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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

R. Lawton McIntosh, Trial Court Judge

Appellate Case No. 22-001453
Case No. 2020-CP-37-00765

The Estate of David Greene……..Appellant,

v.

MT Investments, LLC, Lakewood Capital Group, LLC,
Marina Bay Property Owners Association, Inc., and
John Doe(s), Members of MT Investments, LLC…….Defendants,

Of Whom

MT Investments, LLC, Lakewood Capital Group, LLC,
and John Doe(s), Members of MT Investments, LLC are…….....Respondents,

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INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

Adam Greene filed this action on October 15, 2020, on behalf of himself, asserting causes of action for breach of contract and negligent misrepresentation based upon a sale of a lakefront lot in Oconee County to his late father. The defendants were MT Investments, LLC, Marina Bay Property Owners Association, Inc. and John Doe(s), Members of MT Investments, LLC. On October 28, 2020, Adam Greene filed an amended complaint to add Lakewood Capital Group, LLC as a defendant.

Marina Bay Property Owners Association (hereinafter "Property Owners") answered the complaint on December 18, 2020. MT Investments, LLC, Lakewood Capital Group, LLC, and John Doe(s), Members of MT Investments, LLC (hereinafter "MT Defendants" or Respondents),[1] answered the amended complaint on December 22, 2020 and moved to dismiss the amended complaint on the ground that Adam Greene did not have standing to bring the case. On January 27, 2021, Property Owners filed a motion for judgment on the pleadings. On March 9, 2021, following a hearing, the trial court granted Respondents' motion to dismiss and granted Plaintiff 60 days to reopen the estate of David Greene and to substitute the estate as the real party in interest.

On April 15, 2021, Plaintiff filed an amended complaint substituting the Estate of David Greene, Appellant herein, as the Plaintiff and adding a cause of action for negligence against Respondents plus a separate cause of action for negligence against Property Owners.

Both Property Owners and Respondents moved for summary judgment. The trial court held a hearing on these motions on June 2, 2022. On June 20, 2022, the trial court granted Property

[1] Lakewood Capital, LLC is the parent company and only member of MT Investments, LLC. There are no John Does, members of MT Investments, LLC.

Owners' motion for summary judgment. On June 30, 2022, the trial court granted Respondents' motion for summary judgment.

In granting Respondents' motion, the court held that the parol evidence rule and doctrine of merger precluded Plaintiff's claim for breach of contract alleging that the contract of sale included the right to have a certain type of dock. The court also held that Plaintiff's claim arising in negligent misrepresentation could not succeed because there was a valid non-reliance clause in the contract of sale of the Lot and because Appellant had no evidence that Appellant's decedent had relied on any statements made by Respondents in decedent's purchasing the Lot. Further, Respondents did not make a false representation. The court further held that Appellant's claim arising in negligence that Respondent owed Appellant a duty to design Marina Bay subdivision so that Appellant could have the type of dock Appellant's decedent wanted could not succeed because Appellant presented no authority that such a duty exists.

On July 27, 2022, Appellant served its notice of appeal upon Respondents.

STANDARD OF REVIEW

"'Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.'" *Legette v. Piggly Wiggly, Inc.*, 368 S.C. 576, 578, 629 S.E.2d 375, 376 (Ct. App. 2006) (quoting *Café Assocs. Ltd. V. Gerngross*, 305 S.C. 6, 9, 406 S.E.2d 162, 164 (1991)). "'In determining whether any triable issues of fact exist, the evidence and all the inferences that can be drawn therefrom must be viewed in the light most favorable to the nonmoving party.'" *Legette*, 368 S.C. at 578, 629 S.E.2d at 376 (quoting *Redwend Ltd. P'ship v. Edwards*, 354 S.C. 459, 468, 581 S.E.2d 496, 501 (Ct. App. 2003)). "'When reviewing the grant of summary judgment, the appellate court applies the

same standard applied by the trial court….'" *Id.* (quoting *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 861 (2002)).

FACTS

On or about September 7, 2016, David Greene purchased a lakefront lot in a subdivision known as Marina Bay in Oconee County, South Carolina. Title to Real Estate. Before Mr. Greene purchased the Lot, he was provided with the Marina Bay Property Report (the "Property Report") along with the Declaration of Covenants, Restrictions and Property Owners Association and Limitations Running with the Land for Marina Bay Subdivision (the "Declaration"). S.J. Order. pp. 1-2.

The Property Report indicated that most of the lots in Marina Bay could have docks. While the Property Report stated that certain lakefront lots could not have docks, no such indication was given for the Lot. The Property Report further stated that there were "no established sizes or designs required for docks installed in Marina Bay according to Shoreline Management Guidelines." Prop. Rpt., p. 1. However, the Property Report also stated:

> This property report contains important information regarding responsibilities associated with future development of this property. The following information has been obtained from sources deemed reliable. No representation or guarantee to the accuracy thereof is made and such information is subject to change without notice.

Id. The Property Report also disclosed that all matters concerning docks are under the control of Duke Energy ("Duke"). *Id.*

The contract of sale signed by Mr. Greene states, in part:

> …Purchaser acknowledges and agrees that Seller has not made, does not make, and specifically negates and disclaims any representations, warranties, promises, covenants, agreements, or guaranties of any kind, character, or nature whatsoever, whether express or implied, oral or written, past, present, or future, of, as

> to, concerning or, with respect to the Property. Purchaser has had the opportunity to inspect the Property to the greatest extent that Purchaser desires, and Purchaser has not relied and is not relying upon any representations, warranties, promises, covenants, agreements or guarantees of any kind whatsoever by Seller or their representatives.

Contract, ¶ VI. The deed to the property makes no mention of the property being able to have a dock. Deed.

David Greene built a house on the Lot but did not apply to Duke for a dock permit. Greene Dep. 21:1-3; 25:5-7. He died on May 19, 2018. The Lot was distributed to his children, Adam Greene and Logan Humphries. Deed of Distribution. When these distributees were attempting to sell the property, the personal representative, Adam Greene, applied for a dock permit from Duke Energy, and discovered that to be able to build a full U-shaped dock, under Duke's guidelines, he would have to get permission from the neighboring lot owner to put in a dock of that size because construction of a full U-shaped dock would require construction across the neighbor's hypothetical property lines that Duke implies within the lake. Greene Dep., p. 28:16 -29:21. He was able to obtain a permit from Duke Energy to allow for an L-Shaped dock to be built on the Lot. Greene Dep. p. 26:8-11. The heirs then sold the lot for less than they could have had the Lot been able to have a full dock. Greene Dep. p. 33:8 – 35:3. Then, Adam Greene, and ultimately, the Estate of David Greene brought this action alleging breach of contract, negligent misrepresentation and negligence.

ARGUMENT

I. THE TRIAL COURT CORRECTLY RULED THAT THE CONTRACT OF SALE CONTAINED A VALID NON-RELIANCE CLAUSE BARRING APPELLANT'S CLAIM OF NEGLIGENT MISREPRESENTATION.

Appellant's arguments in this appeal are principally based on its claim of negligent misrepresentation, i.e. that MT Investments negligently misrepresented to David Greene that he could have a dock on the Lot without any restrictions. Though Appellant discusses the merger clause in the contract of sale which was relevant in the failure of the breach of contract action, the trial court's ruling on the claims for breach of contract was not raised in Appellant's brief. The trial court's ruling regarding negligence in designing the subdivision is mentioned. App. Brief, p. 10; however, Appellant does not set forth why it believes that ruling was wrong.

Turning to the claim of negligent misrepresentation, the elements of that tort are:

> (1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the statement; (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance upon the representation.
>
> Not every statement made in the course of commercial dealings is actionable at law. A mere statement of opinion, commendation of goods or services, or expression of confidence that a bargain will be satisfactory does not give rise to liability in tort.

AMA Mgmt. Corp. v. Strasburger, 309 S.C. 213, 222, 420 S.E.2d 868, 874 (Ct. App. 1992) (internal citations omitted).

There are four problems with Appellant's position regarding negligent misrepresentation: (1) While Respondent MT Investments provided information to decedent stating that the Lot could have a dock, Respondent did not state that such a dock would be without restrictions, and

Respondent was, in fact, able to obtain a permit for a dock; (2) Respondent MT Investments expressly stated that it was providing the best information it had, but that the final decision as to the type of dock, if any, that the Lot could have was up to Duke Energy. Property Report. Declaration, p. 7; (3) Appellant signed a contract of sale in which he expressly disclaimed his reliance on anything told to him by Respondents concerning the property. Contract, ¶ 6; and (4) There is no evidence as to whether David Greene relied on anything he was told, or whether any such reliance was justifiable.

Appellant argues that the general non-reliance clause in Paragraph VII of the Contract of Sale is insufficient to defeat a claim for negligent misrepresentation. However, the lower court's ruling was based upon Paragraph VI of the contract, Order, pp. 5-6, which Appellant did not address. Paragraph VI provides, in full:

> VI. INSPECTIONS: All lots have been approved for on-site sewerage system. Purchaser acknowledges having inspected the lots, and the recorded plat, and accepts such property in its present condition. The sale of the property is made on an "AS IS, WHERE IS" condition and basis with all faults, known or unknown, patent, latent, or otherwise. Owner shall not improve the property from its current condition. Purchaser acknowledges and agrees that Seller has not made, does not make, and specifically negates and disclaims any representations, warranties, promises, covenants, agreements, or guaranties of any kind, character, or nature whatsoever, whether express or implied, oral or written, past, present, or future, of, as to, concerning or with respect to the Property. Purchaser has had the opportunity to inspect the Property to the greatest extent that Purchaser desires, and Purchaser has not relied and is not relying upon any representations, warranties, promises, covenants, agreements or guarantees of any kind whatsoever by Seller or their representatives.

Contract, ¶ VI.

In *Redwend v. Ltd Partnership v. Edwards,* 354 S.C. 459, 581 S.E. 2d 496 (Ct. App. 2003) and in *Slack v. James*, 364 S.C. 609, 614 S.E.2d 646 (2005), the court of appeals and the supreme court set forth the differences between non-reliance clauses that are effective and those that are not to defeat a claim of fraud or negligent misrepresentation.

Where a non-reliance clause is set forth in or is merely an extension of a merger clause, it cannot defeat a claim for fraud or negligent misrepresentation. However, where the non-reliance clause is in a separate paragraph, specifically uses the word "*reliance*" or some form of it, and specifically states what is not being relied upon, the clause is effective. *See, Redwend,* 354 S.C. at 470-471, 581 S.E.2d at 502; *Slack,* 364 S.C. at 617, 614 S.E.2d at 640.

The clause at issue in this case meets all of these criteria, and, therefore, negates the element that decedent justifiably relied upon a statement outside the contract as to the dockability of the lot. The non-reliance clause is in a paragraph separate from the merger clause and is entitled *Inspection*. It uses the terms "relying." It deals with the buyer's right to inspect the property and disclaims any representations about the Lot. Thus, the terms of non-reliance are very specific and relate to representations about the property. Therefore, this is a valid non-reliance clause, and bars Appellant's claim of negligent misrepresentation.

Because of the non-reliance clause, Appellant's argument that the information in the Property Report would lead a purchaser to believe that he or she could build a full U-shaped dock on the Lot are not availing. Further, this argument leaves out the important disclaimer in the Property Report discussed above stating that the information provided was obtained from sources deemed reliable and that the accuracy of that information was not guaranteed. Property Report.

This contract of sale has a valid non-reliance clause, and, therefore, the trial court properly granted summary judgment on Appellants' claim for negligent misrepresentation.

Appellant also argues that the contract of sale is very short with the number "14" being the only specific identifier of the lot purchase and that makes no reference to the lot being a lakefront lot in the legal description designed for construction of a full sized-dock App. Brief, p. 9. There is no evidence that there was any confusion about which lot was Lot 14. The fact that the contract

does not mention a dock supports the notion that Respondents were expressly not making a representation that they could warrant the right to have a dock. As the summary judgment order addresses, referring to the materials outside the contract to contradict, vary or explain the written instrument is barred under the parol evidence rule. S.J. Order, p. 4.

Further, Appellant argues that the deed makes no mention of the ability of the Lot to have dock. App. Brief, p. 9. That argument does not help Appellant's position. Under the doctrine of merger the terms of the deed are controlling. *Hughes v. Greenville Country Club*, 283 S.C. 448, 322 S.E.2d 827 (Ct. App. 1984).

In *Hughes*, Chanticleer Real Estate, Inc. offered ninety-six acres of land to Greenville Country Club to develop the Chanticleer golf course. *Id.* at 449, 322 S.E.2d at 827. The offer included a provision reserving "certain rights of way for the benefit of the adjoining property." *Id.* The offer included three enumerated rights, but also stated that if other adjustments were required, the offeror "would expect reasonable accommodation." *Id.*

However, the deed made no provision for "reasonable accommodation." *Id.* at 450, 322 S.E.2d at 827. Thus, when an assignee of rights under the original offer attempted to enforce the provision for reasonable accommodation under the offer, that provision was no longer in effect because the deed did not mention it. *Id.* at 451. 322 S.E.2d at 828. The *Hughes* case does note that South Carolina recognizes the contrary intent exception to the merger doctrine; however, the party "denying merger has the burden of proving by clear and convincing evidence that merger was not intended." *Id.* (Internal citations omitted).

No such evidence was offered in this case. In fact, the order granting summary judgment notes that the deed refers to the Declaration, which provides that docks must be approved by Duke and does not state that what types of docks are available to be built on any lot. S. J. Order, p. 4.

The deed's reference to the Declaration but not to the Property Report would seem to indicate that the Property Report was not intended to survive the doctrine of merger. Thus, under the doctrine of merger, any representations made in the Property Report were not effective after the deed was executed.

Appellant appears to argue, however, that because the deed itself did not include a reference to the Lot having a full-sized dock, the deed itself (as well as the contract) is a negligent misrepresentation, on its own. To the extent that is Appellant's argument, it does not appear to have been argued below, and to the extent it was, it simply has no basis in law.

II. THE TRIAL COURT CORRECTLY RULED THAT RESPONDENT DID NOT OWE A DUTY TO DEVELOP THE LOTS IN A MANNER SUCH THAT A FUTURE PURCHASER COULD OBTAIN A LOT THAT COULD HAVE A PARTICULAR TYPE OF DOCK.

Appellant appears to misconstrue the court's ruling on the existence of Respondents' duty to Appellant in the context of negligent misrepresentation. App. Brief, p. 11. Respondents did not argue, nor did the trial court rule that Respondents did not have a pecuniary interest in representations it made and, thus, a duty to use due care in providing accurate information. That issue was not addressed by the trial court. With respect to the actual representations that were made, the trial court focused rather on the lack of evidence that any such representations were false. S. J. Order, p. 5.

The court's ruling as to a lack of a duty was in the context of Appellant's claim in negligence that Respondent owed Appellant a duty to develop the property in a manner such that Appellant could have purchased the kind of lot that Appellant's heirs wanted. S. J. Order, pp. 5-7. Appellant does state that Duke's denial of a permit for a U-shaped dock "alludes to the fact that the lot itself was negligently designed." App. Brief, p. 10. That argument was rejected at trial on

the ground that that is no authority supporting the notion that a developer owes a duty to an unknown customer to design a lot in a certain fashion. S. J. Order, p. 6. Appellant offers no argument in this court that that ruling was wrong.

III. THE TRIAL COURT CORRECTLY RULED THAT APPELLANT HAD NOT PROVIDED EVIDENCE TO PROVE THE ELEMENT OF JUSTIFIABLE RELIANCE IN ITS NEGLIGENT MISREPRESENTATION CLAM.

In a claim for negligent misrepresentation a plaintiff must prove that he or she relied on a statement made by the defendant and that such reliance was justifiable. *See, AMA Mgmt. Corp.* 309 S.C. at 222, 420 S.E.2d at 874 (Ct. App. 1992). No such evidence was presented in this case. No evidence was presented as to Mr. Greene's knowledge about the ability of the Lot to have a dock prior to purchasing the Lot, such as whether he spoke with someone at Duke about the matter.

Appellant has argued that the type of dock that the Lot could have was of great concern to Appellant. However, that is hearsay. If Respondents could be liable for negligent misrepresentation, then Respondents would be entitled to take the deposition of the person who allegedly justifiably relied on the representation, and this Respondents cannot do.

For instance, the decedent may have been aware that there was a risk that the Lot could only have a full U-shaped dock with his neighbor's permission. It may have been the case that reasonable research could have revealed that the owner of the Lot would need the neighbor's consent to build a U-shaped dock. Greene Dep. p. 31:6-20 (noting that the subsequent propsective purchasers were able to discover the issues with dockability). It may also have been the case that while decedent's heirs cared greatly about the type of dock that the Lot could have, decedent himself was not as concerned when he decided to purchase the Lot and would have purchased it anyway.

In Respondents' motion for summary judgment, they argued that the same policies which disallow an estate's suing in fraud, should apply to negligent misrepresentation claims as well. Amended Mot. Sum. Judgmnt. The basis of this argument is that South Carolina Supreme Court has held that causes of action alleging fraud or deceit (including grossly negligent disclosure practices) do not survive the death of a claimant. *Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 564-65, 564 S.E.2d 94, 97-98 (2002).

In this case, the trial court was not willing to hold that negligent misrepresentation cannot survive the death of the claimant. Hearing Trans. p. 20. It may be that if prior to death, the decedent had testified, subject to the defendant's right to cross-examine the witness, that he or she had justifiably relied upon a negligent misrepresentation that such a claim could survive. However, in this case, there is no such evidence, and the court correctly properly granted summary judgment to Respondents.

CONCLUSION

WHEREFORE, for the foregoing reasons, Respondents respectfully pray that the order of the trial court granting summary judgment be affirmed or based upon any other grounds appearing in the Record on Appeal.

February 2, 2023.

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