Designation of Matter for filing in the above referenced matter.

Thank you for your assistance in this matter. Please do not hesitate to contact me with any questions.

Sincerely,
RUSSELL P. PATTERSON, P.A.

Russell P. Patterson

RPP:djd

Enclosures

cc: Counsel of Record (w/encl.)
Paige N. Lorberbaum (w/encl.)