

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
)
 ALLEN LIVINGSTON,)
)
 Plaintiff,)
)
 versus)
)
 HAROLD SIMMONS,)
)
 Defendant.)

IN THE COURT OF COMMON PLEAS
 FOR THE NINTH JUDICIAL CIRCUIT
 CASE NO.: 2010-CP-10-8027

PROPOSED ORDER

FILED
 2013 FEB 27 AM 11:56
 JULIE J. ARMSTRONG
 CLERK OF COURT
 BY _____

THE WITHIN MATTER came before this Court after restoration to the trial docket on a Motion to Restore filed on September 14, 2010 pursuant to a Rule 40(j) dismissal on January 13, 2010. The Court has heard testimony and argument for nearly two (2) days and has received numerous exhibits. This case presented major issues regarding the credibility of the parties and the conflicting recollections of the litigants and the witnesses.

Plaintiff appeared represented by counsel and presented witnesses (2) to support the waste allegations in his claim. Defendant appeared represented by counsel, calling one witness in support of his counterclaim and defense.

This case centers on the issue of whether the Defendant has substantially performed his agreement under the contract negotiated by the parties on June 15, 2000. This matter began as an ejectment action in the Summary Court. Plaintiff alleged that Defendant failed to pay rent when due and demanded for the period beginning 2005 through October 2007. Defendant denied fault and counterclaimed for damages and specific performance on the bases that the agreement executed by the parties was an installment land contract.

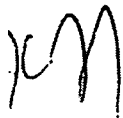
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To determine the nature of their relationship, this Court considered documents submitted by each party that were alleged to set out the terms of their agreement. After careful consideration of those documents, which were two versions of the contract signed by the parties, this Court determined that the document offered by Mr. Simmons was the original agreement and the best evidence of their expectations since it contained original signatures from both parties and the original signatures of a witness. Real property is often sold under contracts that provide for the payment of the purchases in a series of installments. "These contracts, usually termed installment land contracts, are drafted in many ways. Typically, the vendor retains legal title to the property until all of the purchase price has been paid." . . . Lewis v. Premium Investment Corporation, 351 S.C. 167, 568 S. E. 2d 361 (2002). Basic contract law provides that when a contract is clear and unambiguous, the language alone determines the

contracts' force and effect. C.A.N Enterprises, Inc. v. South Carolina Health & Human Services Fin. Commissions, 296 S.C. 373, 373 S.E. 2d 584 (1988).

The Defendant contends that, in fact, he has paid against the principle in advance by making payments at a higher and faster rate than required under the contract. Mr. Simmons' primary proof for his position is the example where Plaintiff alleges a default in payments during the year of 2007 yet the evidence (Defendant's Ex.) indicates that Mr. Simmons paid \$500.00 beyond what was required for the period alleged. Mr. Simmons testified that during the length of the contract he would pay at a higher or faster rate in order to protect himself from defaulting on the payments. Defendant tendered his entire collection of receipts for the contested period of payment. This record of payment totaled \$87,540.00. A comparison of the chronological pay period utilizing the contract rate against Defendant's record of payment reveals that Mr. Simmons at the time of trial had paid \$16,040.00 beyond what was required under the contract. Our Court of Appeals has specifically held that in an installment land contract, the vendee in possession of the land is considered the owner of an equitable interest in the property. Southern Pole Buildings, Inc. v. Williams, 289 S.C. 521, 347 S. E. 2d 121 (Ct. App. 1986), See also, Lewis v. Premium Investment Corporation, supra, footnote 4.

Actions to foreclose or cancel an instrument are actions in equity. Wilder Corporation v. Wilke, 324 S.C. 570, 576, 479 S.E. 2d 510, 513 (1996). The courts of South Carolina have long held that forfeitures or penalties are not favored in either law or equity. Cody Discount, Inc. v. Merritt, 368 S.C. 570, 629 S.E. 2d 697 (Ct. App. 2006) reh. den. (May 2006), citing Lewis v. Premium Investment Corporation, supra.

 The theory of equitable conversion provides that under an executory contract for the sale of real estate, the equitable estate passes to the purchaser and the bare legal title for security purposes remains in the vendor. Brooks v. Council of Co-Owners of Stones Throw Horizontal Property Regime 1, 315 S.C. 474, 476, 445 S. E. 2d 630, 632 (1994) citing 8A George W. Thompson, Commentaries on the Modern Law of Real Property § 4447 (1963). Despite Mr. Simmons' struggles, his efforts to successfully satisfy his obligations are impressive, fundamentally, and significant, legally. Earlier during argument of counsel, defense counsel objected to the treatment of the list of conditions on page four of the contract as applicable to the Defendant buyer. Counsel argues that once Defendant became a buyer, those conditions no longer applied to the Defendant. In light of the doctrine of equitable conversion and review of the content of those conditions, this Court is convinced that those conditions are inapplicable to an equitable owner and possessor of the property, excepting the requirement for insuring the property.

Defendant contends that plaintiff was aware of the Defendant's change from tenant to purchaser because practically every receipt and payment instrument is designated for 'mortgage'. Mr. Simmons has been very fastidious in recording the matter of payment and, but for his records, there would be no recollection. Plaintiff admitted that he kept no records of their transactions. Mr. Simmons demonstrates an approach that reflects the essence of this agreement: a substantial amount of money would be spent for a major property but the transaction involved a diminis scale, i.e. no major lender and \$500.00 per month payments.

Plaintiff offered no evidence or testimony of making demand for payment. The 'mortgage' can be clearly seen on the money orders Mr. Simmons used for payment. The "mortgagee" notation can be seen on the Defendant's exhibit showing deposits into Plaintiff's Wells Fargo/Wachovia account as early as 2005 and Mr. Simmons' receipts show this notation as early as 2002. Plaintiff's behavior in accepting these payments under the circumstances evidenced convinced Mr. Simmons that the building at North Carolina Avenue would one day be his. "The principal that the vendee becomes the equitable owner of real property while the contract is still executory was established for the purpose of enabling him to resort to a court of equity for the protection of his rights, on the ground that a mere action for damages arising from a breach of the contract by the vendor would not afford him equitable relief." Good v. Jarrard, 93 S.C. 229, 236, 76 S.E. 2d 698, 701 (1912). In this instance the vendor's breach is the ejectment action taken without due cause.

Plaintiff initiated this action alleging default in payment and some opinion regarding the building; subsequently, he amended his complaint to include alleged other failure. After reviewing the exhibits, this Court is not convinced that Mr. Simmons has done anything to depreciate the value of the property. According to the County Tax Assessor, the property's value has increased appreciably. All testimony describes the building as a once vacant structure with very sparse amenities. Mr. Simmons added a room for an office so there was some improvement. There has been no claim for insurance payment so that item is not material to this action, nor the contractual relationship. Plaintiff claims a loss in relation to his payment of property taxes. At no time did he complain to Mr. Simmons about the property taxes or seek clarification as to who was responsible for these tax payments. In light of Mr. Simmons' constant use of the "mortgage" term, it would seem that a discussion regarding taxes and insurance would have occurred. Plaintiff is an experienced and well-established business man who knows the relative value of "allowed business deductions" and probably appreciated the availability of these expenses. So the behavior of seeking an ejectment appears like "eating your cake and having it too."

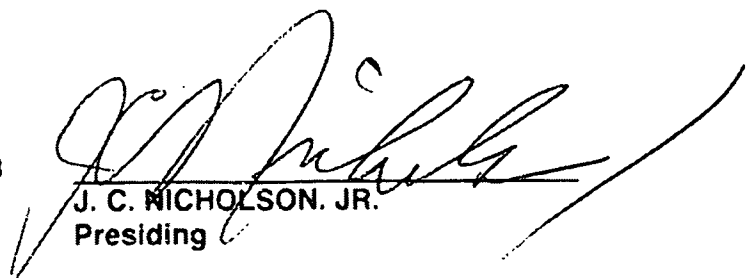
Therefore, credibility remains a big issue in this case; from the considerations involving which version of the contract to the Plaintiff's selective memory on many issues of fact. This Court has been troubled with his version of the facts. His original allegations regarding non-payment between both 2005 and 2007 being revealed to be substantially incorrect and as to the year of 2007 as being entirely inaccurate, and then a crucial factor in looking at the version of the contract is how the front page of Plaintiff's contract contains the wrong address for the subject property and on subsequent pages involving the term for Mr. Simmons' period to make payments being left completely out of the version put forward by the Plaintiff. This tells this Court that there is a proper place for equity in its considerations.

Mr. Simmons has requested relief under the theory of specific performance and that is proper in a matter of equity. He has also requested relief under the theory of unjust enrichment and that is also proper in an equitable action. Under the facts shown the most appropriate relief is specific performance. It is my confirmed opinion that the Defendant should be allowed the relief that he has requested. Hence I am ordering that the transaction be carried out as agreed upon to include Mr. Simmons assuming all of the responsibilities of the purchaser under their agreement as stated in Defendant's contract (Ex.) including the payment of property taxes and the arrangements for insurance. Further, I order that any property taxes paid by the Plaintiff be compensated from Mr. Simmons' overpayment of the purchase price. He will have sixty (60) days to arrange for insuring the building in a commercially reasonable manner.

I further find that the defendant is given credit for \$87, 540.00 towards the purchase price of \$125,000 with a balance of \$37,460.00 to be paid on the installment contract at the rate of \$500 a month until the balance is paid. The defendant will obtain an amortization schedule and supply a copy to the plaintiff. The defendant will either pay by money order or check with a notation of payment and marked from the amortization schedule by both parties.

AND IT IS SO ORDERED.

2/20/13, 2013
Charleston, S.C.


J. C. NICHOLSON, JR.
Presiding