THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Robert J. Bonds, Circuit Court Judge

Case No. 2021-CP-07-00482
Appellate Case No. 2022 - 001097

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.

FINAL BRIEF OF RESPONDENTS

Benjamin E. Nicholson, V
BURR & FORMAN LLP
Post Office Box 11390
Columbia, SC 29211
(803) 799-9800
nnicholson@burr.com

Attorney for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

STATEMENT OF THE CASE

Respondents, MFM Properties, LLC and MFM Residential Properties, LLC, (collectively, "Respondents") moved for summary judgment against the defendant, Rotunda Land & Development Group, LLC ("Appellant") on the basis that there is no genuine issue of material fact but that Rotunda breached a land sales contract (as amended) by failing to pay earnest money it forfeited when it failed to close the contract in the timelines provided. Respondents by their Complaint seek the payment of forfeited earnest money to them by Appellant. This matter was argued before the lower court on April 5, 2022 at the Beaufort County Courthouse present. Counsel for both sides waived a court reporter and therefore the motion was decided on the filed pleadings, memoranda, and other documents filed in connection with the motion. The lower court filed its order granting summary judgment on Mary 23, 2022.

The lower court found that the following facts were not in dispute. Appellant has not objected do this depiction of the facts, so Respondents below recite the lower court's rendition of the facts in its Order.[1]

> MFM Properties, LLC and MFM Residential Properties, LLC (collectively, "MFM" or "Plaintiffs") entered into a Purchase and Sale Agreement with Rotunda effective August 19, 2019 ("Agreement") for the sale of undeveloped real property located in Hardeeville, Jasper County, South Carolina ("Property") for $16,000,000.
>
> Per Section 1(b) of the Agreement, in partial consideration of MFM's execution of the Agreement, Rotunda agreed to deposit One Hundred Thousand ($100,000.00) Dollars and no/cents in escrow with as escrow agent, defendant Calloway Title and Escrow, Inc. ("Escrow Agent.")[2] This sum is the "Initial Earnest

[1] Although there are two orders in this case, one granting summary judgment and a subsequent order awarding Respondents' costs and attorney's fees, the only order substantively addressed by the appeal is the May 23, 2022 order, which herein is referred to simply as "Order."

[2] [Footnote in quoted portion of Order.] Calloway Title & Escrow, LLC is a defendant in this lawsuit only by virtue of the fact that it holds the Initial Earnest Money in trust. Calloway has been served but has not answered or appeared as all parties agree that Calloway is a nominal party with the sole purpose of paying the Initial Earnest Money to the prevailing party in this litigation. MFM seeks in its Third and Fourth Causes of Action an order that Calloway pay the Initial Earnest Money to MFM, which is granted as noted *infra*.

Money." Per Section 12(b) of the Agreement, should Rotunda default under the Agreement, one of MFM's remedies was that the Initial Earnest Money would be forfeited to MFM.

Rotunda by letter dated February 12, 2020 exercised an option to extend an Initial Inspection Period pursuant to the Agreement and tendered an extension fee to the Escrow Agent on February 13, 2020 as provided for in the Agreement. By letter of April 17, 2020, Rotunda terminated the Agreement in accordance with Section 3(c) of the Agreement which entitled MFM to recover the Initial Earnest Money.

Rather than require the forfeiture of the Initial Earnest Money, an amendment to the Purchase and Sale agreement was made. By a Reinstatement of and First Amendment to the Agreement dated July 8, 2020 ("First Amendment"), Plaintiffs and Rotunda agreed to reinstate, amend and modify the Agreement. Among the terms of the First Amendment was that Rotunda per Section 4(b) tender a second One Hundred Thousand ($100,000.00) Dollars and no/cents in escrow with Escrow Agent by November 30, 2020. This sum is called the "Additional Earnest Money" in the First Amendment and herein. The First Amendment also confirmed at Section 4(a) that the Initial Earnest Money was non-refundable.

Rotunda failed to deposit either the Additional Earnest Money or the additional extension fee with the Escrow Agent by November 30, 2020 as required by the First Amendment. Rotunda failed to close on the property as required by the Agreement and First Extension. MFM demanded that Rotunda direct the Escrow Agent to pay the Initial Earnest Money of $100,000 to MFM and Rotunda has failed to do so. Further, MFM has demanded that Rotunda pay the Additional Earnest Money to MFM and Rotunda has failed to do so.

While admitting that it had not performed these steps required by the Agreement and First Amendment, Rotunda repeatedly asserts in its Answer that it is "ready and willing and able to do so." Additionally, at some point in late November or early December 2020, Paul Lange, owner of Rotunda, had conversations with Harry Morgan, a principal of MFM. In these conversation [sic], Lange discussed a need for additional time to execute the Purchase and Sale agreement due to Covid-19 affecting the planning process with the Town of Hardeeville.

Notwithstanding Rotunda's position that it was still negotiating, MFM through legal counsel told Rotunda four times in December 2020 that Rotunda must either close by December 31, 2020 or send the Initial Escrow Money and the Additional Escrow Money to MFM. MFM declared the Agreement and First Amendment irrevocably in default by letter of January 12, 2021. This lawsuit followed.

Order, pp. 1-3. (R. 1-3). This appeal followed.

STANDARD OF REVIEW

Summary judgment is proper where there is no issue as to any material fact, and the moving party is entitled to judgment as a matter of law. Pittman v. Grand Strand Ent., Inc., 363 S.C. 531, 611 S.E.2d 922, 925 (2005). The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder. Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 433, 438 (2003). Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. Regions Bank v. Schmauch, 354 S.C. 648, 582 S.E.2d 432, 438 (Ct. App. 2003).

Appellate courts use the same standard of review as the trial court to review the grant of summary judgment. Knight v. Austin, 396 S.C. 518, 722 S.E.2d 802, 804 (2012). On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in the light more favorable to the non-moving party below. USAA Prop. & Cas. Ins. Co. v. Clegg, 377 S.C. 643, 661 S.E.2d 791, 796 (2008).

ARGUMENT

I. THE PETITIONER'S ARGUMENTS ARE CONCLUSORY AND THUS ABANDONED.

Appellant makes three short arguments.

First, Appellant claims there is a genuine issue of material fact as to whether or not the parties reached an agreement to extend the Contract. However, Appellant makes absolutely no argument *why* this is so. The failure to point out the evidence that supports Appellant's claim that there is a genuine issue of material fact is thus a conclusory argument. Therefore, that issue must be determined to be abandoned on appeal. Jinks v. Richland Cnty., 355 S.C. 341, 585 S.E.2d 281, 282, n. 3 (2003).

Further, Appellant ignores the basis of the lower court's ruling. It is fundamental that an appellate court should affirm a lower court's ruling if the appealing party does not challenge that ruling. Biales v. Young, 315 S.C. 166, 432 S.E.2d 482, 484 (1993). The failure to challenge is considered an abandonment on the issue on appeal. Id. It does not matter if the ruling is right or wrong, if not appealed, it nonetheless becomes the law of the case. Carolina Chloride, Inc. v. Richland Cnty., 394 S.C. 154, 714 S.E.2d 869, 878 (2011). If a court's decision can be upheld on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become law of the case. Anderson v. Short, 323 S.C. 522, 476 S.E.2d 475, 477 (1996).

The lower court ruled that there was no genuine issue of material fact but that:

- Appellant breached its contract by defaulting under the First Amendment. First Order, p. 4 (R. 4).
- Appellant failed to identify any term of another agreement accepted by Respondents extending the time to comply with the First Amendment. First Order, p. 5 (R. 5).
- Appellant failed to identify any essential term of another agreement such as price, time and place. First Order, pp. 7-8 (R. 7-8).
- Appellant failed to rebut the court's holding that any purported agreement, lacking a writing, would be unenforceable anyway due to the Statute of Frauds, S.C. Code Ann. § 32-3-10(4). First Order, pp. 9-10 (R. 9-10).

Appellants failed to challenge any of these findings. Therefore, each finding is the law of the case. Carolina Chloride, Inc. v. Richland Cnty., Id. As the Court may affirm on any unchallenged ground, this Court must affirm.

Second, Appellant argues that the Initial Earnest Money of $100,000 had been already paid. However, payment is an affirmative defense. SCRCP 8(c). Appellant did not plead the affirmative

defense of payment in its Answer. (R. 32-36).[3] Indeed, Appellant nowhere in any pleading filed with the Court argued payment as a defense. There is no mention of this issue in the Record on Appeal. Not surprisingly, the lower court never ruled on the issue, as it was not confronted with it.

It is axiomatic that a litigant is required to raise an issue fairly to the trial court, thereby giving the trial court an opportunity to rule on the issue. State v. Brannon, 388 S.C. 498, 502, 697 S.E.2d 593, 595–96 (2010). In order to be preserved for appellate review, the issue must have been (1) raised by the appellant and ruled on by the trial court; (2) raised in a timely matter; and (3) raised with sufficient specificity before the trial court. S.C. Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 641 S.E.2d 903, 907 (2007). The record on appeal should confirm that the issue raised in the appeal was raised in the lower court; the failure to be included prevents appellate review. McCall v. IKON, 380 S.C. 649, 670 S.E.2d 695, 703 (Ct. App. 2008). Therefore, this issue is not preserved for review by this Court. [4]

Third, Appellant seeks reversal of the lower court's award of attorney's fees to the Respondents. Brief, p. 7. That claim is self-evident and must fail as the two prior appellate grounds fail.

[3] Generally, defenses not raised in the pleadings will not be considered on appeal. McNeely v. S.C. Farm Bureau Mut. Ins. Co., 259 S.C. 39, 190 S.E.2d 499 (1972)("The estoppel issue argued by appellant in his brief was not made by the pleadings nor raised in the exceptions. Accordingly that issue is not before this Court.")

[4] Appellant also for the first time raises a claim regarding a $45,000 Inspection Period Extension Fee. Brief, p. 7). However, again, Appellant never mentioned such a payment in any prior pleading or to the Court, and thus any argument (to the extent argument was actually made) is barred at this appellate level. State v. Brannon, 388 S.C. 498, 502, 697 S.E.2d 593, 595–96 (2010).

II. THE CIRCUIT COURT CORRECTLY FOUND THAT THERE WAS NO GENUINE ISSUE OF MATERIAL FACT.

Given that the Appellant had made no substantive arguments supporting its appeal, it is difficult for Respondents to reply to a negative. That stated, Respondents believe that the lower court addressed the arguments in favor of summary judgment succinctly and correctly.

A. There was no agreement to extend the time for Appellant's performance.

The lower court correctly held that there was no evidence that there was actually an agreement made between the parties extending the time for Appellant's performance.

> Rotunda is owned primarily by Paul Lange, Rotunda's SCRCP 30(b)(6) deposition designee, and his wife. Mr. Lange is a highly sophisticated real estate investor with a career in commercial development. Lange in no way disputed any of the terms of the Agreement or First Amendment in the Rotunda deposition. He admitted these were the only written agreements with MFM. (Lange Dep. 23:13-25).
>
> When asked repeatedly for the terms of any other agreement with MFM regarding the Property, Lange never could identify one with any specificity. However, he finally admitted that MFM Properties never granted an extension to the First Amendment, at least not one with any terms like time, place or consideration. (Lange Dep. 29:8-12).

Order, p. 6. (R. 6, *citing* Lang Depo, R. 70).

The lower court held that there was no agreement for an extension because:

(1) The parole evidence rule barred any evidence of a modification of the written agreements, as there was no evidence of a meeting of the minds on all essential terms of a modification of the agreements. Order, pp. 6-8 (R. 6-8).

(2) The parties were only negotiating and did not complete them, so no new agreement arose. Order, p. 8 (R. 8).

As noted *supra*, Appellant makes no arguments why the lower court was incorrect in any of these rulings.

B. If there was an agreement for an extension, it was not in writing and thus was barred by the Statute of Frauds.

The lower court held that even if there was sufficient evidence of an agreement for an extension, there was no evidence that the Respondents agreed to such extension in writing which defeated the claim. The lower court reasoned:

> Finally, even if Rotunda had produced sufficient evidence to show all the terms of an agreement that somehow modified the Agreement, there is no evidence of a *written* amendment to the Agreement and First Amendment. This is fatal to Rotunda's defense. These agreements are for the sale of land. The South Carolina Statute of Frauds requires that any contract for an interest in land must be in writing and signed by the party against whom it is seeking to be enforced. S.C. Code Ann. § 32-3-10(4)[5]. Failure to put such a contract in writing renders it void. Id. Moreover, a contract required to be in writing by the South Carolina Statute of Frauds cannot be orally modified. Windham v. Honeycutt, 279 S.C. 109, 302 S.E.2d 856 (1983) (Court held evidence of oral modification of the real estate contract violated the Statute of Frauds); see Player v. Chandler, 299 S.C. 101, 382 S.E.2d 891, 895 (1989).
>
> "To satisfy the Statute of Frauds, every essential element of the contract must be expressed in a writing signed by the party to be compelled." Fici v. Koon, 372 S.C. 341, 642 S.E.2d 602, 604 (2007). "The burden of proof is on the party seeking to enforce the contract." Id. "The writing must reasonably identify the subject matter of the contract, sufficiently indicate a contract has been made between the parties, and state with reasonable certainty the essential terms of the agreement." Honorage Nursing Home of Florence, S.C., Inc. v. Florence Convalescent Ctr., Inc., 367 S.C. 108, 623 S.E.2d 853, 856 (Ct. App. 2005). The writing must "'be thereafter executed with such clarity and certainty as to show that the minds of the parties had met on all material terms and with no material term left for future agreement or negotiation.'" Robert Harmon & Bore, Inc. v. Jenkins, 282 S.C. 189, 318 S.E.2d 371, 374 (Ct. App. 1984) *quoting in part* 73 Am. Jur. 2d Statute of Frauds § 341.
>
> Rotunda purports to change the Agreement and First Amendment by changing the terms for its performance, that is, the payment of the Initial Earnest Money and Additional Earnest Money. However, Rotunda has presented no

[5] [Footnote in quoted portion of Order.] S.C. Code Ann. § 32-3-10(4) provides: "No action shall be brought whereby: … (4) To charge any person upon any contract or sale of lands, tenements or hereditaments or any interest in or concerning them; … Unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some person thereunto by him lawfully authorized."

> writing signed by MFM evidencing this alleged agreement. Thus, any such oral contract is void pursuant to the Statute of Frauds.

Order, pp. 9-10. (R. 9-10). The Record contains no writing signed by Respondents. Therefore, the lower court was correct in its holding that any claimed oral extension of the time for Appellants to perform would be unenforceable pursuant to the Statute of Frauds.

CONCLUSION

The Appellant makes no substantive arguments that the lower court's Order was in any way incorrect. Respondents are at a loss on how to respond to such conclusory arguments. The Respondents respectfully request that the Court affirm the lower court's grant of summary judgment.

Respectfully submitted,

Dated: July 27, 2023

BURR & FORMAN LLP

By: *s/Benjamin E. Nicholson, V*

Benjamin E. Nicholson, V
SC Bar # 10137
nnicholson@burr.com
1221 Main St., Suite 1800 (29201)
P.O. Box 11390 (29211)
Columbia, South Carolina
Tel. (803) 799-9800
Fax. (803) 753-3278

Attorneys for Respondents,
MFM Properties, LLC and
MFM Residential Properties, LLC