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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

The Honorable Donald B. Hocker, Circuit Court Judge

Appellate Case No. 2022-001547
Civil Action No. 2020-CP-07-1064

Turner’s Marina, LLC.....Respondent-Appellant,

v.

Paige Lorberbaum, Jeffrey A. Klapper, and Diane L. Klapper Defendants.

Of whom Page Lorberbaum is the Appellant-Respondent and Jeffrey A. Klapper and Diane L. Klapper are Respondents.

**INITIAL RESPONDENTS’ BRIEF OF JEFFREY A. KLAPPER AND
DIANE L. KLAPPER**

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TABLE OF CONTENTS

Table of Authorities3

Statement of Issues on Appeal4

Statement of the Case4

Standard of Review6

Arguments6

 1. JUDGE HOCKER DID NOT ABUSE HIS DISCRETION IN DENYING
 TURNER’S MARINA, LLC’S CLAIM FOR COSTS AND
 ATTORNEY’S FEES6

 2. THE TRIAL COURT COMMITTED ERROR BY FAILING TO FIND
 THE SUBJECT RIGHT OF REPURCHASE VIOLATED THE UNIFORM
 STATUTORY RULE AGAINST PERPETUITIES (S.C. CODE ANN. 27-
 6-10)8

Conclusion8

TABLE OF AUTHORITIES

State Cases

Baron Data Sys., Inc. v. Loter, 297 S.C. 382, 384, 377 S.E.2d 296, 297 (1989).....6,7

Nelson v. Merritt, 281 S.C. 126, [314 S.E.2d 840](#) (Ct.App.1984)); *accord Blumberg*, 310 S.C. at 493, 427 S.E.2d at 660.6

Statutes

SC Code Ann. 27-6-10 *et seq.*8

Other Authorities

None

STATEMENT OF ISSUES ON APPEAL

1. Did Judge Hocker abuse his discretion in finding that Plaintiff failed to offer specific proof of its attorney's fees and costs in his August 4, 2022 Order?
2. Did Judge Hocker err in failing to find the subject right of repurchase violated the Uniform Rule Against Perpetuities?

STATEMENT OF THE CASE

Respondents JEFFREY A. KLAPPER AND DIANE L. KLAPPER (“Respondents Klapper”) adopt by reference in part Respondent-Appellant Turner’s Marina, LLC’s Statement of the Case in its Initial Respondent’s Brief received by this Court December 5, 2022.

On May 13, 2020, Turner’s Marina filed its Summons and Complaint alleging breach of contract and seeking monetary damages or specific performance of its right of repurchase, and attorney’s fees as are allowed under the R.V. Resort Covenants. Record on Appeal at p.____. The Klapper Defendants answered on June 10, 2020, alleging that Turner’s Marina did not have any “Right of First Refusal” in April 2019 because allegedly Turner’s Marina’s assignor, Billybob’s Marinas, Inc., had retained “the right of repurchase acquired from Property Research Holdings, Inc.” for a certain time period that Billybob’s had extended partial owner financing. Record on Appeal at p.____.

Defendant Lorberbaum answered on June 12, 2020, and also alleged that Turner’s Marina did not have the right of repurchase in April 2019 because “the assignment of right of first refusal did not take effect until the later of several events.” Record on Appeal at p.____

. Defendant Coastal States Bank answered on June 12, 2020 also, but a settlement was reached with the Bank, they were dismissed from the case and have no interest in this appeal. Record on

Appeal at pp. ____.

Although the Plaintiff initially requested a jury trial, the Honorable Bentley Price, serving as the Chief Administrative Judge for the 14th Judicial Circuit, strongly suggested that the case be tried non-jury after the Plaintiff subpoenaed Mr. Johnson as a witness and Mr. Johnson filed a Motion in Limine to block his testimony. The parties agreed to try the case non-jury and the trial was held on June 30, 2022 before the Hon. Donald B. Hocker in Beaufort County. At trial, the Plaintiff requested that Ms. Lorberbaum be ordered to convey Lot 158 to Turner's Marina, for \$54,500 less the three years of lost rental revenues, or that Turner's Marina be awarded damages of \$252,997.50 as the lost revenue it suffered as a result of not having Lot 158 to rent out over the next 61 years.

On August 4, 2022, Judge Hocker entered a final Order in the case, finding that the failure of the Klappers and Ms. Lorberbaum to allow Turner's Marina to purchase Lot 158 was a material breach of the R.V. Resort Covenants, and ordered Defendant Lorberbaum to convey Lot 158 to Turner's Marina for \$54,500 within ninety (90) days of August 4, 2022, or by November 2, 2022. He declined to award Turner's Marina attorney's fees. See Record on Appeal at p. ____.

On August 15, 2022, Turner's Marina filed its SCRCP 59(e) Motion to Alter or Amend the August 4, 2022 Order (Record on Appeal at p. ____) and Ms. Lorberbaum's new counsel Russell Patterson filed her Motion to Alter or Amend the Order on August 16, 2022. (Record on Appeal at p. ____) On September 21, 2022, Turner's Marina filed its Petition for Reformation of Right of Repurchase. Record on Appeal at p. _____.

On September 27, 2022, Judge Hocker entered his Order denying both motions to alter or amend the August 4, 2022 final Order. Record on Appeal at p. _____. Ms. Lorberbaum's counsel then apparently filed her Notice of Appeal by mail on October 27, 2022,

which was received by Turner's Marina's counsel on November 2, 2022. On November 3, 2022, Turner's Marina filed its cross-appeal. Record on Appeal at p. ___.

STANDARD OF REVIEW

Respondents Klapper adopt Appellant-Respondent Paige Lorberbaum's Standard of Review in her Initial Respondent's Brief received by this Court December 30, 2022 and add: "Where there is a contract, the award of attorney's fees is left to the discretion of the trial judge and will not be disturbed unless an abuse of discretion is shown." *Baron Data Sys., Inc. v. Loter*, 297 S.C. 382, 384, 377 S.E.2d 296, 297 (1989) (citing *Smith v. Smith*, 264 S.C. 624, 216 S.E.2d 541 (1975); *Nelson v. Merritt*, 281 S.C. 126, 314 S.E.2d 40 (Ct.App.1984)); *accord Blumberg*, 310 S.C. at 493, 427 S.E.2d at 660. "Where an attorney's services and their value are determined by the trier of fact, an appeal will not prevail if the findings of fact are supported by any competent evidence." *Baron Data Sys.*, 297 S.C. at 384, 377 S.E.2d at 297 (citing *Singleton v. Collins*, 251 S.C. 208, 161 S.E.2d 246 (1968)).

ARGUMENTS

1. Judge Hocker did not abuse his discretion in denying Turner's Marina, LLC's claim for costs and attorney's fees.

Turner's Marina, LLC addressed its claim for contractual costs and attorney's fees during the trial only in a short line of questions and answers, to wit:

- Q. Mr. Turner, have you had to hire and pay an attorney to bring this suit?
A. I have.
Q. Is that attorney me?
A. That is you.
Q. And what, Mr. Turner, are you paying me on an hourly basis?
A. \$325 an hour.
Q. To your knowledge, based upon your lifetime in the Hilton Head and Beaufort County area, is that rate comparable to what other lawyers of a

similar background and experience would charge?

A. Yes.

(Transcript p. 50 at Record on Appeal p. ____)

That was it. No reservation of right to supplement this testimony was ever requested. The Plaintiff rested (Transcript p. 159 at Record on Appeal p. ____), and the Court closed the evidence with no request for further consideration of attorney's fees and costs (Transcript p. 189 at Record on Appeal p. ____).

The trial court addressed the issue specifically in its Final Order: "Although there is a provision with the R.V. Resort Covenants providing for attorney's fees in certain situations to prevailing litigants, there was no specific proof offered during trial as to the amount of attorney's fees expended by the Plaintiff, and thus I award no attorney's fees to the Plaintiff." See p. ____ Record on Appeal.

Turner's states in its Brief "it is standard practice in the Lowcountry of South Carolina to reserve a hearing on attorney's fees until after a final court decision." See p. 10-11 Respondent-Appellant's Initial Brief. Even if such "standard practice" was binding on Judge Hocker, which it is not, no reservation was ever requested or made. In trial, Plaintiff addressed its attorney's fees claim but did so woefully inadequately rather than requesting to reserve the claim for a post-trial hearing.

"Where there is a contract, the award of attorney's fees is left to the discretion of the trial judge and will not be disturbed unless an abuse of discretion is shown." *Baron Data Sys., Inc. v. Loter*, 297 S.C. 382, 384, 377 S.E.2d 296, 297 (1989). Without any record of a request to supplement the evidence at a later hearing, there should be no finding of abuse of discretion by the Judge.

2. Respondents Klapper adopt by reference Appellant-Respondent Paige Lorberbaum's Argument "THE TRIAL COURT COMMITTED ERROR BY FAILING TO FIND THE SUBJECT RIGHT OF REPURCHASE VIOLATED THE UNIFORM STATUTORY RULE AGAINST PERPETUITIES (S.C. CODE ANN. 27-6-10) as set forth in her Initial Brief received by this Court on November 28, 2022.

CONCLUSION

The Trial Court did not abuse its discretion in finding that Turner's Marina, LLC did not prove its cost and attorney's fees.

The Trial Court did err in finding the Right of Repurchase in the 1981 Covenants did not violate S.C. Code 27-6-20. If not for such error, Turner's Marina, LLC could not even claim to be a prevailing party and even less to be entitled to attorney's fees and costs even though there was insufficient evidence to make such an award.

March 15, 2023

Respectfully submitted,

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