STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY	)	CASE NO. 2020-CP-08-00914
SM Charleston, LLC,	)	
	)	
Plaintiff,	)	
	)	
Versus	)	JUDGMENT FOR THE DEFENDANT
	)	
Daniel Island Riverside Developers, LLC,	)	
	)	
Defendant.	)	
	)	

THIS MATTER was called for trial before the undersigned on December 5 and 6, 2022, at the Berkeley County Courthouse. Present at the trial were plaintiff SM Charleston, LLC through its representative, Roger Hunt, and its counsel, R. Bruce Wallace, Esq. Defendant Daniel Island Riverside Developers, LLC, was present through its representative, Robert Behringer, and its counsel, David K. Haller, Esq. This case arises from the sale of property in Berkeley County. This court has jurisdiction over the subject matter of this action and the parties named herein. Venue is proper in Berkeley County. The action was referred to me on June 13, 2022, by consent of the parties with finality.

Having heard the witnesses, reviewed the exhibits, and considered the arguments of counsel, I find for Defendant Daniel Island Riverside Developers and order the Clerk of Court for Berkeley County to pay over all sums in her possession to the Defendant immediately.

FINDING OF FACTS

SM Charleston, LLC is a subsidiary of Stanley Martin Homes, a large, sophisticated tract home builder with a large presence in the Charleston area. Daniel Island Riverside Developers, LLC is also an owner of property and builder.

On April 18, 2018, SM Charleston, LLC (hereinafter, "SMC") agreed to buy, and Daniel Island Riverside Developers, LLC (hereinafter "DIRD") agreed to sell, two tracts of land located on Daniel Island in the City of Charleston, Berkeley County totaling just over 20 acres for $13,250,000.00. At the time of the contract, DIRD had received conceptual approval of a subdivision plat with 89 lots for townhomes and single-family residential lots; however, the plan had not yet received final approval. Exhibit 1, PSA ¶8.5. The parties agreed that "Seller will continue to pursue TRC approval prior to Closing; provided however, that the Parties agree that obtaining TRC approval shall not be a condition to Purchasers obligations to close on the purchase of the property." Exhibit 1, PSA ¶8.5.

Because a final development plan was pending approval from the City of Charleston, the initial Purchase and Sale Agreement created a "Lot Loss Price Reduction" by which SMC might be allowed a reduction in the sales price. Under the Lot Loss Price Reduction plan agreed to by the parties in the original agreement, if an act instigated by the City of Charleston in the approval process reduced the number of lots approved and being purchased by SMC, the sale price would be reduced by $120,000 for each townhouse lot lost or $175,000 for a single-family residential lot. Exhibit 1, PSA, ¶2.1.

In the PSA, SMC also agreed to a broad 60-day inspection period, during which SMC was entitled to access the property freely to conduct all tests and research necessary to determine if the property was suitable for its needs. See PSA, ¶1.15. During the inspection period, SMC had the right to cancel the contract without penalty for any reason. "In the event that Purchaser is not satisfied, in its sole and absolute judgment, with the feasibility of Purchaser's acquisition, financing and development of the Property, Purchasers shall have the right to terminate this agreement for any reason or for no reason by written notice to Seller prior to the expiration of the

Inspection Period." Exhibit 1, PSA, ¶ 3.1. If SMC terminated the contract, it would be entitled to its earnest money back. Id.

SMC received its 60-day inspection period, and it received three extensions of that period over the course of the next four and a half months for which it paid no additional consideration. In August of 2018, the parties entered into a Fifth Amendment to the PSA; it is the Fifth Amendment and the Escrow Agreement it created that is the subject of this litigation.

The Fifth Amendment deleted the original Paragraph 2.1 provision and restated it. The general provisions that the development must been approved for 89 lots and a reduction in the sales price if not as caused by acts of the City of Charleston remained. However, to proceed to closing prior to approval, the parties agreed to escrow certain funds to be held according to an Escrow Agreement. The parties agreed:

> Because the subdivision plat will not be recorded prior to Closing, and in order to secure the potential Lot Loss Price Reduction, a portion of the Seller's proceeds in the amount of One Million One Hundred Fifty Thousand and NO/100 ($1,150,000.00) Dollars (hereinafter, the "Escrow Funds") shall be withheld at **Closing and shall be held in trust by an escrow agent in accordance with an escrow agreement to be executed by the Parties at Closing**, such escrow agreement to have substantially the same terms and provisions as set forth in the agreement attached hereto as Exhibit A.
>
> Notwithstanding the foregoing, the Parties agree that (A) the Lot Loss Price Reduction shall not apply in the event that the Property is not approved for a total of eighty-nine (89) lots as a result of the action of the Purchaser, its engineer, or other agents in modifying or changing anything concerning the Development Plan as it currently exists; and **(B) the Purchaser shall have no remedy and no recourses against Seller in the event that the Purchaser loses lots with a value exceeding the Escrow Funds.** (Emphasis Added); Exhibit 3.

The referenced Escrow Agreement provides as follows:

> **5. Termination of Escrow.** This Escrow Agreement *shall terminate* upon the earlier to occur of:
>
> (a) the delivery by Seller to Escrow Agent and Purchaser of written confirmation of the recorded Subdivision Plat, and the number of single family and

townhome lots shown thereon, and delivery of any resulting Lot Loss Price Reduction, if any, to Purchaser; or

(b) Eighteen (18) months following the recording of the Deed.

Upon termination of this Escrow Agreement, Escrow Agent shall deliver to Seller the remaining balance of the Escrowed Funds, and all interest, if any, earned thereon. Upon such payments, Escrow Agent shall have no further obligations pursuant to this Escrow Agreement, except to the extent of accounting for any portion of the Escrowed Funds previously disbursed by Escrow Agent.

Exhibit 4 (emphasis added).

In summary, the parties agreed that SMC would escrow $1,150,000.00 of the purchase price for any reduction in lots caused by the City of Charleston. The Escrow Agreement provided an 18-month period by which SMC could obtain a final subdivision plat.

SMC offered the testimony of Mark Lipsmeyer, who was SMC's president at the time the PSA was negotiated and signed. He testified that SMC sought out advice from its engineering team, Seamon, Whiteside & Associates, prior to suggesting the 18-month period and that its advice was that 18 months would be sufficient time to obtain a recorded subdivision plat. Russ Seamon, president of Seamon, Whiteside & Associates, was also called by SMC. He also testified that he advised SMC that 18 months would be sufficient time based on his years of experience working with the City of Charleston planning and zoning departments.

Bob Behringer, DIRD's principal, testified that DIRD agreed to the 18 months termination date because it was a definitive and reasonable amount of time. Further, he testified that DIRD needed to come to an end of its dealings because a former member had passed away and its heirs needed the matter put behind them.

Closing was held on October 16, 2018, and SMC took title to the property that day. The parties agree that 18-months from the filing of the deed was April 16, 2020. SMC further admits

no plat had been filed as of that date. As of the conclusion of the trial, no subdivision plat had been recorded.

A month after closing, SMC hired Seamon, Whiteside as its engineering company, a different company than did the original conceptual plan. The Fifth Amendment required SMC to submit the Development Plan (which the parties acknowledge was the conceptual plan) "as it currently exists" to the City of Charleston. See Exhibit 3 ("In the event that the Property is not approved for a total of eighty-nine (89) lots as shown in the Development Plan, then as it currently exists…"). However, SMC did not submit the Development Plan. Instead, it submitted a different plan divided into two phases and only submitted a proposed plan for Phase One. It was unclear whether plans for Phase Two had been submitted by the time of trial. Eric Schultz, a City of Charleston employee stated a Phase Two plan had not been submitted, while Russ Seamon, testified the Phase Two plan had been submitted. The plan for Phase Two, with its total number of lots, has not been approved and remains subject to amendment. The total number of lots for the 20-acre development has not been set by any formal order of the City of Charleston.

Further, the total Development Plan was not submitted for formal approval to the City of Charleston prior to the expiration of the 18 months period. Over the more than four years between closing and the trial of this case, SMC submitted for staff review, but not City of Charleston formal approval, eight separate plans for Phase One. SMC with Seamon, Whiteside's assistance, took comments from City of Charleston staff that were not formally required by the City of Charleston and amended the plan over and over during the intervening years. On examination, Eric Schultz, the City of Charleston employee acknowledged that while he could make comments and suggestions to plans and submittals, he could not force anyone to do anything. Russ Seamon likewise acknowledged that City of Charleston employees could not require any changes to plans

submitted for approval. SMC never sought any formal relief using City or judicial process over any of the lots or other changes it made to the Development Plan because of City staff.

The record before me shows only that the formal City of Charleston approval for Phase One consisting of 54 total lots with nearly nine acres still subject to development and approval. SMC offered the testimony of Roger Hunt, its vice president, and Michael Cain, an employee of Seamon, Whiteside who worked on SMC submittals. Each gave testimony of changes made to the plans over the four-year period it made in response to staff comments to the plan. Again, the only exhibit submitted by SMC which showed formal City approval was the approval of Phase One's 54 lots with nine unapproved acres, but not a recorded plat. Schultz acknowledged it was possible 35 additional lots could be approved for the remaining acreage. Of the 54 lots, Cain admitted that the choice of what type of lot was placed in the development was driven by SMC, not the City, and often because of the particular product SMC wanted to offer for sale in the development.

CONCLUSIONS OF LAW

This is a contract interpretation case. SMC has brought a claim for a declaratory judgment to determine its rights under the contract. DIRD alleges SMC has breached the contract and breached the contract by a fraudulent act by failing to surrender the earnest money at the conclusion of the 18-month period while knowing it had agreed to an 18-month deadline.

The seminal question between the parties are whether the Lot Loss Sales Reduction survives the terminate date in the Escrow Agreement. If SMC's position is correct, it must further prove that a specific number of lots were lost because of acts of the City of Charleston. Given a clear reading of the unambiguous contractual documents together, I find the only logical interpretation of the contract is that SMC's Lot Loss Sales Reduction rights terminated 18 months

subsequent to the filing of the deed in April of 2020. Accordingly, SMC breached the contract by failing to surrender the escrow funds to DIRD at the end of its 18-month period. However, even if I were to interpret the contract documents in the way SMC alleges, I would find it has failed to meet its burden of proof that the City of Charleston caused it to lose the requisite number of lots or the amount of its loss. Accordingly, I find for the Defendant.

> The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language. Parties to a contract have the right to construct their own contract without interference from courts to rewrite or torture the meaning of the [the contract]. If the contract's language is clear and unambiguous, the language alone determines the contract's force and effect. When a contract is unambiguous a court must construe its provisions according to the terms the parties used; understood in their plain, ordinary, and popular sense.

Schulmeyer v. State Farm Fire and Cas. Co., 353 S.C. 491, 579 S.E.2d (2003). The duty of courts is to enforce unambiguous contracts from the perspective of the parties' situation at the time of the execution of the agreement.[1] *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 498, 649 S.E.2d 494, 502 (Ct. App. 2007).

Further, when an agreement consists of multiple documents, they should be read together, regardless of the date on which they were executed:

> [W]here the instruments have not been executed simultaneously but relate to the same subject matter and have been entered into by the same parties, the transaction comprising the contract will be considered as a whole. This is true even though the transaction consumed more than one day; the date of the writings constituting such transaction is immaterial. Construing contemporaneous instruments together means simply that if there are any provisions in one instrument limiting, explaining, or otherwise affecting the provisions of another, they will be given effect between the parties so that the whole agreement as actually made may be effectuated.

17 Am.Jur.2d *Contracts* Section 264 (1964) cited and applied in *Edward Pinckney Assocs., Ltd. v. Carver*, 294 S.C. 351, 354, 364 S.E.2d 473, 474 (Ct. App. 1987).

[1] Neither party has claimed the contract is ambiguous and the Court is proceeding as if it is not.

Courts should avoid interpretations which lead to absurd or unjust results. "Where one interpretation of a contract makes it unusual or extraordinary and another interpretation, equally consistent with the language employed, would make it reasonable, fair, and just, the latter construction prevails. An interpretation which establishes the more reasonable and probable agreement of the parties should be adopted while an interpretation leading to an absurd result should be avoided." *Koon v. Fares*, 379 S.C. 150, 155, 666 S.E.2d 230, 233 (2008).

The key documents between the parties are the Fifth Amendment to Purchase and Sale Agreement (plaintiff's Exhibit 3) and Escrow Agreement (plaintiff's Exhibit 4). Reading the documents together, they provide:

- SMC purchased 20 acres, more or less, from DIRD for $13.25 million; (Exhibit 3)
- The purchase price was due and payable at closing;
- A final subdivision plat of the property had not been approved by closing and SMC would continue with the approval process of the Development Plan after closing;
- If the property was not approved for 89 lots as shown in the Development Plan, SMC might be entitled to a reduction in the purchase price;
- SMC agreed to submit the Development Plan, "as it currently exists" to the City of Charleston for approval;
- The parties agreed to hold $1.15 million in escrow, "in accordance with an escrow agreement to be executed by the Parties at Closing;"
- SMC was only entitled to a reduction in the purchase price for lots reduced by the City of Charleston and not caused by "the Purchaser, its engineer or other agents;"

- SMC's Lot Lost Sales Reduction was capped at $1.15 million, and it had, "no other remedy and no recourse against (DIRD) in the event (SMC) loses lots with a value exceeding the Escrow Funds;"
- The purpose of the Escrow Agreement was to, "secure and fund the performance of (DIRD's) obligations under this Escrow Agreement and the provisions of Section 2.1 of Purchase Agreement;" (Exhibit 4, ¶1);
- The Escrow Agreement, "shall terminate" upon either SMC presenting to the Escrow Agreement and DIRD a recorded Subdivision Plat and SMC's claimed Lot Loss Sales Reduction **OR** "eighteen months following the record of the Deed" (Exhibit 4, ¶5);
- "Upon termination of this Escrow Agreement, Escrow Agent shall deliver to (DIRD) the remaining balance of the Escrowed Funds, and all interest, if any, earned thereon." (Exhibit 4, ¶5).

Reading these provisions together, the only logical interpretation of the contract is that SMC had 18-months to obtain a recorded Subdivision Plat showing the number of lots lost and, if it did not, DIRD was to receive the entire escrowed funds back. First, the Fifth Amendment, which created SMC's Lot Loss Price Reduction rights, states the funds were to be held in escrow according to the Escrow Agreement. Second, the Escrow Agreement states the purpose of the agreement was to, "secure and fund" the loss of lots. Third, the Escrow Agreement plainly states that it, "shall terminate" upon either SMC providing a recorded plat or 18-months from the recording of the deed. Fourth, the Fifth Amendment states that SMC's only remedy for lost lots is the escrowed funds. Accordingly, the Escrow Agreement and Lot Loss Sales Reduction terminated in April of 2020.

Such a reading is consistent with the positions of the parties at the time of closing. Both Mark Lipsmeyer of SMC and Russ Seamon of Seamon, Whiteside testified that they discussed and analyzed the amount of time needed to complete the planning process and agreed 18-months was sufficient. Bob Behringer testified he agreed to the 18-months because it was a reasonable amount of time while at the same time concluding the transaction so his co-member's heirs could receive their inheritance. Russ Seamon and Michael Cain testified that the issues SMC claimed to face in approval were abnormal and not something either party could anticipate. There was no testimony that any act by DIRD after closing caused any delay or interfered with SMC's rights. Looking at the position of the parties at closing, it is clear the 18-month termination date was negotiated in good faith, at arm's length, by sophisticated parties for the mutual benefit of both. *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 498, 649 S.E.2d 494, 502 (Ct. App. 2007) (holding the contract should be read as of the positions of the parties at the time of execution).

SMC asserts the Lot Loss Price Reduction continues in perpetuity until the total number of lots is determined because the intent of the Escrow Agreement is to, "secure and fund" the loss of lots. It gives no meaning to the language of the Escrow Agreement that it "shall terminate" either on a plat being provided or 18-months from the filing of the deed. Such a determination leads to an absurd result, requiring me to ignore the termination date in the Escrow Agreement and the recourse limitation in the Fifth Amendment. Reading the agreements together as a whole, as I must, the clear intentions of the parties are that Lot Lost Price Reduction and Escrow Agreement terminated in April of 2020 and DIRD is entitled to the funds.

Reading the Fifth Amendment and Escrow Agreement together, SMC had a definitive time of 18-months to obtain approval of the Development Plan for a potential reduction of the purchase

price. If a record Subdivision Plat was not provided by the end of the 18-month period, the funds reverted to DIRD. SMC's potential reduction was capped at the amount if escrow and it had no other recourse against DIRD. It is undisputed no final plat of the property has been filed and that 18-months from the recording of the deed was April of 2020. Accordingly, the Escrow Agreement terminated in that month and DIRD was entitled to the immediate return of all escrowed funds, plus any interest. SMC breached the contracts by failing to cooperate with the return of the funds.

Even if I were to interpret the contract in the manner put forth by SMC, I would be forced to find it has not met its burden of proof that it was entitled to a Lot Loss Sale Reduction. In this regard, the primary reason is that one half of the property remains in the planning and permitting process. Phase One is the only portion of the property where the number of available lots has been conclusively established. Phase Two of the development has not been approved and the number of lots to be approved in that phase is undetermined. While there was testimony from SMC employees that the plat for Phase Two would not change, City of Charleston employees were less certain and acknowledged that changes are routinely made in plans. The law and processes certainly allow for SMC to try for more lots. There is no better evidence of the potential for change in the plans than the process SMC testified to in court. As the process continues, the plans can change. Until a final plan is approved, any final determination of the number of lots platted in the development is speculative. *Collins Holding Corp. v. Landrum*, 360 S.C. 346, 350, 601 S.E.2d 332, 334 (2004) ("The law does not require absolute certainty of data upon which lost profits are to be estimated, but all that is required is such reasonable certainty that damages may not be based wholly upon speculation or conjecture …"). Allowing SMC to succeed at this point under its theory of the case allows it to receive all the escrow, all the property, and the right to subsequently do whatever it wanted with the remainder of the property. In other words, SMC would obtain

double its bargain: a reduced price for the land and the right to change its use when it otherwise contracted not to.

Second, SMC contracted to submit the Development Plan, "as it currently exists" to the City. Instead, it submitted a multi-phase project to get lots on the market sooner. SMC cannot now complain that the number of lots to the Development Plan changed when it took a different direction than what it contracted to do for its own financial gain.

Third, the lots it claims to have lost were routinely attributed to amendments it made based on comments from City of Charleston staff. The only formal determination from the City of Charleston that was placed in the record was a partial approval of Phase One. Otherwise, changes to the plans were made because of staff comments. However, Eric Schultz and Lee Batchelor, City of Charleston employees, testified they do not have the authority to make SMC do anything. While SMC had the ability to seek full approval of the Development Plan using city and judicial remedies processes, it elected not to use them and made the changes on its own.

The contract allowed for a reduction in the purchase price only for changes made to the Development Plan by the City of Charleston. The City of Charleston operates through its elected representatives and formal processes set out in its ordinances and state statute. City employees are just that, employees, who acknowledged here they are powerless to force anything of anyone. Inasmuch as SMC has not come forward showing formal loss of lots caused by the City of Charleston, it has failed in its burden of proof.

THEREFORE, IT IS ORDERED that judgment on plaintiff's declaratory judgment claim is entered in favor of DIRD; and

IT IS FURTHER ORDERED that judgment be entered in DIRD's favor on its breach of contract claim; and

IT IS FURTHER ORDERED that the Court does not find SMC acted in bad faith to succeed on its breach of contract accompanied by a fraudulent act claim; and

IT IS FURTHER ORDERED that DIRD is given judgment against SMC in the amount of $1.15 million, plus interest accumulated thereon, and pre-judgment interest of eight and three-quarters (8.75%) percent from April 16, 2020, as allowed by S.C. Code Ann. §34-31-20; and

IT IS FURTHER ORDERDED that the Clerk of Court for Berkeley County as holder of the interpleaded funds, pay to Defendant Daniel Island Riverside Developers, LLC, all proceeds, including interest, held by her, which shall reduce the judgment against SMC; and

IT IS FURTHER ORDERED that the record for this matter shall remain open pending a review of DIRD's prayer for attorney's fees and costs at another date.

AND IT IS SO ORDERED!!

(JUDGE'S SIGNATURE PAGE TO FOLLOW)

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2020-CP-08-0914

SM Charleston, LLC,

PLAINTIFF(S)

Daniel Island Riverside Developers, LLC,

DEFENDANT(S)

David K. Haller **604 Savannah Highway** **Charleston, SC 29407**	**Attorney for :** ☐ Plaintiff ☑ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☑ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _____

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☑ See attached order (formal order to follow) ☐ Statement of Judgment by the Court: _____

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
Daniel Island Riverside Developers, LLC	SM Charleston, LLC	$ 1,150,000.00
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

(Signature Page to Follow)

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

_____
_____
_____
_____
_____
_____
_____

ATTORNEY(S) FOR THE PLAINTIFF(S)

David K. Haller
604 Savannah Highway
Charleston, SC 29407

Robert Bruce Wallace
205 King Street, Suite 400 / PO Box 486
Charleston, SC 29402
ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

Berkeley Common Pleas

Case Caption: Buist Byars & Taylor Llc As Escrow Agent VS Daniel Island Riverside Developers Llc , defendant, et al

Case Number: 2020CP0800914

Type: Master/Order/Other

AND IT SO ORDERED!

s/Dale E. Van Slambrook #3079