THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

Appeal from Charleston County
Court of Common Pleas

D. Craig Brown, Circuit Court Judge

Supreme Court Appellate Case No. 2023-001450
Opinion No. 2023-UP-249 (S.C. Ct. App. Filed June 21, 2023)

Buck Investments, LLC, ...Respondent,

v.

ROA, LLC; Deborah Rice-Marko; and PNC Bank, N.A.,
Successor to RBC Bank, ... Defendants,

Of whom

ROA, LLC is..... Appellant/Petitioner.

APPELLANT/PETITIONER'S REPLY TO RESPONDENT'S RETURN TO PETITION FOR CERTIORARI

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I. INTRODUCTION

An issue in this case is the application of the impossibility defense to the breach of contract claim asserted in the underlying action.[1]

Respondent suggests the impossibility issue presented does not merit the grant of this Petition because there are no "special and important reasons..." to do so, and this issue is not a "... novel question of law...."

Petitioner, ROA, LLC ("ROA"), respectfully submits the contrary is true. This Court should grant this Petition and reverse the Court of Appeals because the Court of Appeals misapplied the defense of impossibility to the facts of this case, making that defense one that is impossible to successfully mount in nearly any factual situation. The Court of Appeals' application of the impossibility defense is not in keeping with South Carolina's common law of impossibility nor with that of other states.

In holding as it did, the Court of Appeals relied on its own cases dealing with the impossibility defense. This Court has not weighed in substantively on the defense of impossibility. It should do so in this case because the Court of Appeals misapplied the law of the defense of impossibility, and this Court should correct that misapplication. South Carolina's formulation of the impossibility defense is designed to relieve a party such as ROA from its duty to perform when performance becomes impossible due to the act or acts of a third party, especially when non-performance concerns a fact or consideration contemplated by the parties in their written contract. The Court of Appeals failed to recognize these fundamental tenants of contract law.

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[1] The Petition for Certiorari raises a second issue arguing the Court of Appeals erred in affirming the circuit court's failure to grant Petitioner's motion for judgment notwithstanding the verdict on its affirmative defense of waiver. Petitioner stands on its Petition for Certiorari arguments regarding this issue.

This Petition is not, as Respondent suggests, "lodged to perpetuate litigation...." This Petition was filed to invite the Court to correct the Court of Appeals' misapplication of the law of impossibility.

Because of the importance of this issue and its relative novelty to this Court, the Petition should be granted, the decision of the Court of Appeals reversed.

ARGUMENT IN REPLY

1. Respondent has misstated and/or provided incomplete statements regarding the facts of the case.

Respondent argues that "[a]t no time prior to the closing dates did ROA disclose to Buck that there was potentially an impediment to closing." Return at 2.

Respondent, however, knew of the mortgage encumbering the property or, at a minimum, expected its attorneys to "figure that out as some point...," and such an encumbrance would not come as a surprise to Respondent. (Trans. p. 142, l. 16 – p. 143, l. 3, ROA 84 – 85). Respondent also knew or should have known of the mortgage provision that gave ROA's lender, PNC Bank ("PNC"), absolute discretion to accept or reject any sales contract. Further, Respondent knew or should have known of the mortgage modification agreement having a maturity date of July 15, 2013. (Modification of Mortgage, Ex. GG to PNC Foreclosure Complaint, Portion of ROA Ex. 7, ROA 519). Respondent also knew there was a "lender issue" causing some concern regarding the closing. "FYI it must be a lender issue." (E-mail dated April 5, 2013, from Edgar A. Buck, Jr. to attorney, ROA Ex. 6, ROA 530).

In fact, during the negotiations leading up to the finalization of the sales contract, in an email exchange between Respondent's real estate agent (Geoffrey Louis Groat, Jr.), and ROA's attorney, Respondent's real estate agent said, "... it is becoming apparent that there may be some significant financial or lender issues at hand...." (Trans. p. 198, ll. 11 – 13, ROA 134). Mr. Groat

was then asked whether "... as early as February 22nd at least you had some concerns as to whether there was a lender issue, correct..." to which Mr. Groat responded, "I was beginning to think there could've been." (Trans. p. 198, ll. 18 – 21, ROA 134).

Therefore, it is no surprise that the parties included the "ascertainable sum of money" phrase in the final contract when referring to encumbrances, such as mortgages, on the property which, if an "ascertainable sum of money" could be identified, would be removed.[2]

Respondent suggests that "after the default of ROA, its lender ... asserted rights to the real property based on its alleged mortgage interest and filed a foreclosure action...." Return at 2. Respondent also suggests that because the initial closing date was April 3, 2012, and the PNC foreclosure was not filed until May 3, 2013, "the existence of the foreclosure action cannot be a legal excuse, because it did not exist at the time the closing was to occur."

This is not an accurate statement of the facts or the law.

The sales contract regarding the King Street property had a closing date of April 3, 2013, but also *provided a 30-day grace period if the closing did not occur on April 3, 2013*. (Buck Ex. 1, ROA 338). The 30-day grace period ran on May 3, 2013, the same day PNC filed its foreclosure action, which forms one of the bases for ROA's impossibility of performance defense under the contract. (Portion of ROA Ex. 7, PNC Foreclosure Complaint, ROA 425 - 428).

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[2] In a further February 2013 email exchange between Mr. Groat, Respondent's real estate agent, and Respondent's principal, Edgar A. Buck, Jr., Mr. Groat says, "... I've gotten no confirmation from Eric [ROA's attorney] as to the reasons for this request but I'm sure that it is exactly what you and your dad were thinking. The lender must be wanting to evaluate this and perhaps even appraise some of the other properties in the cross collateralization to make sure they're not upside down." (Trans. p. 199, ll. 10 – 15, ROA 135). This exchange is, again, a clear indication of the contemplation by the parties, pre-contract, of lender issues and how to deal with them.

Respondent argues that ROA's impossibility defense is foreclosed by ROA's subsequent "agreement" with PNC in 2017 to release the property for $4 million and ROA's receipt in 2018 of a letter of intent by someone to purchase the property for $5.125 million. Return at 8. Respondent's argument is without merit.

The "agreement" was not reached until July 2017, over four years after the contract grace period expired on May 3, 2013, and long after Respondent brought suit for breach of contract. (Transcript p. 241, ll. 14-21, and Second Amended Complaint, ROA 177, 9). Accordingly, this "agreement" is irrelevant to the impossibility of performance defense asserted by ROA at trial. "[C]ourts have long recognized that impossibility ... of performance at the *time that performance is due* may excuse enforcement of a contract...." *Edge Group WAICCS, LLC v. Sapir Group, LLC,* 705 F.Supp.2d 304, 381 (S.D.N.Y. 2010) (emphasis added) (applying New York law); *see also Texas Co. v. Hogarth Shipping Corp.*, 256 U.S. 619, 629–30 (1921) ("It long has been settled in the English courts and in those of this country, federal and state, that where parties enter into a contract on the assumption that some particular thing essential to its performance will continue to exist and be available for the purpose and neither agrees to be responsible for its continued existence and availability the contract must be regarded as subject to an implied condition that, *if before the time for performance* and without the default of either party the particular thing ceases to exist or be available for the purpose, the contract shall be dissolved and the parties excused from performing it.") (emphasis added); 17A Am. Jur. 2d Contracts § 659 (2023) ("If the act to be performed necessarily depends on the continued existence of a specific thing, *its destruction before the time for performance*, without the fault of the promisor, will excuse a failure to perform, unless the promisor has assumed by contract the risk of its existence.") (emphasis added).

Respondent's Return also refers to a 2018 letter of intent to purchase the King Street property received by ROA, which is equally irrelevant to the impossibility of performance issue on appeal. *Id.*

Respondent irrelevantly argues that "Rice Marko [ROA's trial witness], offered no testimony regarding ROA's financial condition ...." Return at 5. As pointed out in ROA's Petition, 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 Court of Appeals' 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...."

2. Reply to the argument on the law of impossibility.

The Court of Appeals and Respondent rely on *Morin v. Innegrity, LLC,* 819 S.E.2d 131, 424 S.C. 559 (Ct. App. 2018) and *Hawkins v. Greenwood Dev. Corp.,* 328 S.C. 585, 493 S.E.2d 875 (Ct. App. 1997), and ROA's Petition addresses the distinctions between these cases and the facts in this case and why those cases are not controlling.

Suffice it to say that here, the King Street sales contract, unlike Morin's employment contract, contemplated the encumbrance of one or more mortgages on the property and their removal by ROA *if that could be accomplished through the payment of an "ascertainable sum of money."*[3]

It could come as no surprise to Respondent that a mortgage encumbered the property and that to relieve the property from that encumbrance, both parties agreed that the mortgage

[3] As shown by the record cited at pages 2 and 3, above, and in footnote 2 above, the parties were well aware of "lender issues" pre-contract, and the inclusion of the "ascertainable sum of money" was designed to deal with those issues.

encumbrance would be removed if that removal could be accomplished through the payment of an *"ascertainable sum of money."*

PNC's 11:47 a.m., May 3, 2013, foreclosure complaint filing asserts its right to sell the King Street property, along with all the other property described in the complaint, at public auction and asks the foreclosure court to determine the amount owed under all the mortgages it held, *in toto*. There was no "ascertainable sum of money," as contemplated by the King Street sales contract, by which ROA could pay to remove the PNC mortgage as an encumbrance on the King Street property.

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." PNC's mortgage could not be removed by an "ascertainable sum of money" and, therefore, rendered ROA's performance impossible.

A party pleading impossibility "... 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 affected by any means...." *Serio v. Copeland Holdings, LLC,* 521 S.W.3d 131, 138 (Ark. 2017) 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,* 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 impracticality 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.").

The "nature of the thing to be done" was the removal of encumbrances on the King Street property by payment of an "ascertainable sum of money." There being no ascertainable sum of money, ROA was excused from performance under the King Street sales contract by the defense of impossibility.

In *Hawkins,* the Court of Appeals affirmed the circuit court's rejection of the impossibility defense, citing trial testimony to the effect that "it would be difficult, but not impossible, to obtain the required permits…" contemplated by the contract. *Id.* at 592, 493 S.E. 2d at 879.

Here, there is no evidence the King Street sales 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. The impossibility defense was clearly made out and the Court of Appeals erred in concluding otherwise.

ROA respectfully submits no South Carolina cases are directly on point. However, ROA's Petition cites (and cited in its Court of Appeals briefs) the Arkansas Court of Appeals opinion in *Serio*. ROA respectfully submits the *Serio* court's pronouncement of the common law impossibility test to the effect that "it must be shown that the thing required under the contract cannot be accomplished…." comports with South Carolina's common law of impossibility and supports ROA position that the Court of Appeals erred in affirming the circuit court's impossibility defense ruling – the encumbrance of the PNC mortgage on the property

could not be removed because PNC refused to provide an ascertainable sum of money – per the express language of the contract – to accomplish such removal.

CONCLUSION

The issues presented in the Petition are of great importance and, regarding the impossibility defense, is one that this Court has not directly considered.

For the reasons set forth in ROA's Petition for Certiorari and this Reply, ROA respectfully requests the Court grant its Petition and reverse the Court of Appeals' decision.

Respectfully submitted,

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