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Mar 27 2023

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.

SUPPLEMENTAL RECORD ON APPEAL

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INDEX

Page 17 of the Transcript of Summary Judgment HearingSR1
Amended Motion for Summary Judgment.....SR2
Page 21 of Transcript of Deposition of Adam Greene.....SR7

1 both of those items were drafted by the developer.

2 To the merger doctrine itself, our position has
3 been the same. That, otherwise, a deed is the four
4 corners of the deed, the deed has exceptions carved
5 out in that deed and it points to the covenants and
6 restrictions and that both serves as a reliance for any
7 third party in their due diligence with their purchase
8 of subsequent properties to know that they're going to
9 be bound by the covenants and restrictions, but also
10 that goes both ways in that the POA has an obligation to
11 enforce those same covenants and restrictions and that
12 enforcement should be not be limited to one party or
13 the other. If -- if a property owner has to abide by
14 the covenants and restrictions, the POA should have to
15 enforce those same.

16 And, again, going back, Your Honor, without
17 specificity to a U-shape dock, the fact that there are
18 docks -- or properties listed that are not eligible
19 for a dock that's recognized in the covenants and
20 restrictions or have a limitation on the dock, but then
21 this lot in addition to all of the other lots on the
22 property that have full U-shape docks that were sold
23 at the same price point as this one, I think it's
24 reasonable for -- for the Estate to ask that the POA
25 enforce its restrictions against its developer and --

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS

COUNTY OF OCONEE

) CASE NO.: 2020-CP-37-00765

The Estate of David Greene,

)

)

)

Plaintiff,

) AMENDED MOTION

) FOR SUMMARY JUDGMENT

v.

)

)

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

)

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Defendants.

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Defendants MT Investments, LLC, Lakewood Capital Group, LLC, and John Doe(s) Member of MT Investments, LLC (“MT”) hereby move for summary judgment as to all claims of the Plaintiff.

FACTS

The decedent, David Greene purchased a lot from MT. His complaint is that the property he purchased had been advertised as dockable, and that there were no restrictions shown in any materials he was provided as to the type of dock he could have. The amended complaint refers to the Marina Bay Property Report, which states, *inter alia*, that there are “no established sizes or designs required for docks installed in the Marina Bay according to Shoreline Management Guidelines.” The Marina Bay Property Report also states:

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.

Exhibit 1. The Marina Bay Property Report also discloses that all matters concerning docks are under the control of Duke Energy (“Duke”). *Id.* Duke owns the lake and makes all the rules about docks.

Attached hereto as Exhibit 2 is the contract of sale signed by Mr. Greene stating, 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.

Exhibit 2

Further, the deed to the property makes no mention of the property being dockable. Exhibit 3.

David Greene made no attempt to put a dock on the property before he passed away. The issue as to the property’s dockability arose when his heirs attempted to sell the property. Then, the heirs learned that in order to put a full-sized covered dock on the property, Duke’s guidelines required them to have to have their neighbor’s permission based upon where such a dock would be located. However, Mr. Greene’s heirs could put a smaller dock on the property.

Mr. Greene’s heirs allege that that the property is less valuable than it would have been had it been able to have a larger, covered dock. Based upon these facts, Mr. Greene’s estate has filed this action against MT for Breach of Contract, Negligent Misrepresentation and Negligence.

ARGUMENT

Plaintiff's contractual arguments are barred by the parol evidence rule. *Gilliland v. Elmwood Properties*, 301 S.C. 295, 302, 301 S.E.2d 577, 581 (1990) ("None of the alleged breaches of contract can be evidenced by express contractual provisions. The parol evidence rule prevents the introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to the execution of a written instrument when the extrinsic evidence is to be used to contradict, vary, or explain the written instrument.")

Further, because this transaction involves a deed, the doctrine of merger prevents the plaintiff from offering evidence contrary to or in addition to the terms of the deed. *Hughes v. Greenville Country Club*, 283 S.C 447, 322 S.E.2d 827 (Ct. App. 1984). The deed is attached as Exhibit 3. As stated above, it says nothing about docks. South Carolina law is clear that the deed is the "final bargain of the parties." *Wilson v. Landstrom*, 281 S.C. 260, 315 S.E.2d 130, 132 (Ct. App. 1984). The cause of action for breach of contract, based as it is entirely on matters outside the deed, fails as a matter of law.

Negligent Misrepresentation

To prove negligent misrepresentation, "[T]he plaintiff must allege and prove the following essential elements to establish liability for negligent misrepresentation: (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.” *AMA Mgmt. Corp. v. Strasburger*, 309 S.C. 213, 222, 420 S.E.2d 868, 874 (Ct. App. 1992) (emphasis added).

The 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). Thus, this cause of action cannot be brought on behalf of the estate.

There are two reasons for this: (1) *Mattison v. Palmetto State Life Ins. Co.*, 197 S.C. 256, 15 S.E.2d 117, (1941) was the original case holding that cases alleging fraud and deceit do not come within the survivability statute. S.C. Code Ann. § 56-5-90. The court held that claims based upon fraud do not survive because they are not within the survivability statute because they are neither claims for injury to real estate or to the person or personal property of the decedent. *Id.* (2) In *Faircloth v. Finesod*, 938 F.2d 513 (4th Cir. 1991), the Fourth Circuit agreed with the appellant that the possible rationale for the rule is that fraud requires proof of the state of mind of the plaintiff at the time the representation was made. *Id.* at 517.

Those same issues are present here. The decedent, Mr. Greene, may have been aware that Duke’s rules for building a dock could limit his ability to get the dock he wanted. He certainly should have been aware, and likely was, that MT did not guarantee that a particular type of dock would be available. Of course, as to either of those issues, they cannot be proved either way. Thus, even if this court finds that negligent misrepresentation does survive the death of the decedent, there is no evidence in this case as to Mr. Greene’s reliance.

Further, as noted above, Mr. Greene had waived any reliance on warranties or representations of any kind. *See, Ama Mgmt. Corp. v. Strasburger*, 309 S.C. 213, 420 S.E.2d 868,

874 (Ct. App. 1992) (“There is no liability where information is furnished with a clear understanding that the defendant assumes no liability for its accuracy.”)

NEGLIGENCE

The premise of Plaintiff’s claim for negligence is that MT owed Plaintiff a duty to develop the property so that Plaintiff’s lot was not subject to restrictions on the type, size and design of the dock permitted to be installed on the property. Amended Complnt. ¶48. A developer owes no such duty. As discussed above, MT made clear at all times that whether and when a property is dockable is totally up to Duke. Without a duty, MT cannot be liable in negligence.

CONCLUSION

WHEREFORE, MT Investments, LLC and John Doe(s) Member of MT Investments, LLC

s/Bernie W. Ellis

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Members of MT Investments, LLC

Greenville, South Carolina
April 11, 2022

1 Q Okay. And did your dad build the house on
2 it?

3 A He, yeah, contracted it out. But, yes.

4 Q Okay. And -- yeah. When was the house
5 built?

6 A I don't know the exact answer to that. If he
7 bought the lot in 2016, I want to say the house was being
8 built in 2017.

9 Q Okay. So when you inherited the house, the
10 house was already on there?

11 A That is correct.

12 Q Okay. And after you and your sister
13 inherited it, did you immediately put it on the market?

14 A We did not immediately put it on the market;
15 no.

16 Q Okay. How long was it on the market before
17 you sold it?

18 A I don't remember how long it was on the
19 market. It was some time, after losing contracts.

20 Q Well, I'm trying to -- what I'm trying to do
21 is get a picture of how long did it take you to sell it,
22 once you started trying to sell it? Was it two months,
23 three months, a year? I mean --

24 A Again, I don't remember off the top of my
25 head. It was over a month, but less than three months.

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CERTIFICATE OF COUNSEL

The undersigned certified that this Supplemental Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

March 27, 2023

s/Bernie W. Ellis

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