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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

D. Craig Brown, Circuit Court Judge

Appellate Case No. 2018-001729
Circuit Court Case No. 2016-CP-10-0507

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 PETITION FOR REHEARING

Under Rule 221(a), SCACR, Appellant ROA, LLC ("ROA") petitions the Court to rehear the issues ruled on in the Court's Opinion Number 2023-UP-249 ("Opinion"), entered June 21, 2023, and respectfully submits the Court overlooked or misapprehended the matters set forth below. ROA requests the Court grant this Petition, vacate the Opinion, reverse the circuit court's rulings on the issues raised in this appeal, and enter judgment for ROA.

I. INTRODUCTION

This dispute involves a March 20, 2013, contract in which ROA agreed to sell commercial property to Respondent Buck Investments, LLC ("Buck"). The contract required Buck to provide ROA, within ten days of receipt of a title insurance commitment regarding the property, notice of

any exception to title not acceptable to it, and required ROA, at closing, to remove "those [title] exceptions which can be removed by paying an ascertainable sum of money such as mortgages…." The contract was to close April 3, 2013, but provided for a 30-day extension. Thus, with the extension, the contract had to close by May 3, 2013.

When the contract was signed, the property was encumbered by a recorded mortgage dated November of 2007, which was amended in 2009 to provide cross-collateralization with several other properties owned by Defendant Deborah Rice-Marko and other entities and which was modified again in July 2011, with the execution and recording of a Forbearance Agreement. Section 9 of the mortgage prohibited ROA from selling the property without the mortgagee's consent, "which may be withheld in [the mortgagee's] sole discretion…."

By the extended May 3, 2013, closing date, ROA could not secure the mortgagee's permission to sell the property or obtain from the mortgagee an "ascertainable sum of money" that it could pay to release the property from the mortgage. Further, on May 3, 2013, the mortgagee filed a 202-paragraph, 70-page foreclosure complaint regarding the property and other properties owned by Defendant Deborah Rice-Marko encumbered by the 2009 cross-collateralized mortgages. The foreclosure complaint alleged no sum certain regarding the debt(s) owed on any of the mortgages, including the one encumbering the property, asking only that the debts regarding all the notes secured by all the cross-collateralized mortgages be "ascertained and determined under the direction of the Court…."

Accordingly, on the date performance under the contract was required, i.e., May 3, 2013, it was impossible for ROA to perform because the mortgagee would not consent to the sale, and there was no ascertainable sum of money by which ROA could remove the encumbrance of the mortgage. ROA was, therefore, excused from performance under the contract.

II. ARGUMENT

A. The Court erred in affirming the circuit court's grant of a directed verdict dismissing ROA's impossibility defense because, as a matter of law, the refusal of the mortgagee to consent to the sale of the property and the lack of any ascertainable sum of money to release the property from the encumbrance of the mortgage made it impossible for ROA to close its contract to sell that property to Buck.

1. There was no "ascertainable" sum of money which, by its payment, ROA could obtain the release of the property from the encumbrance of the mortgagee, and the mortgagee refused to approve the sale of the property.

In affirming the circuit court, this Court in the Opinion relied on two cases, *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). While both set out South Carolina's law of impossibility, the facts of both are easily distinguishable from the facts here; therefore, neither is controlling.

"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**." *V.E. Amick & Assocs., LLC v. Palmetto Environ. Group, Inc.*, 394 S.C. 538, 545, 716 S.E.2d 295, 299 (Ct. App. 2011) (emphasis added) (quoting *Hawkins* at 593, 493 S.E. 2d at 879).

In *Hawkins*, Greenwood Development Corporation contracted with Hawkins to build a road whose location was less than precisely shown in the contract documents. Greenwood Development Corporation applied to the Corps of Engineers for a permit to build the road where Hawkins wanted. The Corps rejected the permit application because there was no development plan for the property on which the proposed road was to be located. Greenwood Development Corporation then built a road, but not where Hawkins wanted it built, and litigation ensued.

The circuit court let the defense of impossibility 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 duty 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 this Court, citing trial testimony to the effect that "it would be difficult, but not impossible, to obtain the required permits…." *Id.* at 592, 493 S.E. 2d at 879.

Here, there is no evidence the contract was merely "difficult, but not impossible…." to close. 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, "ascertainable" being the key word or phrase.

The plain meaning of "ascertain" is "to render certain." *Webster's New International Dictionary* at 160 (2d Ed. 1956). The mortgagee refused to provide an ascertainable sum of money to release the property from the mortgage, as evidenced by the mortgagee's May 3, 2016, foreclosure complaint, which did not "render certain" any sum necessary to release the property from the mortgage. The mortgage release sum was in the control of the mortgagee, a third party, and its refusal to provide an ascertainable sum of money by which ROA could obtain the release of the property from the mortgage made ROA's performance under the contract impossible, not merely "difficult."

In *Morin,* 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 asked the lender to 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.

Applying the JNOV review standard, i.e., viewing the trial evidence and inferences in the light most favorable to the nonmoving party, this Court concluded that Innegrity had not proven impossibility.

Citing *Hawkins,* the Court 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 here. The *Morin* circuit court let the impossibility defense go to 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* 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 ROA - Buck 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*…." and, as pointed out above, neither the mortgagee nor its foreclosure filing would or did provide the required "ascertainable sum" by which ROA would have to pay to release the property from the mortgage's encumbrance, to say nothing regarding of the absolute discretion the mortgage invested in the mortgagee to reject any sale of the property which the mortgagee clearly did.

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 ROA – Buck contract contemplated title exceptions, e.g., mortgages,

premising their removal on an "ascertainable sum of money." The mortgage could not be removed by an "ascertainable sum of money" which, therefore, rendered ROA's performance impossible.

This is not a case of "subjective impossibility," as in *Moon v. Jordan,* 301 S.C. 161, 164, 390 S.E. 2d 488, 490 (Ct. App. 1990), quoted by the Opinion at 6, denying an impossibility defense where a party is "… unable to perform … because of his inability to obtain money, whether due to his poverty, a financial panic, or failure of a third party on whom he relies for furnishing money…." In *Moon,* the residential real estate sales contract in question had a standard financing contingency – that the purchaser obtains "adequate financing." The purchaser's loan application was approved, but before closing, the purchaser suffered "financial difficulties" when the sale of her own home failed to close, and her securities account incurred a substantial loss. *Id.* at 162, 390 S.E.2d at 489. This Court concluded that the contingency of adequate financing was met, the purchaser's impossibility defense was not made out, and therefore the *Moon* circuit court correctly granted summary judgment to the seller.

As pointed out above, the ROA – Buck contract expressly contemplated title exceptions, premising their removal on an "ascertainable sum of money." The mortgage could not be removed because there was no "ascertainable sum of money" to remove it, and the mortgagee would not consent,[1] rendering ROA's performance impossible.

The Court misconstrued or overlooked ROA's arguments regarding the foregoing and, therefore, this Petition should be granted, the Opinion withdrawn, and the Court should reverse the circuit court.

[1] The consent of the mortgagee being required as demonstrated by the circuit court's early grant to the mortgage of summary judgment on Buck's specific performance cause of action. *See* Order of the Hon. J.C. Nicholson, Jr., ROA 1 – 3.

2. The out-of-state cases cited by ROA are persuasive given the unique facts of this case.

As it did in its briefs, ROA respectfully submits that no South Carolina cases are directly on point. However, ROA cited the case of *Serio v. Copeland Holdings, LLC,* 521 S.W.3d 131 (Ark. Ct. App. 2017), which is instructive. A mortgage and an IRS tax lien encumbered the Serio property. Its owners defaulted under the mortgage, and the mortgagee began foreclosure proceedings. The owners then 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 sued the owners for breach of contract, and the owners pleaded impossibility as a defense. The lower court rejected the impossibility defense. The Arkansas Court of Appeals reversed.

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.* at 138 (quoting *Frigillana v. Frigillana*, 584 S.W.2d 30, 33 (Ark. 1979)). "Impossibility of performance … 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,* 215 S.W. 669 (Ark. 1919)).

The Arkansas Court of Appeals referenced the doctrine of "impracticality," saying "the law of impossibility has evolved into a broader and more equitable rule of impracticality [which] may excuse a party from performing contractual objections … [and] [p]revention of performance by a government order or regulation may qualify as an impracticability-of-performance defense," *Serio* at 138. However, the 1919 Arkansas Supreme Court *Whipple* opinion, which the Arkansas

Court of Appeals cited for the general law of impossibility,[2] makes no reference to "impracticality" regarding the impossibility jury instruction questioned in that case. Further, the jury instruction questioned in the 1919 case accurately states both Arkansas and South Carolina law regarding the defense of impossibility.

Here, the "nature of the thing" to be done, which rendered ROA's performance under the contract impossible, is analogous to what the owners/sellers in *Serio* found impossible – obtaining a release of a portion of the property to be sold from the encumbrance of a defaulted mortgage and an IRS lien. ROA's impossibility conundrum was not based on its inability to accomplish the release of the mortgage through lack of funds or funding sources. Instead, it was brought about by the "thing" itself – the impossible ascertainment of an amount to release the mortgage lien.

ROA also cited *Olbum v. Old Home Manor Inc.*, 459 A.2d 757 (Pa. Super. 1983), where 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 762

[2] "Impossibility of performance of a contract sufficient to excuse the non-performance upon the part of either party means an impossibility consisting of 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." *Whipple* at 671.

(quoting *Restatement of Contracts 2d* § 263, Destruction, Deterioration or Failure to Come Into Existence of Thing Necessary for Performance).

The Pennsylvania court found both parties understood the contract was based on two specific veins of coal under the landowners' property. Thus, the court concluded that the mining company's duty to pay royalties terminated when the coal was exhausted. Although the Pennsylvania Superior Court used the word "impracticability" in a footnote to its opinion, it explained its use of the word, saying:

> [t]he instant situation [the exhaustion of the coal source] presents a genuine problem of impracticability; it presents a case of 'the thing cannot be done' as opposed to one of 'I cannot do it.' The fact that performance is merely beyond a party's capacity to render would not be sufficient to discharge his obligation.
>
> *Olbum* at 762, n.1.

Subjective impossibility, the "I cannot do it" defense, is not enough to excuse performance under a contract. Objective impossibility, "the thing cannot be done," defense is.

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, i.e., the "thing" necessary to remove the mortgage encumbrance,[3] and ROA's performance was thus excused.

The Court misapprehended or overlooked the persuasive authority of *Serio* and *Olbum*.

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[3] In footnote 7 at page 8 of the Opinion, the Court says "… the sum of money ROA may have had to pay to release the Property could have been in excess of $20 million, that option was still legally *possible."* (emphasis in the original). One cannot write a check or initiate a wire transfer for a "sum in excess of $20 million" unless there is an ascertainable "excess" amount, and here there was none. The footnote also says, "[a]s the circuit court recognized, Rice-Marko presented no evidence of her financial condition…." Rightfully so - Rice-Marko's financial condition, i.e., possible poverty or lack of funding sources, would not support ROA's impossibility defense.

3. Buck's claims for fraudulent misrepresentation and breach of contract accompanied by a fraudulent act were dismissed and neither claim nor evidence presented supporting those claims are relevant to the impossibility issue.

Buck's third cause of action alleged fraudulent misrepresentation, and its fourth cause of action alleged breach of contract accompanied by a fraudulent act. ROA 15 and 16. Neither cause of action went to the jury as both were dismissed. ROA 282. Any evidence presented at trial of either claim is not relevant to the issues before this Court on appeal.

The Court, nevertheless, appeared to rely in some measure on such evidence, saying that ROA's impossibility defense "… ignores Rice-Marko's own trial testimony supporting Buck's claim that she 'and ROA knowingly and intentionally omitted and misrepresented facts concerning the status of the Property.'" Opinion at 7. The Opinion goes on to say that Rice-Marko "never disclosed to Buck that the note and mortgage were in default…." and that she "admitted she was nonresponsive to [Buck's] inquiry [concerning closing] but continued to assert she was not having any difficulty with [the mortgagee] because … 'we were negotiating'" and finally that ROA breached the "Representations and Warranties" section of the sales contract. Opinion at 7 – 8.

None of this has anything to do with the issue before this Court – whether the circuit court was correct in granting Buck a directed verdict, dismissing ROA's impossibility affirmative defense, and the Court misapprehended otherwise.

To the extent this evidence forms any basis for the Opinion's conclusion, the Opinion overlooked or misconstrued its relevance.

4. Conclusion regarding impossibility.

As provided in the sales contract, the "nature of the thing to be done" was the removal of the encumbrance of the mortgage on the property by payment of an ascertainable sum of money. There being no ascertainable sum of money, ROA was excused from performance by the defense

of impossibility and the circuit court erred in granting Buck a directed verdict dismissing this affirmative defense.

The Court misapprehended and overlooked ROA's arguments regarding impossibility and, therefore, ROA respectfully requests the Court reconsider and withdraw the Opinion and reverse the circuit court.

B. The Court erred in affirming the circuit court's failure to grant ROA's motion for a judgment notwithstanding the verdict on its waiver affirmative defense.

The Opinion affirms the circuit court's denial of ROA's motion for judgment notwithstanding the verdict regarding its waiver defense, saying a reasonable jury "could have found .. that Buck had not waived its rights." Opinion at 9. ROA respectfully disagrees.

"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). It 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)." "Generally, the party claiming waiver must show that the party against whom waiver is asserted possessed, at the time, actual or *constructive* knowledge of … all the material facts …." Opinion at 9 (emphasis added) (quoting *Janasik v. Fairway Oaks Villas Horizontal Prop. Regime*, 307 S.C. 339, 344, 415, S.E. 2d 384, 387-88 (1992)).

This Court in the Opinion recognizes that Buck waived its rights under the sales contract by not proceeding with the title inspection and exception process the contract provided. As a matter of public record, the mortgage provided Buck constructive knowledge of the mortgagee's unfettered

discretion to consent, or not to consent, to the sale of the property and the same holds true for the cross-collateralization agreement entered into by ROA in 2011 (ROA 462). By waiving its title exception rights under the sales contract, Buck waived its right later to seek damages under the contract because ROA could not secure the consent of the mortgagee to sell the property. ROA respectfully submits no reasonable jury could have decided otherwise, and the Court overlooked or misapprehended this aspect of ROA arguments seeking reversal of the circuit court's ruling on this issue.

C. The directed verdict motion on impossibility.

In footnote four on page 5 of the Opinion, the Court disagrees with ROA's argument that in light of the circuit court's grant of Buck's directed verdict motion, its own directed verdict motion on the same subject would have been futile. The Court says in the footnote that ROA's argument on impossibility fails "procedurally."

"This [c]ourt does not require parties to engage in futile actions in order to preserve issues for appellate review." *Feggler v. Gentner,* 396 S.C. 461, 469, 722 S.E. 2d 26, 31 (Ct. App. 2012) (quoting *Staubes v. City of Folly Beach,* 339 S.C. 406, 415, 529 S.E. 2d 543, 547 (2000)). "Appellate courts recognize — or at least they should recognize — an overriding rule of civil procedure which says: whatever doesn't make any difference, doesn't matter." *McCall v. Finley,* 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987).

At the close of all the evidence, Buck moved for a directed verdict on Buck's breach of contract cause of action. ROA 232. There followed a lengthy discussion of the impossibility defense by ROA's counsel, which began "… With respect to the impossibility of performance argument, Your Honor, our position is that …," at which point the circuit court said, "Let's deal with this first, please if you don't mind…." The circuit court then asked ROA's counsel for ROA's position about the existence of a contract between ROA and Buck and ROA's non-performance, to

which ROA's counsel responded, "… sure we have a contract that breached, we have the question of whether or not it was a justifiable breach," the circuit court responding "[o]n the issue of impossibility…" to which ROA's counsel rejoined "[c]orrect." ROA 234-235. A discussion followed between the circuit court and ROA's counsel regarding the impossibility defense, including references to the evidence adduced at trial on that issue and the *Morin* case. Turning then to Buck's counsel, the circuit court said, "… [i]f you have something new, I'll hear from you on those issues. With regard – let me say what I'm gonna rule…." at which point the circuit court granted Buck's directed verdict motion on the impossibility defense and explained the basis for its decision. ROA 239-241. Faced with the circuit court's grant of Buck's directed verdict motion on ROA's impossibility defense, ROA moving for a directed verdict on impossibility would have been futile and bordering on disrespectful, the circuit court having just ruled, and explained it's ruling, on the very same issue.

The Opinion misconstrued or overlooked the foregoing.[4]

III. CONCLUSION.

ROA respectfully submits the Court misconstrued or overlooked the matters set forth above, and requests the Court grant this rehearing petition, withdraw the Opinion, reverse the circuit court rulings, and enter judgment for ROA.

[signature page follows]

[4] The Court in footnote four also said ROA did not request a directed verdict on the question of impossibility, "instead stating 'we believe that issue should go to the jury.'" ROA's counsel said, "… we have the issue of waiver and estoppel which we believe should go to the jury … [a]nd then … we have as to damages and mitigation of damages argument (sic) that we believe should go to the jury." ROA 235.

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July 7, 2023

THE STATE OF SOUTH CAROLINA
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PROOF OF SERVICE

The undersigned hereby certifies that, on this date, a copy of **Appellant's Petition for Rehearing** has been served upon Respondent's counsel listed below via email, as follows:

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July 6, 2023

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July 6, 2023

VIA EMAIL: ctappfilings@sccourts.org
The Honorable Jenny Abbott Kitchings
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S. C. Court of Appeals
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RE: Buck Investments, LLC vs. ROA, LLC
Appellate Case No. 2018-001729

Dear Ms. Kitchings:

Enclosed herewith please find Appellant's Petition for Rehearing, together with the Proof of Service, in the above-referenced matter.

Kindly file the same and return a clocked-in copy to the undersigned via email.

This firm's check in the amount of $50 in payment of the required filing fee will be hand delivered to your office.

Please do not hesitate to contact me with any questions.

With kind regards, I am

Sincerely yours,

CALLISON TIGHE & ROBINSON, LLC

s/ Louis H. Lang

Louis H. Lang

LHL:ksr
Enclosures
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