THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC 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 REPLY BRIEF OF RESPONDENT-APPELLANT TURNER'S MARINA LLC

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Bluffton, South Carolina
January 9, 2023

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CASES

STATUTES - None

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ARGUMENT

Judge Hocker erred in failing to reduce the purchase price Turner's Marina was[1] required to pay Ms. Lorberbaum at conveyance of Lot 158 on December 28, 2022, by an amount reflecting 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. Judge Hocker's August 4, 2022 Order held "[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 in the Respondent-Appellant's Initial Brief, this finding is without evidence that reasonably supports it, and thus was an error of law that should be reversed.

The Respondent-Appellant has specifically cited to the sworn, uncontradicted testimony of Turner's Marina's President Neil Turner, that Turner's Marina lost at least $4,147.50 in annual rental revenue for the three plus year period between April 22, 2019 and the date of verdict, August 4, 2022. Mr. Turner's testimony was based on specific records maintained by Turner's Marina, LLC (which runs the rental program):

> So through our historical records from '15, '16, '17 and '18 and for the rental of Lot 158, each time there was a lot rental we were able to record it down, 2018 was the only year that the Klappers were not on their site or a guest was not on the site, so it was given to a full year, the assumption of that. So it's the best indicator to see what the price would have been, so we used that year's income, which is $4,147.50. I have 61 years left in that declarant right of rental, so it would amount to $252,997.50 is what I am asserting conservatively as damages.

[1] On December 28, 2022, Defendant Lorberbaum tendered her Deed in exchange for payment by Turner's Marina, LLC of $54,500. This voluntary conveyance pursuant to Judge Hocker's Order has, from the Respondent-Appellant's perspective, rendered the Appellant-Respondent Lorberbaum's initial appeal in this matter moot, and will be the subject of a forthcoming Motion To Dismiss that Appeal.

Record on Appeal, transcript, p. 47, line 25 through p. 48, line 10.

Following Mr. Turner's identification and authentication of the records, Plaintiff's Exhibits 7 and 8, being the records of historic rentals, including specifically those of Lot 158, were admitted. See Record on Appeal and transcript p. 49.

In reply to Mr. Turner's testimony, the totality of Ms. Lorberbaum's testimony regarding actual rentals was: "The lot right next to me in the last three years, I'm estimating, has rented approximately a total of three weeks. I'm there every day and it's empty on a regular basis." Record on Appeal, transcript p. 177, lines 16-19. She did not challenge Mr. Turner's testimony concerning the actual historical rental statistics of Lot 158, and provided no basis of personal knowledge as to whether the "lot right next to me" was even available for rental, and her counsel did not question Mr. Turner as to that unidentified lot's rental history. Although the Appellant-Respondent asserts that "[t]he uncontradicted testimony of Lorberbaum was that rentals over the last three (3) years were substantially less than historical rentals due to Turner's actions," (Appellant-Respondent's Initial Brief at p. 7), there actually is no such testimony in the record.

Mr. Turner's testimony was more than sufficient to establish the amount of damages he suffered in lost rentals during the three plus years he was deprived of his rightful ownership.

> Proof of the amount of loss with absolute or mathematical certainty is not required, and it does not matter that the determination of damages depends to some extent on the consideration of contingent events. So, it had been held sufficient if a reasonable basis of computation is afforded, even though the result may be only approximate, or to adduce evidence which is the best the case is susceptible of under the circumstances, and which will permit a reasonably close estimate of the loss.

Piggy Park Enterprises, Inc. v. Schofield, 251 S.C. 385, at 391, 162 S.E.2d 705, at 708 (1968), citing 25A C.J.S. Damages Section 162(2), p. 80.

The Supreme Court's oft-cited decision in Piggy Park, found the 1968 damage calculation appropriate in computing a reduced rental value of the property. And that 54-year-old decision was recently cited with approval by Judge Childs in a federal action involving alleged damages by plaintiffs whose personal identifying information was stolen in a ransomware attack. There, in In Re Blackbaud, Inc. Customer Data Breach Litigation, 567 F.Supp.3rd 667 (D.S.C. 2021), Judge Childs denied Blackbaud's Motion to Dismiss based on claims that the Plaintiffs' damages were "conclusory allegations that they 'face an imminent risk of future harm'," stating:

> Under South Carolina law, 'actual damages are when the wrongful act has caused loss or injury which can be assessed in money, the universal and cardinal principle being that person [sic] injured shall receive compensation commensurate with his loss or injury, and no more.' (Citations omitted.) 'While neither the existence, causation, nor amount of damages can be left to conjecture, guess or speculation, proof with mathematical certainty of the amount of loss or damage is not required.' Whisenant v. James Island Corp., 277 S.C. 10, 281 S.E.2d 794, 796(1981)(citing Piggy Park Enter., Inc. v. Schofield, 251 S.C. 385, 162 S.E.2d 705 (1968).

In Re Blackbaud, Inc., *id.* at 686.

Neil Turner's testimony concerning lost rental on Lot 158 was based on historical data for 2018, same being the *only* year in the three-year period preceding the sale when the lot was available for rental, established sufficient facts upon which a damages calculation could have been made. Judge Hocker erred in failing to do so. As a result, Turner's Marina was forced to pay at closing on December 28, 2022, at least $12,442.50 more than it equitably should have paid to obtain Lot 158.

The Appellant-Respondent Lorberbaum also asserts in reply, that the $12,442.50 was correctly denied by Judge Hocker because "[i]t 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." Brief at p. 7. This argument was not made at

trial, was not relied upon by Judge Hocker in his Order, and no citation to authority supports it. Nor does an analytical review. Turner's Marina undisputedly lost at least $12,442.50 because of Ms. Lorberbaum's purchase of the lot over Turner Marina's demand to exercise its legitimate right of repurchase. Turners Marina was ready, willing and able to close the purchase on April 22, 2019 (Record on Appeal at _____, transcript p. 40, lines 24-25 through p. 41, line 1.), and to use the Lorberbaum/Klapper denial of Turner's Marina's right of repurchase as an argument against the damages makes no equitable sense. As noted in our Brief, equity looks to substance rather than form, which maxim evolved out of judicial regard for that which ought to be done. Regions Bank v. Wingard Properties, Inc., 394 S.C. 241, 715 S.E.2d 348 (Ct.App.2011). It is undisputed that Turner's Marina lost over three years of rental income on Lot 158; the only question is whether the evidence presented as to the basis of the lost rental claims was sufficient, which as shown above, it was.

Finally, the Appellant-Respondent asserts, again without citation to any case law, that the reduction in the required purchase price by $12,442.50 should have been denied because the Plaintiff elected its remedy of specific performance at trial. The Plaintiff did request specific performance, but he also requested the lost rental damages that accrued while he was denied ownership of the lot. "I would like ownership of the lot to be transferred to Turner's Marina. I'm prepared and ready to pay the sales price minus the lost rental, but if the Court deems that is not the appropriate avenue, damages will be fine." See Record on Appeal, transcript, p. 50, lines 7-10. The equities of the situation demand that Judge Hocker should have reduced the purchase price by the amount of lost rental revenues proven. Equity will not suffer a wrong without a remedy. Taff v. Smith, 114 S.C. 306, 103 S.E.2d 551 (1920). By his Order, Judge Hocker basically allowed Ms. Lorberbaum the free use of Lot 158 for more than three years while Turner's Marina lost at least

$12,442.50 in rental revenues. She bought the lot for $54,500 in 2019 because "I thought it would be a good investment property." Record on Appeal, transcript at p. 173, lines 2-3. She lived there full-time despite the Covenant prohibition on permanent living quarters. Record on Appeal, transcript at p. 183, lines 10-22. When she finally complied with Judge Hocker's Order to convey the lot to Turner's Marina on December 28, 2022, she was paid back her full $54,500 investment, notwithstanding the dramatic downturn in real estate of 2022. In essence, Turner's Marina was punished for exercising its legal right of repurchase while Ms. Lorberbaum was rewarded for her actions by being allowed to live free on Lot 158 for more than three years.

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, Inc. v. Coggins, 386 S.C. 43, at 48, 686 S.E.2d 200, at 202 (Ct. App. 2009). Here, the evidence shows that Turner's Marina suffered a minimum specific dollar loss as a result of not being allowed to purchase 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.

CONCLUSION

For the reasons set forth above, this Court should enter its Order revising the judgment and now granting Turner's Marina LLC a judgment against the Defendant Lorberbaum for $12,442.50 because Ms. Lorberbaum has voluntarily moved forward with the conveyance of Lot 158 to

Turner's Marina, LLC, and Turner's Marina LLC paid her $54,500 on December 28, 2022, consistent with Judge Hocker's Order.

Respectfully Submitted,
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