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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from Charleston County
Court of Common Pleas

The Honorable D. Craig Brown, Circuit Judge

Case Number 2016-CP-10-0507
Appellate Case No. 2018-001729

RECEIVED
JUN 03 2019
SC Court of Appeals

Buck Investments, LLC, ...Respondent,

-v-

ROA, LLC, Deborah Rice-Marko, and
PNC Bank, N.A., successor to RBC Bank (USA)..... Defendants.

Of whom ROA, LLC, is the.....Appellant.

APPELLANT'S FINAL BRIEF

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

I.

Did the Circuit Court err in granting Buck a directed verdict on ROA's impossibility defense when the refusal of PNC Bank to release the King Street property from the encumbrance of its mortgage made it impossible for ROA to close its contract to sell that property to Buck?

II.

Did the Circuit Court err in denying ROA's JNOV motion regarding its waiver and estoppel defenses when the recorded PNC mortgage encumbering the King Street property expressly provided PNC had unfettered discretion to consent or withhold consent to the sale of the property, the sales contract provided ROA had an obligation to remove only those mortgages encumbering the property which could be removed by paying an "ascertainable sum of money" for such removal, and the King Street sales contract obligated Buck to inspect title before closing?

STATEMENT OF THE CASE

Respondent, Buck Investments, LLC (Buck), filed its Second Amended Complaint on October 1, 2014.¹ (Second Amended Complaint, ROA 9). Buck's breach of contract cause of action was the only cause of action that went to the jury and is the only subject of this appeal.

Appellant, ROA, LLC (ROA), filed its Second Amended Answer to Buck's Second Amended Complaint on May 2, 2018 (Second Amended Answer, ROA 39). ROA's Second Amended Answer asserted the affirmative defenses of impossibility of performance, impossibility of performance/frustration of purpose and waiver and estoppel (Fifth, Seventh, and Eighth Defenses, respectively, Second Amended Complaint, pp. 4 and 5, ROA 42-43).

The Circuit Court granted Buck's directed verdict motion and dismissed ROA's impossibility/frustration of purpose defense. (Transcript p. 314, l. 22 – p. 315, l. 8, ROA 239-240).

ROA moved for and was denied a directed verdict on its waiver and estoppel defenses. (Transcript p. 295, l. 15 – p. 296, l. 8, ROA 225-224 and p. 298, ll. 12 – 23, ROA 228). ROA renewed its directed verdict motion regarding its waiver and estoppel defenses at the close of the evidence and testimony, that motion being denied again. (Transcript, p. 325, ll. 18 – 25, ROA 250).

After deliberations, the jury returned a verdict against ROA on Buck's breach of contract cause of action for \$900,000.00. (Form 4, Jury Verdict, ROA 4-6).

Thereafter, ROA timely moved for judgment notwithstanding the verdict under Rule 50(b), SCRCp (JNOV) or alternatively, under Rule 59(e), SCRCp, regarding its impossibility and estoppel and waiver defenses (JNOV Motion and Amended JNOV Motion ROA 48 and 55).

¹ Buck's Second Amended Complaint is the pleading upon which the issues in the case were tried to a jury.

ROA's JNOV motion was denied by order entered August 16, 2018. (Form 4 order denying ROA's post-trial motions, ROA 7), and this appeal followed.

STATEMENT OF FACTS

This lawsuit involves commercial property at 438 King Street, Charleston, South Carolina.

On March 20, 2013, ROA agreed to sell the King Street property to Buck under a written contract. (Buck Ex. 1, ROA 288). The contract provided a purchase price of \$3,500,000.00, and a ten-day inspection period during which Buck had to conduct a title examination of the property from which a title insurance commitment, opinion, or report was to issue. The contract required Buck to provide ROA, within ten days of receipt of the title commitment, etc., notice of any exception to title not acceptable to it, providing ROA a "reasonable period, not to exceed 15 days," to elect to remove the unacceptable exception. The sales contract also required ROA, at closing, to remove "those exceptions which can be removed by paying an ascertainable sum of money such as mortgages...." *Id.* The contract closing date was set for April 3, 2013, but provided if ROA failed to close the contract on that date, ROA had an additional 30 days (until May 3, 2013) in which to close the transaction. *Id.*

When the contract was signed, the King Street property was encumbered by a mortgage held by PNC Bank. (Portion of ROA Ex. 7, PNC Foreclosure Complaint, ROA 425-428). The mortgage was dated November of 2007, and was amended in 2009 so as to provide cross-collateralization with several other properties owned by Defendant, Deborah Rice-Marko, or other entities. The mortgage was again modified in July of 2011 with the execution of a Forbearance Agreement. The Forbearance Agreement and the modified mortgage were recorded in the public land records of Charleston County. *Id.*

Section 9 of the mortgage prohibited ROA from selling the King Street property without PNC Bank's consent "which may be withheld in [PNC's] sole discretion...." (Order granting PNC Bank summary judgment, and Portion of ROA Exhibit 7, ROA 1 and 503, respectively).

When it entered into the contract, Buck did not know specifically that the King Street property was encumbered by a mortgage, but it expected its attorneys to "figure that out at some point....," and such an encumbrance would not come as a surprise to Buck. (Transcript, p. 142, l. 16 – p. 143, l. 3, ROA 84-85).

Regarding the modified mortgage and forbearance agreement, ROA received a default notice from PNC Bank dated November 26, 2012, (Buck Ex. 3, ROA 306, and Transcript p. 215, ll. 6 – 12, ROA 151), and a second default letter dated February 15, 2013, (Buck Ex. 6, ROA 312, and Transcript p. 215, ll. 17 – 20, ROA 151).

At the time the contract to sell the King Street property was signed, ROA was in negotiations with PNC Bank to resolve their dispute regarding the mortgage and the other cross-collateralized properties. (Transcript p. 251, l. 18 – p. 252, l. 23, ROA 187-188). These negotiations continued after the contract was signed, following the sales contract closing date, through May 3, 2013, at which point PNC Bank filed a lis pendens and foreclosure complaint. (Transcript, p. 253, l. 17 – p. 255, l. 20, ROA 189-191, and Portion of ROA Ex. 7, ROA 425-428).

The foreclosure complaint was 70 pages long, containing 202 paragraphs, describing numerous properties, including the King Street property, and naming as defendants/borrowers/mortgagors. Among the entities named was The Brothers of SC, LLC, which is a limited liability company owned by the sons of Deborah Rice-Marko, but whose loans were unrelated, but cross-collateralized to the PNC note and mortgage, regarding the King Street

property. (Portion of ROA Ex. 7, and Affidavit of Rice-Marko, Buck Ex. No. 20, ¶ 5, 14, 16 ROA 425-426 and 329, 331, 332, respectively).

PNC's foreclosure complaint requested the debts regarding all the notes secured by all the mortgages, including the note secured by the mortgage on the King Street property, be "ascertained and determined under the direction of the Court..." that the Court render a judgment of foreclosure regarding all the mortgages, including the PNC mortgage encumbering the King Street property, and all the property described, including the King Street property, be sold under the direction of the Court. (Portion of ROA Ex. 7, prayer for relief paragraphs 2, 5 and 6, ROA 494 and 495, respectively).

The contract never closed and this litigation ensued.

STANDARD OF REVIEW

Regarding Issue I, the Circuit Court's erroneous grant of a directed verdict against ROA on its impossibility defense, the Court's jurisdiction extends to correcting errors of law. *Townes Asso., Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976). When considering a directed verdict motion, the Court must view the evidence and all reasonable inferences in the light most favorable to the non-moving party. *S.C. Fed. Credit Union v. Higgins*, 394 S.C. 189, 193 – 194, 714 S.E. 2d 550, 552 (2011) (citations omitted).

Regarding Issue II, the Circuit Court's denial of ROA's JNOV Motion regarding its defenses of waiver and estoppel, the Court's review extends to determining if there is any evidence to support the jury's verdict. *Id.* and *Shupe v. Settle*, 315 S.C. 510, 515, 445 S.E. 2d 651, 654 (Ct. App. 1994).

ARGUMENT

I.

The Circuit Court erred in granting Buck a directed verdict on ROA's impossibility defense because, as a matter of law, the refusal of PNC Bank to release the King Street property from the encumbrance of its mortgage made it impossible for ROA to close its contract to sell that property to Buck.

A party to a contract must perform its obligations under the contract unless its performance is rendered impossible by an act of God, the law, or by a third party. "Impossibility must be real and not a mere inconvenience...." *V.E. Amick & Assocs., LLC v. Palmetto Environ. Group, Inc.*, 394 S.C. 538, 716 S.E.2d 295 (Ct. App. 2011).

In granting Buck's directed verdict motion regarding ROA's impossibility defense, the Circuit Court cited *Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 493 S.E.2d 875 (Ct. App. 1997) and *Morin v. Innegrity, LLC*, 424 S.C. 559, 819 S.E.2d 131 (Ct. App. 2018). (Transcript, p. 314, l. 22 – p. 315, l. 8).

In *Hawkins*, Greenwood Development Corporation contracted with Hawkins to build a road in a certain area, the exact location of the road being less than precisely shown in the contract documents. Greenwood Development Corporation applied to the Corps of Engineers for a permit to build the road as Hawkins wished, but the Corps rejected the permit application because there was no development plan for the property upon which the proposed road was to be located. Greenwood Development Corporation then built a road not located where Hawkins desired and litigation ensued.

The Court of Appeals allowed the defense of impossibility to be submitted to the jury, the jury rejected that defense, and awarded Hawkins \$1,500,000.00 in damages. Following the verdict, Greenwood Development Corporation moved for judgment notwithstanding the verdict, arguing any obligation it had to build the proposed road where Hawkins wished was rendered

impossible by the Corps' denial of a permit to do so. The Circuit Court rejected that argument and was affirmed by the Court of Appeals. The Court of Appeals, citing trial testimony to the effect that "it would be difficult, but not impossible, to obtain the required permits...." concluded the Circuit Court correctly denied Greenwood Development Corporation's JNOV motion. *Id.* at 592, 493 S.E. 2d at 879.

Here, there is no evidence the contract was merely "difficult, but not impossible...." to close. There is no dispute the contract anticipated the existence of mortgages encumbering the property and the removal of those mortgages by ROA, if that could be done by payment of an ascertainable sum of money. There was no ascertainable sum of money by which ROA could remove the PNC mortgage. In addition, the mortgage gave PNC unfettered discretion to accept or reject the sale of the King Street property, and its May 3, 2016 foreclosure complaint filing was a clear rejection of any such sale. Thus, the only evidence adduced at trial was that the sales contract was impossible to close. The Circuit Court, therefore, erred in granting Buck a directed verdict on ROA's impossibility defenses, and its denial of ROA's JNOV motion must be reversed.

In *Morin*, the other case relied on by the Circuit Court in granting a directed verdict against ROA's impossibility defense, an employer (Innegrity) agreed that if an employee (Morin) was terminated without cause, Innegrity would remove Morin as a guarantor on Innegrity's loans. Morin was terminated without cause. Innegrity requested the lender remove Moran as a guarantor on the loans, but the lender refused.

Morin sued and Innegrity argued that performing its contractual obligation was rendered impossible due to its financial inability to meet its outstanding obligations and the lender's refusal to consent to the removal of Morin as a guarantor.

The Court of Appeals, applying the JNOV review standard, i.e., viewing the trial evidence and inferences therefore, in the light most favorable to the nonmoving party, concluded Innegrity had not proven impossibility.

Citing *Hawkins*, the Court of Appeals said Innegrity failed to establish the defense of impossibility because its failure to obtain Morin's release from the loan guaranty was not a "... thing [which] ... cannot by any means be accomplished..." but was "only improbable or out of the power of the obligor...." to accomplish. *Id.* at 592, 493 S.E.2d at 879.

Morin is distinguishable from the facts in this appeal. The *Morin* Circuit Court let the impossibility defense go the jury and the jury rejected the defense, finding for Morin. Here, the Circuit Court granted Buck a directed verdict on ROA's impossibility defense. The standard of review in *Morin*, therefore, differs from the standard of review here.

In addition, the contract between Morin and Innegrity contained an unconditional promise by Innegrity to remove Morin as a guarantor if he was terminated without cause. The King Street property sales contract, however, contemplated the existence of mortgages encumbering the property and provided ROA would "remove at closing those [mortgages] *which can be removed by paying an ascertainable sum of money.*" (Buck Ex. 1, ¶ 4, ROA 290, emphasis added). PNC's May 3, 2016 foreclosure complaint filing asks the foreclosure court to determine the amount owed under all the mortgages it held, *in toto*. There was no "ascertainable sum of money" by which ROA could pay to remove the PNC mortgage as an encumbrance on the King Street property.

Finally, the mortgage itself gave PNC absolute discretion to accept or reject the sale of the property and no power, not even the Court, could force the release of the mortgage. "[Buck] cannot compel PNC to consent to the [sales contract] due to PNC's Mortgage." (Order granting

PNC Bank Summary Judgment, ROA 1). With the filing the foreclosure complaint, ROA could not remove the title exception mortgage because PNC had asserted its right to reclaim the property and force a foreclosure sale.

As the *Morin* court said, early impossibility cases “were uniform that once a party contracted to perform an act, their failure to perform the act promised breached the contract, *unless it expressly excused performance or allocated the risk of nonperformance elsewhere.*” *Id.* at 568, 819 S.E. 2d at 136. The King Street sales contract contemplated title exceptions, premising their removal on an “ascertainable sum of money.” The mortgage could not be removed by an “ascertainable sum of money” and, therefore, rendered ROA’s performance impossible.

There are no South Carolina cases directly on point. The case of *Serio v. Copeland Holdings, LLC*, 2017 Ark. App. 280, 521 S.W.3d 131 (2017) is instructive. The *Serio* property was encumbered by a mortgage and an IRS tax lien. Its owners went into default under the mortgage, and the mortgagee began foreclosure proceedings. Thereafter, the owners entered into a sales agreement, agreeing to sell a portion of the property to a third party. The owners could not obtain a release of the portion of the property they sought to sell from either the mortgagee or the IRS. Ultimately, the property was sold at a foreclosure sale. The contract purchaser then sued the owners for breach of contract, and the owners pleaded impossibility as a defense. The lower court rejected the impossibility defense, and was reversed by the Arkansas Court of Appeals.

An Arkansas impossibility pleader “... must show that he took virtually every action within his power to perform his duty under the contract. It must be shown that the thing to be done cannot be effected by any means....” *Id.*, 521 S.W.3d at 138, quoting *Frigillana v.*

Frigillana, 266 Ark 296, 302, 584 S.W.2d 30, 33 (1979). “Impossibility of performance ... is sufficient to excuse the nonperformance on the part of either party means an impossibility consisting in the nature of the thing to be done, and not the inability of the party to do it, and it must be shown that the thing required under the contract cannot be accomplished. *Id.*, citing *Whipple v. Driver*, 140 Ark. 393, 215 S.W. 669 (1919). *See also Thornton v. Interstate Securities Co.*, 35 Wash. App. 19, 666 P.2d 370 (1983) (“Impossibility of performance encompasses both strict impossibility and impracticability due to extreme and unreasonable difficulty, expense, injury or loss; the unexpected, yet foreseeable event which renders performance impossible must be fortuitous and unavoidable on part of promisor.”).

Similarly, in *Olbum v. Old Home Manor Inc.*, 313 Pa.Super. 99, 459 A.2d 757 (1983), a mining company agreed to pay landowners \$3,000 per month for four years for the right to mine coal on their property. When the coal ran out in 14 months, the mining company stopped paying and the landowners sued. The trial court entered judgment for the mining company; the landowners appealed, contending that the mining company’s contractual obligation to pay royalties did not terminate when the merchantable coal under their property became exhausted. The Superior Court of Pennsylvania agreed with the trial court, saying that if the existence of a specific thing was necessary for performing a duty, its failure to come into existence, destruction, or such deterioration as made performance impracticable was an event the nonoccurrence of which was a basic assumption on which the contract was made. *Id.* at 108, 459 A.2d at 762, quoting *Restatement of Contracts*, 2d, § 263, Destruction, Deterioration or Failure to Come Into Existence of Thing Necessary for Performance.

The Pennsylvania appellate court found both parties understood the contract was based upon two specific veins of coal under the landowners’ property. Thus, the court concluded that

the mining company's obligation to pay royalties terminated when the coal was exhausted. Judgment affirmed.")

Buck and ROA understood and contemplated the existence of mortgages encumbering the King Street property. The sales contract provided for the removal of such mortgages where there existed an ascertainable sum of money. No such ascertainable sum of money existed, to say nothing regarding the absolute discretion PNC had to reject the sales contract and the filing of the May 3, 2016 foreclosure action.

ROA did everything it could to obtain the release of the King Street property from the PNC mortgage encumbrance. It failed because of the impossibility of that task. ROA was, therefore, as a matter of law, excused from performance.

The Circuit Court erred in granting Buck a directed verdict on ROA's impossibility defense and denying its JNOV motion. Its decision must be reversed and judgment entered for ROA.

II.

The Circuit Court erred in denying ROA's JNOV motion regarding its waiver and estoppel defenses because the recorded PNC mortgage encumbering the King Street property expressly provided PNC had unfettered discretion to consent or withhold consent to the sale of the property, the sales contract provided ROA had an obligation to remove only those mortgages encumbering the property which could be removed by paying an "ascertainable sum of money" for such removal, and the King Street sales contract obligated Buck to inspect title before closing.

South Carolina recognizes the affirmative defenses of waiver and estoppel. "Waiver is a voluntary and intentional abandonment or relinquishment of a known right," *Eason v. Eason*, 384 S.C. 473, 480, 682 S.E.2d 804, 807 (2009) (citing *Parker v. Parker*, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994)); *see also King v. James*, 388 S.C. 16, 30, 694 S.E.2d 35, 42 (Ct. App.

2010); *Sanford v. South Carolina State Ethics Comm'n*, 385 S.C. 483, 496-97, 685 S.E.2d 600, 607 (2009), and may be expressed or implied by a party's conduct. *Parker*, 313 S.C. at 487, 443 S.E.2d at 391. Acts inconsistent with a continued assertion of a right may constitute a waiver. *Bonnette v. State*, 277 S.C. 17, 18, 282 S.E.2d 597, 598 (1981).

Similarly, “[e]quitable estoppel occurs where a party is denied the right to plead or prove an otherwise important fact because of something which he has done or failed to do.” *Eason* at 480, 682 S.E.2d at 807 (citing *Parker* at 487, 443 S.E.2d at 391). “The distinction between waiver and estoppel is close, and sometimes the doctrines merge into each other with almost imperceptible gradations.” *Id.* at 487, 443 S.E.2d at 391. “Estoppel is an equitable doctrine, essentially flexible, and therefore to be applied or denied as equities between the parties may preponderate.” *Quail Hill, LLC v. County of Richland*, 379 S.C. 314, 324, 665 S.E.2d 194, 199 (Ct. App. 2008) (rev’d in part on separate grounds).

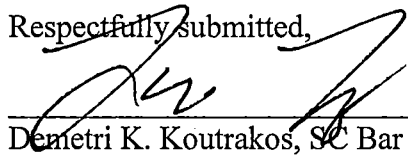
The King Street property sales contract imposed upon Buck an obligation to inspect the title to the property before closing and to identify any exceptions to the title that Buck required ROA to cure. The recorded PNC mortgage, which plainly requires PNC’s consent to any transfer of the property and gives PNC unfettered discretion to withhold its consent, was a matter of public record when the parties executed the King Street sales contract. Buck could have demanded that ROA provide Buck with evidence of PNC’s consent to the transfer. Buck did not do so, instead opting to proceed toward closing knowing that ROA’s obligation under the contract was limited to removing liens on the property at the time of closing that could be removed by the payment of an ascertainable sum. Having chosen this course of conduct, the doctrines of waiver and estoppel preclude Buck from now arguing that ROA breached any contractual obligation it owed to Buck.

CONCLUSION

The Circuit Court erred in granting Buck a directed verdict on ROA's impossibility defense and erred in denying ROA's JNOV motion. The judgment against ROA must be reversed and judgment entered for ROA.

The Circuit Court erred in denying ROA's JNOV motion on its waiver and estoppel defenses and the judgment against ROA must be reversed and judgment entered for ROA.

Respectfully submitted,



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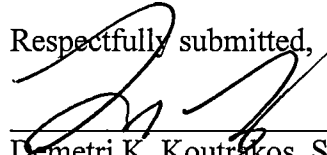
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CERTIFICATE OF COUNSEL

I hereby certify that this Final Brief of Appellant complies with Rule 211(b), SCACR.

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