

**RECEIVED**

**Feb 22 2023**

**SC Court of Appeals**

THE SOUTH CAROLINA COURT OF APPEALS

MFM Properties, LLC and MFM Residential Properties,  
LLC, Respondents,

v.

Rotunda Land & Development Group, LLC and  
Calloway Title & Escrow, LLC, Defendants,

of which Rotunda Land & Development Group, LLC is  
the Appellant

Appellate Case No. 2022-001097

---

**INITIAL BRIEF OF APPELLANT**

---

Terry A. Finger, Esquire  
FINGER, MELNICK, BROOKS & LABRUCE, P.A.  
Post Office Box 24005  
Hilton Head Island, SC 29925-4005  
(843) 681-7000  
(843) 681-8802 (fax)  
[tfinger@fingerlaw.com](mailto:tfinger@fingerlaw.com)  
Attorney(s) for Appellant  
Rotunda Land & Development Group, LLC

**TABLE OF CONTENTS**

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIES.....ii

STATEMENT OF ISSUES ON APPEAL.....1

STATEMENT OF THE CASE.....2

STATEMENT OF FACTS.....3

STANDARD OF REVIEW.....5

ARGUMENT.....6

    I.    The Court erred in granting summary judgment because Appellant showed  
          there are genuine issues of material facts.....6

    II.   The Circuit Court erred in granting a judgment for any dollars in excess of the  
          Initial Earnest Money deposit.....7

    III.  The Circuit Court erred in awarding Respondent attorney fees and costs.....7

CONCLUSION.....8

## TABLE OF AUTHORITIES

*Fleming v. Rose*, 350 S.C. 488, 493, 567, S.E.2d 857, 860 (2002)

*Brockbank v. Best Capital Corp.*, 341 S.C. 372, 534, S.E.2d 688 (2000)

*Trivelas v. S.C. Department of Transportation*, 348 S.C. 125, 558 S.E.2d 271 (S.C. App., 2001)

## STATEMENT OF ISSUES ON APPEAL

- I. Did the Circuit Court commit error in granting summary judgment because Appellant showed there were genuine issues of material facts?
- II. Did the Circuit Court commit error in granting a judgment for any dollars in excess of the initial earnest money deposit?
- III. Did the Circuit Court commit error in awarding Respondent attorney fees and costs?

## STATEMENT OF THE CASE

This matter involves a Purchase and Sale agreement whereby Appellant was going to purchase 2,632 acres of land in Jasper County South Carolina from the Respondents. The Agreement was dated August 19, 2019 with a closing scheduled no later than August 1, 2020. The purchase price was \$16 Million dollars. Appellant paid an earnest money deposit of \$100,000.00.

For various reasons, the transaction did not close. Respondents filed an action on March 16, 2021 with five causes of action, to-wit: (1) Breach of Contract, (2) Declaratory Judgement regarding the Initial Earnest Money, (3) Mandatory Injunction regarding the Initial Escrow Money, (4) Specific Performance regarding the Initial Earnest Money, (5) Mandatory Injunction regarding Documents, and (6) Specific Performance regarding Documents.

Appellant filed an answer alleging among other things a general denial and that it was ready, willing and able to close.

Respondents filed a Motion for Summary Judgment and the motion was heard in Beaufort County by the Honorable Robert Bonds on April 5, 2022. An initial order granting Summary Judgment was issued on May 23, 2022. This was not a final order as the issue of Respondents' attorney fees, interest, and costs was left open. The Final Order of Judgment was issued by the Lower Court on July 29, 2022.

Appellant timely filed an appeal of the Final Order.

## STATEMENT OF FACTS

The vacant property owned by Respondents was to be purchased by Appellant. The development under the auspices of the Town of Hardeeville. As in any development of this size and scale, Appellant began its due diligence and a major portion of that effort involved dealing with the Hardeeville Planning department and Town Council. The goal was to negotiate a Development Agreement that would control the development density, types of uses, fees, schedules, infrastructure, public improvements/donations, and other typical development agreement features. This is a complex negotiation that involves public meetings and proceedings at the Planning Commission and Town Council level. Also essentially involved is acquiring the necessary land planning experts such as engineers, land planners, and other design professionals.

Appellant properly and diligently proceeded with the needed actions to reach an agreement with the Town of Hardeeville. At the critical time in early 2020, COVID hit and the planning process came to a grinding halt. (See Lange deposition at pages 18, 24, 44, and 45).

The parties on July 8, 2020 reached an amendment to the Purchase and Sale agreement extending the due diligence and closing date. (See exhibit 3 to Lange deposition). In late November and early December, Paul Lange, owner of Appellant, had conversations with Harry Morgan, a principal of the Respondents. In those conversations. Lange spoke of the need for additional time due to the COVID problems in getting the development agreement negotiated with the Town of Hardeeville to a comfortable point. Morgan was aware of the problems that COVID was causing. (See Lange deposition at pages 43-44).

As a result of the conversations, Paul Lange firmly believed that Harry Morgan and the Respondents agreed to additional extension due to COVID and Respondents wanted the extension proposal to be put in writing.

Thereafter, the attorney for Respondents, Gary S. Griffin, through a series of letters and emails in December did not acknowledge the conversations and agreement to extend the closing that the parties had agreed to. Cary Griffin tendered performance on December 30, 2020.

On December 31, 2020, counsel for Appellant informed Cary Griffin that the principals had talked and had agreed to put together revised terms. (See exhibit 10 to Lange deposition).

Thereafter, Cary Griffin requested that Paul Lange not contact his client directly and in January claimed that the contract was terminated. (See exhibits 11, 12, and 13 of Lange deposition).

On February 19, 2020, counsel for Appellant sent the revised proposal that the principal of the Respondents requested in late December. Among other things, the price was increased to \$16.5 Million, additional earnest money non-refundable, and closing in 120 days. (See exhibit 17 to Lange deposition). That offer was responded to on February 26, 2020 with a “simple rejection.” (See exhibit 18 to Lange deposition). On March 11, 2021, Appellant submitted a Letter of Intent to document the discussions of the parties in November and December, 2020.

## STANDARD OF REVIEW

When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCF. “*Fleming v. Rose*, 350 S.C. 488, 493, 567, S.E.2d 857, 860 (2002). Summary judgment is appropriate when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c), SCRCF. “When determining if any triable issues of fact exist, the evidence and all reasonable influences must be reviewed in the light most favorable to the non-moving party.” *Fleming*, 350 S.C. at 493-94, 567 S.E.2d at 860.

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 534, S.E.2d 688 (2000). Because it is a drastic remedy, summary judgment should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues. *Trivelas v. S.C. Department of Transportation*, 348 S.C. 125, 558 S.E.2d 271 (S.C. App., 2001).

## ARGUMENT

**I. The Court erred in granting summary judgment because Appellant showed there are genuine issues of material facts.**

The Respondents did not submit any affidavits except from their attorney, Cary S. Griffin. The affidavit of Cary S. Griffin essentially authenticated many of the Exhibits to the deposition of Paul Lange.

The deposition testimony of Paul Lange that Appellant and Respondent had reached an agreement to extend the Contract is not contradicted by either of the principals of the Respondent. Based upon the Agreement, Appellant had his attorneys prepare revised purchase documents with a Five Hundred Thousand (\$500,000.00) Dollar increase in purchase price. The revised documents were anticipated by Respondents and would have, among other things, complied with the Statue of Frauds and the merger clause in the contract. The revised documents were sent in February 2021 and again on March 11, 2021 (Exhibit 21 to Lange Deposition). Respondent filed suit on March 16, 2021.

A genuine issue of material fact exists as to whether the parties reached an agreement to extend the contract and allow additional time for the Development Agreement to be formalized with the Town of Hardeeville. The numerous deposition exhibits, construed in the light most favorable to Appellant show a genuine issue of material fact.

**II. The Circuit Court erred in granting a judgment for any dollars in excess of the initial earnest money deposit.**

The Respondents' First Cause of Action in the Complaint is the only Cause of Action that involves any claim over and above the \$100,000.00 Initial Earnest Money of \$100,000.00. The Initial Earnest Money has been paid to Respondents.

Respondents claim that Appellant did not pay the Additional Earnest Money of \$100,000.00 set out in the Reinstatement of and First Amendment to Purchase and Sale Agreement. (Ex 3 to Lange Deposition). If the Additional Earnest Money was not paid, the result is that the Reinstatement fails and Respondents are left with the remedies from the Initial Purchase and Sale Agreement. This is exactly what Respondents' attorney stated in Exhibit 15 to the Lange Deposition. This remedy is to have the Initial Earnest Money forfeited to Respondents. That has been done. Additionally, a \$45,000.00 Inspection Period Extension fee paid prior to the Reinstatement was paid to Respondents. The Lower Court did not consider the \$45,000.00 paid to Respondents when it calculated the damages under the Summary Judgment Orders.

**III. The Circuit Court erred in awarding Respondent attorney fees and costs.**

The Final Order from the Lower Court awarded \$20,000.00 in attorney fees to Respondents. Appellants submits the Summary Judgment should be reversed which would require the attorney fees to be reversed also.

## **CONCLUSION**

The Appellant respectfully requests the Final Order of the Lower Court be reversed and the case be remanded for trial.