STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas
The Honorable R. Scott Sprouse

Case No. 2020-CP-04-01202
Appellate Case No. 2022-001527

Moats Construction, Inc.,

Appellant,

v.

Cecil R. Dyar,

Respondent.

REPLY BRIEF OF APPELLANT

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Moats Construction, Inc. (hereinafter, "Moats") raised three issues on appeal. Respondent Cecil Dyar (hereinafter, "Dyar") addressed none of them. Instead, Dyar focuses his brief on disputing the factual basis of Moats's legal claims, which supports Moats's position that summary judgment was inappropriate and Moats should have been allowed to pursue its legal claims and present contested factual issues to a jury. Dyar also contends that Moats is barred from pursuing this appeal because it satisfied the judgment rather than let its property be sold or post a bond. On both points, Dyar is incorrect.

Background of Dispute

Throughout his brief, Dyar repeatedly mischaracterizes Moats as refusing to acknowledge any balance owed under the 2011 Agreement for Sale and Purchase of Real Property (the "Agreement").[1] Moats has never contended that there was no balanced owed under the Agreement when it matured in April 2016, or when Moats filed this lawsuit in June 2020. Rather, Moats has maintained that any balance owed should take into consideration numerous amounts owed by Dyar to Moats. In fact, after the bond for title matured, Moats requested a payoff from Dyar to account for numerous issues, including: (1) Dyar's failure to remove heavy equipment stored inside the building on the property, which hindered Moats's use and enjoyment of the property for more than five years; (2) Dyar's failure to clean-up pallets on the property as agreed; (3) Dyar's failure to pay certain fees and resolve resultant liens placed on the property by the City of Anderson that were sent to Dyar's attention as the listed property owner; and, (4) disputed access with the nearby railroad owner that forced Moats to hire legal counsel and incur professional fees for surveying and appraisal. (Damages Hearing Transcript 23:9-18; 24:10-14; 28:3-29:8; 31:7-8; 40:1-15;

[1.] Dyar opens his brief with a discussion of a November 2019 complaint that was never served on Moats. Service, or non-service, of this complaint is irrelevant to this action. The operative complaint that initiated this action was filed by Moats in June 2020.

51:22-52:3). Moats requested a payoff from Dyar that fully accounted for these issues so that Moats could pay off the balance and become the owner of record and more effectively address the railroad access issue and the City of Anderson liens; however, the parties could not agree on a payoff amount. (Damages Hearing Tr. 28:14-29:3).

Before the parties could reach agreement on a payoff, in September 2017, Hurricane Irma damaged the building's roof. (Moats Aff. ¶ 10; Damages Hearing Tr. 24:15-19). The insurance company denied the full amount of the claim and only paid $3.31. (Moats Aff. ¶ 10). Moats requested that Dyar, as the insured, contest the claim payment amount, but Dyar refused to do so. (Damages Hearing Tr. 24:15-19).

Because Dyar refused to acknowledge amounts he owed to Moats, and refused to acknowledge his failure to fully pursue the insurance claim, the parties never reached an agreement on a payoff and Moats initiated this action to resolve the parties' dispute. However, Moats's right to pursue its legal claims against Dyar was taken away when the lower court granted summary judgment and ended Moats's case. Not only was Moats precluded from presenting its claims to a jury, but it was also forced to pay Dyar greatly inflated damages, including "reimbursement" damages for real property taxes and insurance premiums that Dyar never paid. Moats filed this appeal to correct these errors.

ARGUMENT

I. Moats Should Be Granted a Remand for a Jury Trial and Restitution for Amounts Erroneously Awarded and Paid to Dyar.

Moats argues that (1) it was deprived of its right to a jury trial on its legal claims; (2) its legal claims against Dyar should have been tried before Dyar's equitable foreclosure counterclaim; and, (3) the lower court erroneously awarded Dyar windfall damages that impermissibly penalized Moats. Dyar did not address any of these three legal issues raised by Moats.

First, Dyar does not explain why lower court's ruling depriving Moats of its right to a jury trial should be sustained. It is undisputed that Moats was prevented from presenting its legal claims to a jury. Moats initiated this action and demanded a jury trial of its legal causes of action against Dyar for breach of contract and negligence arising out of the parties' 2011 Agreement for Sale and Purchase of Real Property (the "Agreement"). Dyar counterclaimed for foreclosure. The lower court granted summary judgment on Dyar's foreclosure counterclaim, determined the amount of foreclosure damages, and ordered the sale of Moats's property, all without allowing Moats to pursue its legal claims that initiated this action, and despite repeated requests from Moats that it be allowed to do so before conclusion of the foreclosure. (Mem. Opp'n Default J. and Mot. Summ. J. at 6-7); Mot. Reconsider & Amend ¶ 1 (May 7, 2021); Am. Mot. Reconsider & Amend at 2, 5 (June 19, 2021); Mot. Alter Amend 14-15 (July 29, 2022)). This was error, and Dyar does not contend otherwise. *Lester v. Dawson*, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997) ("The South Carolina Constitution provides that the right of trial by jury is to be 'preserved inviolate.'" (quoting S.C. Const. art. I, § 14)); Rule 38, SCRCP ("Issues of fact in an action for the recovery of money only or of specific real or personal property must be tried by a jury, unless a jury trial be waived.").

Instead, Dyar disputes the factual basis of Moats's legal claims. Of course, such a factual dispute is an issue for the jury, not for the court during summary judgment or a hearing on foreclosure damages. Moreover, the factual issues identified by Dyar, (Respondent Initial Brief 11-14), support Moats's position that there were disputed issues of fact underlying its legal claims that needed to be resolved by a jury.

Second, Dyar does not explain how the lower court's decision to rule on Dyar's equitable foreclosure counterclaim *before* permitting a jury to hear and decide common factual issues raised by Moats's legal claims aligns with United States Supreme Court and South Carolina Supreme

Court precedent. Where there are factual issues common to both legal and equitable claims, "absent the 'most imperative circumstances,' the 'at law' claim must be tried first." *Johnson v. South Carolina Nat. Bank*, 292 S.C. 51, 56, 354 S.E.2d 895, 897 (1987) (quoting *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959)). Here, Moats's legal claims and Dyar's equitable counterclaim are all logically related and all arise out of the parties' performance of the Agreement. Moats contends that Dyar failed to turn over exclusive use of the property, failed to keep the building insured, and failed to pursue insurance claims, and Dyar claims that Moats failed to pay the full amount owed under the Agreement. Dyar's duty to keep the Property insured and pay for continuing insurance coverage is directly at issue as part of Dyar's counterclaim seeking reimbursement for insurance premiums, which he was awarded by the lower court. The circuit court erred when it misapplied the legal-equitable claim priority framework and granted summary judgment on Dyar's equitable counterclaim for foreclosure and ordered a sale of the property before a jury determination of Moats's legal claims.

Third, Dyar does not dispute that he was awarded, and received, windfalls at Moats's expense. Moats identified six instances where the lower court's damages award impermissibly penalized Moats and gave Dyar windfalls totaling more than $80,000. Dyar challenged none of these errors during the lower court's hearing and does not do so here. The applicable equitable principles precluding such windfalls and penalties in equitable proceedings are well-established. "Equity will not enforce a penalty for breach of contract." *Lewis v. Premium Inv. Corp.*, 351 S.C. 167, 172, 568 S.E.2d 361, 363 (2002). "Equity does not favor forfeitures or penalties and will relieve against them when practicable in the interest of justice." *Id.* (quoting *Lane v. New York Life Ins. Co.*, 147 S.C. 333, 374, 145 S.E. 196, 209 (1928) (internal quotations marks omitted)). "A party may be unjustly enriched when it has and retains benefits or money which in justice and

equity belong to another." *Anderson Cnty. v. Preston*, 427 S.C. 529, 543, 831 S.E.2d 911, 918 (2019).

Dyar has been enriched at Moats's expense. For example, an error in the date column of the bookkeeper's spreadsheet caused Dyar's bookkeeper to testify to an amount owed that was six months in the future and $7,888 too high. Dyar's bookkeeper testified that Moats owed Dyar "reimbursement" for real property taxes that were in fact already *paid* by Moats, resulting in a $18,648 windfall to Dyar. Dyar's bookkeeper also testified that Moats owed Dyar "reimbursement" for insurance premiums that were either paid by Moats or paid by no one when the building was uninsured, resulting in a $13,728 windfall to Dyar. The lower court erred when it failed to correct these penalties assessed against Moats that resulted in significant windfalls to Dyar.

II. Moats is Not Barred from Pursuing this Appeal After Satisfying the Erroneous Judgment.

Moats has the right to appeal an erroneous judgment. The fact that Moats determined to satisfy the foreclosure judgment rather than lose his property, or post a bond, does not moot its appeal. This Court has the ability to grant the relief requested and order restitution paid to Moats.

A. Moats Determined to Satisfy the Erroneous Judgment Rather than Obtain a Bond.

On July 21, 2022, the circuit court entered an Order Granting [Respondent Dyar's] Motion for Damages and Judgment of Foreclosure and Sale, (Order Damages Foreclosure (Jul. 21, 2022)), which directed the sale of Moats's real property to satisfy the judgment. Moats moved to alter or amend the order, (Mot. Alter Amend Order on Damages Foreclosure (July 29, 2022)), which the circuit court denied on October 4, 2022, (Order Motion/Alter and/or Amend (Oct. 4, 2022)). Once the lower court denied Moats's motion to alter or amend—because the filing of a notice of appeal does not automatically stay a judgment of foreclosure directing the sale of real property—Moats

had to decide whether to pay the erroneous judgment or secure a bond. Rule 241(b)(4), SCACR; S.C. Code Ann. §18-9-170 ("If the judgment appealed from directs the sale or delivery of possession of real property, the execution of the judgment shall not be stayed unless a written undertaking be executed . . . ."). If Moats filed a notice of appeal but took no other action, its property would be sold to satisfy the erroneous judgment. S.C. Code Ann. § 18-9-170; Notice of Sale (Oct. 10, 2022).

In researching terms for a bond, Moats learned that a bond the size of the court's judgment would have to be secured by cash and have recurring annual costs, in addition to the statutory requirement that loan interest and reasonable rental value continue to accrue throughout the appeal. Aff. Russell T. Moats ¶ 5 (Jan. 30, 2023); S.C. Code Ann. § 18-9-170. As such, to avoid these additional costs and move forward with clear title to the property, Moats determined to pay the erroneous judgment in full and seek restitution on appeal. Moats Aff. ¶ 6.

Moats's determination to pay the judgment and appeal the circuit court's errors was communicated to Respondent's attorney before the Respondent provided an adjusted judgment number that included additional interest and costs to be paid as part of the real estate closing on November 7, 2022. (Letter Jim Logan to David Paavola (Oct. 25, 2022)). Moats's intentions were also plainly reflected in the parties' Consent Order and Satisfaction of Judgment (Nov. 23, 2022). (Consent Order and Satisfaction of Judgment). Moats filed its notice of appeal on October 26, 2022, well before the real estate closing on November 7, 2022, and well before entry of the Consent Order and Satisfaction of Judgment on November 23, 2022.

B. Satisfaction of a Judgment Does Not Moot an Appeal When There is a No Compromise of the Judgment or an Agreement to End the Litigation.

Satisfaction of a judgment does not moot an appeal unless there is a compromise of the judgment or agreement to end the litigation. This is the rule followed by federal courts and

implicitly followed by South Carolina courts.

This Court has the statutory authority to reverse a circuit court judgment and order restitution of property that Moats lost due to the erroneous circuit court judgment. The South Carolina Code provides as follows:

> Upon an appeal from a judgment or order the appellate court may reverse, affirm or modify the judgment or order appealed from as to any or all of the parties and may, if necessary or proper, order a new trial. When the judgment is reversed or modified the *appellate court may make complete restitution of all property and rights lost by the erroneous judgment*.

S.C. Code Ann. § 18-1-140 (emphasis added).

The South Carolina Supreme Court has approved restitution of a previously paid judgment. In *Moore v. North American Van Lines*, 319 S.C. 446, 462 S.E.2d 275 (1995), Moore brought a worker's compensation claim against North American Van Lines and was awarded benefits by the worker's compensation commission. *Moore*, 319 S.C. at 447, 462 S.E.2d at 275-76. North American Van Lines paid the judgment benefits to Moore and at the same time appealed the judgment to the circuit court and sought restitution. The circuit court reversed the commission's decision and granted North American restitution of the benefits paid to Moore. *Id.* at 448, 462 S.E.2d at 276. The South Carolina Supreme Court affirmed. *Id.*; *see also Case v. Hermitage Cotton Mills*, 236 S.C. 515, 533, 115 S.E.2d 57, 67 (1960) (explaining that if employer appeal of award is successful, employee would be required to repay the erroneous benefits) (citing 3 Am. Jur. Appeal and Error, Section 1242; 5B C.J.S. Appeal and Error § 1980; Restatement Restitution § 74)).

Respondent cites a 1918 case, *Reedy River Power Co. v. City of Laurens et al.*, 109 S.C. 210, 96 S.E. 116 (1918), for the proposition that this appeal is moot. *Reedy River* is a one-paragraph opinion with no substance explaining the context of the decision. It does not address

the foreclosure context, this Court' statutory authority to order restitution for erroneous judgments, or the situation, as here, where Appellant has raised multiple issues for appeal outside of the satisfied judgment.

Respondent also cites Ohio law for this same proposition. However, even Ohio courts are inconsistent on the application of this legal principle. At least two Ohio courts have ruled that in the foreclosure context, satisfaction of a judgment after the order of sale is issued qualifies as "involuntary," which in Ohio is an exception allowing an appeal of a satisfied judgment. *Chase Manhattan Mtg. Corp., v. Locker*, No. 19904, 2003 WL 22927244, at *7-8 (Ohio Ct. App. Dec. 12, 2003) (citing *MIF Realty L.P. v. K.E.J. Corp.*, No. 94WD059, 1995 WL 322365, at *2 (Ohio Ct. App. May 19, 1995)). The principle underlying the Ohio rule cited by Respondent arises in the context of an appeal after a judgment is satisfied through mutual agreement of the parties, and the question is whether one party can later avoid that settlement agreement. *Chase Manhattan*, 2003 WL 22927224, at *7 (citing the leading Ohio case of *Blodgett* where the "appellant accepted the full amount of a marital award and signed a satisfaction of judgment"). That is not the situation here where there was never an agreement between the parties to compromise the judgment or end this litigation.

In the foreclosure context, Ohio appears to follow essentially the same rule as set forth in the Restatement and followed by federal courts. This rule, as reflected in the Restatement (First) of Restitution § 74 (1937), is as follows:

> A person who has conferred a benefit upon another in compliance with a judgment, or whose property has been taken thereunder, is entitled to restitution if the judgment is reversed or set aside, unless restitution would be inequitable or the parties contract that payment is to be final; if the judgment is modified, there is a right to restitution of the excess.

Under this rule, an appeal of a satisfied judgment is allowed unless there is an agreement among

the parties ending the litigation. This is the rule followed by federal courts. The United States Court of Appeals for the Fourth Circuit has long held that payment of a judgment does not moot an appeal. *Woodson v. Chamberlain*, 317 F.2d 245, 246 (4th Cir. 1963). As the Fourth Circuit stated in *Woodson*:

> The usual rule in the federal courts is that payment of a judgment does not foreclose an appeal. Unless there is some contemporaneous agreement not to appeal, implicit in a compromise of the claim after judgment, and so long as, upon reversal, restitution can be enforced, payment of the judgment does not make the controversy moot.

Id. (citing cases from the Supreme Court, Fifth, Eighth, and Tenth Circuit Courts of Appeals); *cf. Gloria v. Valley Grain Products, Inc.*, 72 F.3d 497, 498 (5th Cir. 1996) ("It is a generally accepted rule of law that where a judgment is appealed on the ground that the damages awarded are inadequate, acceptance of payment of the amount of the unsatisfactory judgment does not, standing alone, amount to an accord and satisfaction of the entire claim." (quoting *United States v. Hougham*, 364 U.S. 310, 312 (1960))).

The Fourth Circuit has further explained that it is only where the parties have a "mutual manifestation of an intention to bring the litigation to a definite conclusion upon a basis acceptable to all parties which bars a subsequent appeal, not the bare fact of payment of the judgment." *Gadsden v. Fripp*, 330 F.3d 545, 548 (4th Cir. 1964). While it is true, as the Fourth Circuit observed in *Gadsden*, that "[i]f an appeal is taken by a defendant after he has paid a judgment, he runs the risk of being unable to obtain restitution if he prevails on appeal[,]" *id.*, this risk shifting, standing alone, does not moot an appeal.

Here, there was no mutual manifestation of intention among Moats and Dyar that the satisfaction of judgment and real estate closing bring this litigation to a definite conclusion. Rather, at all times, Moats made clear that it intended to appeal the judgment. (Letter Jim Logan

to David Paavola (Oct. 25, 2022); Consent Order and Satisfaction of Judgment (Nov. 23, 2022).

Moats contends that it lost more than $80,000 due to the lower court's erroneous order entering foreclosure, sale, and judgment. Nothing prevents this Court from taking up Moats's appeal and ordering restitution of erroneous amounts Moats has already paid to Dyar.

C. Moats's Appeal Raises Issues Separate and Apart From the Judgment of Foreclosure.

Even if payment of the judgment in this instance were to foreclose an appeal, which Moats disputes, Moats has raised issues on appeal that are separate from the amount of the erroneous judgment. Moats contends that the lower court erred when it granted summary judgment on Dyar's equitable foreclosure claim and prevented Moats from moving forward with a jury trial on its legal claims for breach of contract and negligence. Moats seeks a remand so that it may pursue a jury trial of its legal claims against Dyar. These claims were never ruled on by the lower court or a jury and were not part of the order on damages and foreclosure that Moats paid.

Satisfaction of the judgment of foreclosure does not preclude Moats from pursuing an appeal on the basis that the circuit court erred when it precluded Moats from pursuing its legal claims against Dyar.

CONCLUSION

When Moats initiated this action, asserted legal claims against Dyar, and demanded a jury trial, it had the right to have its legal claims decided by a jury before the lower court ruled on Dyar's equitable counterclaim. Instead, the lower court granted summary judgment on Dyar's equitable foreclosure counterclaim, moved forward with a damages hearing, and then ordered the sale of Moats's property. This was error, and Moats requests a remand so that its legal claims can be presented to a jury.

Moats is also entitled to restitution for windfall amounts paid to Dyar that penalized Moats. Equity will not enforce a penalty and will relieve against them when practicable and in the interest of justice. Awarding Dyar "reimbursement" damages for amounts he never paid is inequitable and punitive. Moats requests an order of restitution to require Dyar to repay these windfalls along with additional interest paid to satisfy the judgment.

Finally, this appeal is not barred by Moats's decision to pay the judgment in full rather than incur the additional and substantial costs of securing a bond for duration of this appeal. The parties did not agree to end this litigation or reduce the judgment in any manner. As such, Moats is not barred from filing this appeal.

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