

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

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JUN 21 2013

The Honorable R. Knox McMahon, Circuit Court Judge

SC Court of Appeals

Case No. 2010-CP-32-00442

Dr. Joseph G. Carew and Dr. Karen Carew, ... Appellants,

v.

RBC Centura Bank, RBC Bank as successor in interest of RBC Centura Bank, Clifton W. Hall, Hall Builders, LLC, Appraisal Team of Mid Carolina, LLC, and Teresa Addy-Haltiwanger, Defendants,

Of Whom, RBC Centura Bank, RBC Bank as successor in interest of RBC Centura Bank, are Respondents.

FINAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

- I. Did the trial court err in granting summary judgment by finding RBC Bank owed no duty to the Carews when the Carews were paying for appraisal services through the Construction Loan Agreement?
- II. Did the trial court err in granting summary judgment based on waiver language buried in the Construction Loan Agreement?
- III. Did the trial court err by finding the Carews did not have a right to rely on the acts and disbursal decisions of RBC Bank when RBC admitted it made a mistake when disbursing loan proceeds?
- IV. Did the trial court err by finding that RBC Bank did not breach the Construction Lending Agreement when it authorized construction draws in excess of the actual construction progress of the Carews home?
- V. Did the trial court err by finding that RBC did not breach its obligations in the Construction Loan Agreement?

STATEMENT OF THE CASE

Drs. Joseph and Karen Carew commenced this action by filing their original Complaint on January 29, 2010. (R. pp. 25-44) The suit arises from the construction of the Carews' home at 34 Edens Point Road, Irmo, South Carolina. *Id.* The Carews named as defendants RBC Centura Bank, the construction lender; Appraisal Team of Mid Carolina and Teresa Addy-Haltiwanger, the appraiser; and Clifton Hall and Hall Builders, LLC, the construction contractor. As to Respondent, RBC, the Carews allege negligence and breach of the Construction Lending Agreement. *Id.* The Carews filed a First Amended Complaint on February 25, 2010. (R. pp. 25-44)

All of the Defendants answered, however, during the course of discovery Hall Builders, LLC's Answer was struck and the Court entered judgment in favor of the Carews against Hall Builders, LLC. Defendant Appraisal Team of Mid Carolina, LLC and Teresa Addy-Haltiwanger were granted summary judgment on August 1, 2011. There was no appeal from the entry of summary judgment in favor of the appraiser. On January 6, 2012, RBC Bank moved for summary judgment. Oral argument on RBC's Motion was heard by the Honorable R. Knox McMahon on April 9, 2012. An Order granting summary judgment was signed by the Honorable R. Knox McMahon on May 15, 2012. Appellants received written notice of entry of Judge McMahon's Order on May 23, 2012 and filed and served this appeal on June 21, 2012.

FACTS

The Carews hired Defendant Clifton W. Hall and Hall Builders, LLC to construct a residence at 34 Edens Point, Irmo, South Carolina. (R. pp. 25-44) The financing for the purchase of the property and the construction of the Carews home was provided by Co-Defendant, RBC Bank. (R. pp. 527-537) The Carews entered into a Construction Loan Agreement on February 28, 2008 with RBC Bank financing the lot purchase (\$540,000) and construction contract (\$850,000). *Id.* RBC Bank, not the Carews, hired Appraisal Team of Mid Carolina, LLC and its appraiser, Teresa Addy-Haltiwanger to inspect the home at various stages of construction before RBC would release funds to Clifton W. Hall and Hall Builders, LLC. (R. pp. 25-44)

On April 29, 2008, Clif Hall and Hall Builders obtained a building permit and began construction of the home. (R. p. 27) During the term of the construction, the roof for the home was not complete yet the builder continued to undertake interior finishing work including installing drywall, installing wood flooring, and installing wood trim and cabinets. (R. pp. 27-29 and R. pp. 538-539) During the construction, interior components of the home became wet and damaged. *Id.* On January 7, 2009 Clif Hall of Hall Builders advised the Carews the home suffered water damage because the roof was not yet complete. (R. p. 28 and R. pp. 538-539)

During the course of the construction, RBC Bank would send Teresa Addy-Haltiwanger of the Appraisal Team out to inspect the home at various stages before releasing funds to Hall Builders. (R. p. 201, line 2 – p. 203, line 4 and R. p. 205, line 24 – p. 206, line 6) The inspections were completed on RBC Centura Construction Loan Inspection, Residential Forms. (R. pp. 538-539) As a result of the completion of the forms, RBC disbursed funds, pursuant to Hall Builders' draw request as follows:

- a. \$40,000 on 6/23/08;
- b. \$45,000 on 6/30/08;
- c. \$37,800 on 7/3/08;
- d. \$38,000 on 7/14/08;
- e. \$15,000 on 7/18/08;
- f. \$45,000 on 7/29/08;
- g. \$10,000 on 7/31/08;
- h. \$83,000 on 8/22/08;
- i. \$36,601 on 9/8/08;
- j. \$21,675 on 9/22/08;
- k. \$72,250 on 9/30/08;
- l. \$14,450 on 12/23/08;
- m. \$39,950 on 12/24/08; and
- n. \$86,700 on 2/2/09.

(R. p. 541)

Through early February of 2009, Clif Hall of Hall Builders continued to advise the Carews that construction was proceeding as normal. (R. pp. 27-28) Hall Builders made a draw request on February 2, 2009, and was paid \$86,700.00 by RBC Centura. (R. p. 28 and R. p. 541) On Monday, February 9, 2009, a representative of RBC told the Carews that RBC funded the February 2, 2009 draw of \$86,700.00, that the house was 67% complete and that \$124,665.40 remained on the loan. (R. p. 28)

In mid-February 2009, builder Hall Builders ran into financial difficulty. Hall Builders' problems were so severe that Hall told the Carews he would not be able to complete the home. (R. p. 29) On February 11, 2009, Hall Builders abandoned the job. *Id.* Hall Builders took money

from construction draws and failed to pay the subcontractors. On February 12, 2009, the Carews advised RBC Centura that Hall Builders had released the Carews from the construction contract and that the Carews had retained Pyramid Contracting to take over the project. (R. p. 30) However, because of Hall Builders taking construction draws and failing to pay subcontractors who worked on the house, the Carews were faced with liens from the subcontractors. (R. pp. 30 – 32) As a result of defects relating to staging of construction, Hall Builders abandoning the job; Hall Builders' failure to pay subcontractors; and the requirements to complete the home, the Carews incurred losses of \$583,681.93 above and beyond the loan. (R. p. 540)

ARGUMENTS

I. THE TRIAL COURT ERRED BY HOLDING RBC BANK OWED NO DUTY TO THE CAREWS FOR APPRAISAL SERVICES WHEN THE CAREWS WERE PAYING FOR THOSE SERVICES THROUGH THE CONSTRUCTION LOAN AGREEMENT.

The Carews and RBC entered a written contract by signing the Construction Lending Agreement. As a result each party owed the other the duty to act in good faith. The Carews contend RBC failed in one or more of the following particulars:

- a. By failing to retain a competent inspector;
- b. By issuing funds to the general contractor when those funds were not due;
- c. By paying for the same construction draws twice;
- d. By allowing the general contractor to complete interior portions of the home when the roof and shell of the home were not complete;
- e. By failing to monitor its inspector and the general contractor so as to avoid water intrusion damage to the home;
- f. By issuing funds in an amount greater than the actual completion percentage of the home;
- g. By failing to timely assist Plaintiffs when advised that the asset was in peril of not being completed; and
- h. By failing to timely respond to Plaintiffs which resulted in liens being placed against the property in question, imperiling the asset.

Appraisal Team of Mid Carolina and Teresa Addy-Haltiwanger fall within the definition of "construction monitor", as defined within the construction loan agreement. The services of the construction monitor were paid for by the Carews through the RBC loan agreement. RBC Bank 30(b)(6) representative, Kathy Patterson stated:

- Q. Alright. RBC is relying on the inspector for the information at the site; is that correct?
- A. That is correct; to monitor the progress of construction.
- Q. Okay. And based on what the inspector tells you, you either disburse or don't disburse for a particular draw?
- A. That is correct.

(R. p. 205, line 24 – p. 206, line 6)

The construction monitor was neither selected by the Carews nor were the terms of the provisions relating to the construction monitor negotiated in the RBC contract. The language is boilerplate language within the contract yet the Carews are the ones who paid for the services of the construction monitor.

It is unfair and unconscionable for the Carews to pay for the services of the construction monitor with no corresponding duty in return from the monitor. There was an absence of meaningful choice on the Carews' part; and, absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process and the contract at issue. *Carlson v. General Motors Corp.*, 883 F.2d 287 (4th Cir. 1989). A determination as to whether a contract is unconscionable depends on all the facts and circumstances of the particular case. *Holler v. Holler*, 612 S.E.2d 469 (Ct. App. 2005) and 17A Am. Jur. 2d Contracts § 279 (2004). The RBC construction contract is essentially a take it or leave it contract with only the amount, interest rate, and length of term negotiable. The remaining terms are boilerplate language drawn in favor of RBC. An adhesion contract is a standard form contract offered on a take it or leave it basis with non-negotiable terms. *Munoz v. Green Tree Financial Corp.*, 542 S.E.2d 360 (2001).

The general rule is that courts will not enforce a contract which is violative of public policy, statutory law or provisions of the South Carolina Constitution. *Carolina Care Plan Inc. v. United Healthcare Services, Inc.*, 606 S.E.2d 752 (2004). In this case it is unconscionable and violative of public policy for the Carews to be charged for a service and then have no corresponding duty provided in return by that service provider, the Appraisal Team of Mid

Carolina, Inc. and RBC Bank. The terms are adhesion contract provisions and are violative public policy.

II. THE WAIVER LANGUAGE IN THE CONSTRUCTION LOAN AGREEMENT IS INCONSPICUOUS BOILERPLATE LANGUAGE WHICH WAS NOT SPECIFICALLY BARGAINED FOR.

The trial court granted RBC Bank summary judgment as a result of a waiver in Section 8.4 of the Construction Loan Agreement. Section 8.4 provides in part as follows:

I [the Carews] agree that your [RBC's] failure or the construction monitor's failure (1) to discover defects in the Improvements, including errors or omissions in design, workmanship, materials, supplies, fixtures, parts, products or equipment due to noncompliance with the construction documents, or due to the defects in any of the foregoing will not make either you or the construction monitor liable to me

The waiver is boilerplate language which is buried within the Construction Loan Agreement. The waiver is neither conspicuous nor specifically bargained for. The only terms really subject to negotiation within the boilerplate language of the Construction Loan Agreement are the name of the borrower, whether the loan is acquire land or construct an improvement and the amount of the loan or the interest rate. (R. pp. 527-537) Everything else is boilerplate language. When dealing with a lender's waiver language in a lending agreement, this court has previously stated that the disclaimer "must be (1) conspicuous, (2) known to the buyer, and (3) specifically bargained for." *Kirkman v. Parex, Inc.*, 632 S.E.2d 854 at 858 (2006), citing *Burbo v. Harley C. Douglass, Inc.*, 106 P.3d 258 (Wash. Ct. App. 2005). RBC's disclaiming language in this case violates the protections for borrowers set forth in *Kirkman v. Parex*.

III. RBC'S OWN REPRESENTATIVE ADMITTED IT MADE A MISTAKE IN DISBURSING LOAN PROCEEDS AND THEREFORE SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

In this case, RBC Bank failed to properly monitor the level of completion of the home and disbursed funds above and beyond the percentage of completion. Doing so allowed Hall

Builders to take money away from the Carew project, not pay subcontractors and abandon the project leaving the Carews with liens to satisfy and a partially constructed home to complete. RBC made unilateral decisions as to whether to disburse. The inspections for the critical time period are identified as follows:

- The December 18, 2008 inspection. (R. p. 538)
- The February 2, 2009 inspection. (R. p. 539)

Both inspection documents reflect that interior components of the home were being completed without the roof having been completed. Moving along with the other elements of construction allowed Clif Hall to draw more funds off of the construction loan. In fact for the December 18, 2008 draw RBC loan coordinator, Gail Chaffin, gave an additional 2% on the loan simply at the request of Clif Hall. Regarding the transaction Kathy Patterson testified as follows:

Q. She was basically doing him a favor, right? (Objection by RBC's counsel).

A. I guess you could say that. I guess you could say that.

Q. Alright. I mean, well, the appraiser had given the completion percentage at 6% --

A. At 6, correct.

Q. And she was adding a little extra money to the pot, so to speak, in giving him an additional amount for the draw by making an independent judgment on her part, adding 2% on miscellaneous cleanup, correct?

A. Correct.

(R. p. 227, line 14 – p. 228, line 2)

Ms. Chaffin essentially decided to give Hall a little more money during the holiday season. (R. p. 226, line 14 – p. 227, line 13) The decision was wholly RBC's discretionary decision.

In addition, RBC Bank admitted that the February 2, 2009 draw, which was a draw of \$86,700.00, was given and the funding decision made prior to the inspection occurring. Kathy Patterson testified that the decision is documented wherein the loan representative told Cliff Hall

\$86,700.00 will post on Monday, February 2nd but the inspection did not occur until February 2nd. (R. p. 275, line 8 – p. 276, line 13) RBC 30(b)(6) representative Kathy Patterson acknowledges the sequence, admitted that is what had occurred, and admitted RBC made a mistake. *Id.*

IV. RBC BANK WAS NEGLIGENT BY AUTHORIZING CONSTRUCTION DRAWS IN EXCESS OF THE ACTUAL CONSTRUCTION PROGRESS OF THE CAREWS' HOME AND, THEREFORE, SUMMARY JUDGMENT SHOULD HAVE BEEN DENIED.

RBC contends that the Construction Loan Agreement gives it the unfettered right to disburse funds to either the Carews to pay Hall Builders, or to tender the funds directly to Hall Builders itself. In addition, RBC reserves the right to disburse the funds in an amount it sees fit. Taking RBC's position to its fullest extent means that RBC could disburse the entire amount of the construction loan proceeds directly to the contractor, without ever having the improvement constructed, and then hold the Carews responsible for the full amount of the construction loan. The extension of RBC's position leads to an absurd result which should not be allowed to stand.

RBC Bank retains the right to make the decision of when to release construction proceeds.

- Q. It's RBC's decision as to whether or not to release construction loan proceeds?
A. Yes sir.

(R. p. 296, lines 7-9)

- Q. Okay. Because you have to watch the progress of house, meaning you, RBC, has to monitor the progress of the home?
A. Well, that has been a decision that RBC makes, but it is not in the construction loan agreement.
Q. But you're -- RBC is not going to release the funds if the level of percentage of completion of the house is not appropriate, correct?
A. Correct.

(R. p. 296, line 22-p. 297, line 5)

Ms. Patterson attempts to explain RBC Bank's use of construction report completion percentages as one piece of the RBC disbursal decision. (R. p. 227, line 14 – p. 233, line 21) Ms. Patterson further acknowledges that at the time of the handling of the Carews' loan, monitoring the percentage of loan disbursed, as opposed to the percentage of construction, was done manually. (R. p. 238, line 15 – p. 101, line 11) RBC Bank now has an automated system that allows the percentages to be compared at the time of each draw. *Id.* This safeguard was not in place at the time of the construction of Carews' home. Notwithstanding the RBC process, it is undisputed that RBC disbursed 85% of the loan proceeds when, at best, the house was only 67% complete. RBC should not be entitled to summary judgment in light of their questionable decision making.

As a result of RBC Bank's failure to properly monitor construction, the Carews suffered damages above and beyond owing the balance of the loan. The Carews have incurred \$583,681.93 in additional expenses as a result of these failures. (R. p. 540)

V. THE TRIAL COURT ERRED BY HOLDING THAT RBC DID NOT BREACH ITS OBLIGATIONS IN THE CONSTRUCTION LOAN AGREEMENT, SINCE RBC WAS NOT A MERE LENDER BUT WAS AWARE OF DEFECTS

Generally a mere lender is not liable in tort for construction defects caused by a builder's work. *Roundtree Villas Association, Inc. v. 4701 Kings Corp.*, 321 S.E.2d 46 (1984). In the Carew case, RBC is more than a mere lender since it is aware of defects relating to the home. Both the construction loan form for December 18, 2008 (R. p. 538) and for the February 2, 2009 inspection (R. p. 539) show that the permanent roof was not yet complete. Notwithstanding the fact that the permanent roof was not yet complete, both forms indicate that substantial interior finish work was being completed. RBC's notice that there was no permanent roof, and failure to

take action to remedy it, should render them liable to the Carews. Although a mere lender is not liable for construction defects under *Roundtree Villas*, if the lender is aware of the defects it may be liable. *Kennedy v. Columbia Lumber and Manufacturing Company*, 384 S.E.2d 730, at 734 (1989). See also *Lane v. Trenholm Building Company*, 229 S.E.2d 728 (1976) and *Kirkman v. Parex, Inc.*, 632 S.E.2d 854 (2006).

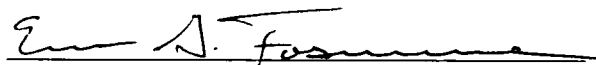
RBC Bank contends that there is no liability under the Construction Loan Agreement for negligence for the appraiser pursuant to *Robertson v. First Union National Bank*, 565 S.E.2d 309 (Ct. App. 2002). In *Robertson* the Plaintiff contended that a building he purchased was negligently appraised at the principal loan amount of \$160,000.00 in order for the bank to let the loan. The *Robertson* Plaintiff contends that in a subsequent appraisal five years later the fair market value of the property was only \$80,000.00. *Robertson* is distinguished because the issue in the Carew case is not the reliance on the appraiser's valuation, but rather the conduct of RBC itself in improperly releasing construction loan proceeds. The *Robertson* court found that the appraiser was employed by the Bank and acting as an agent of the Bank and had no independent duty to the purchaser. If that is the law, then RBC Bank in this case cannot turn around and say that there is no duty owed to the Carews because the appraiser is independent of RBC Bank. RBC Bank attempts to contractually distance itself from the appraiser upon which it relies, whom it selects, and whom it pays, by subsequently claiming there is no duty owed to anyone as a result thereof. At a minimum, the duty running from RBC Bank to the Carews requires that RBC Bank prudently retain and supervise its appraiser and disburse proceeds of the construction loan. In this case, by RBC Bank's 30(b)(6) representative's own testimony, RBC Bank failed to do so.

CONCLUSION

Viewing the evidence in a light most favorable to the Carews, the Trial Court erred in granting summary judgment to RBC. RBC owed duties under the contract to act reasonably and in good faith toward the Carews. The waiver claimed by RBC is not enforceable against the Carews under the fact of this case. Questions of fact regarding RBC's disbursal decisions and RBC's own conduct preclude summary judgment. The order of the trial court should be reversed.

Respectfully submitted,

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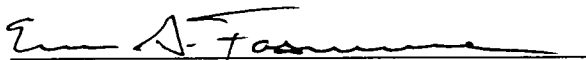
Of Whom, RBC Centura Bank, RBC Bank as successor in interest of RBC Centura Bank, are Respondents.

PROOF OF SERVICE

I certify that I have served the Final Brief of Appellants on RBC Centura Bank; RBC Bank as successor in interest of RBC Centura Bank, by hand delivery, on the ____th day of June, 2013 addressed to their attorney of record,

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellants complies with Rule 211(b),
SCACR.

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