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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
COURT OF COMMON PLEAS

MIKELL R. SCARABOROUGH, MASTER IN EQUITY

APPELLATE CASE NO. 2023-000599

Marc K. Knapp

Appellant,

v.

James Douglas Jenkins, IV, Peter Barnwell Jenkins, and
Alicia J. Roy,

Respondents.

RESPONDENTS' FINAL BRIEF

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24TH day of October, 2023

Charleston, South Carolina

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STATEMENT OF THE CASE

Appellant Marc Knapp sued Respondents James Jenkins, Peter Jenkins, and Alicia Roy on April 28, 2022, after he failed to close on a contract to purchase Respondents' property. Respondents filed a motion to dismiss on June 22, 2022, and a motion to cancel lis pendens on July 22, 2022. The parties exchanged written discovery during the summer of 2022. On September 21, 2022, this matter was referred to the Master-In-Equity for Charleston County by consent and with finality. The Master scheduled a hearing and status conference for December 12, 2022. Respondents filed an amended motion to dismiss and/or for summary judgment on December 2, 2022. Appellant filed his memorandum in opposition to summary judgment and affidavit of Kenneth Koos on December 9, 2022. The Master entered judgment in the Respondents favor by form order on December 12, 2022, and a formal order on January 24, 2023. Appellant filed successive motions to reconsider on December 18, 2022, and January 29, 2023. After a hearing, both motions were denied on April 11, 2023. Appellant then filed this appeal.

STATEMENT OF ISSUES ON APPEAL

1. Did the Appellant preserve his objection to Respondent's summary judgment motion being heard?
2. Was the entry of summary judgment on the Appellant's claims proper?

FACTS

On January 5, 2022, Appellant Marc Knapp (hereinafter "Knapp") agreed to buy from James Jenkins, Peter Jenkins, and Alicia Roy-brothers and sister-- real property located at 5896 Maybank Highway, Wadmalaw Island, Charleston County (hereinafter "the Property"). R.30-38. The Property consists of approximately 6.69 acres of raw, undeveloped land. R.213. Knapp agreed to pay \$285,000.00 in exchange for the Jenkins providing marketable title to the Property. R. 30.

The Property was sold, “As-Is.” R. 33. The contract called for closing on or before February 10, 2022. R. 31. Shortly before the original closing date, the parties agreed to extend closing to February 24, 2022. R. 75.

The Contract required Knapp to obtain and provide proof of his ability to buy the property shortly after entering into the Contract. It provides:

FINANCE: Buyer’s obligation under this Contract [X] is [] is not contingent upon obtaining financing of a [] 30 year or [] 15 year or [X] other _____ purchase money loan at reasonable prevailing market terms with loan(s) equal in amounts to a maximum 80% of the Purchase Price or Appraisal Value whichever is lower. (“Financing Contingency”). Financing Contingency expires at Closing (“Financing Period”). Buyer must make timely good faith efforts to apply for and obtain financing while refraining from contrary actions (“Financing Effort”). In a timely manner, Buyer shall inform Seller and Brokers of pertinent financing issues and authorize Buyer’s Lender to disclose pertinent loan information to Seller and Brokers (“Financing Disclosure”). Buyer shall apply for financing by January 10, 2022 (date) shall Deliver Notice to Seller of reasonable pre-final loan approval (e.g. pre-approval letter, initial approval letter) that contains no unreasonable credit, income, or asset conditions by January 17, 2022 (date) (no repairs required prior to this Notice). Final loan approval occurred when Lender funds loan(s). If the Buyer changes their Lender during the Financing Period they must notify the seller in writing within 7 calendar days. Absent written approval by the Seller Buyer cannot change lender if the closing date agreed up in Paragraph 4 will change as a direct result. If a Lender subsequently declines or fails to approve financing, the Buyer shall notify the Seller and Brokers as soon as possible. If the Seller and Brokers are notified of inability to obtain financing during the Financing Period, either Party may terminate this Contract by Notice.

Contract, ¶7(emphasis added). R. 32. Accordingly, Knapp agreed and was required to (1) apply for financing for raw land by January 10, 2022; (2) provide a pre-approval letter by January 17, 2022; (3) obtain a loan for 80% of the purchase price by the closing date (February 10, 2022); (4) notify the Jenkins that he was changing Lenders; and (5) inform the Jenkins that he had been denied financing by a Lender so they could terminate the contract. R. 32.

Knapp did none of these things:

Q. I'm asking you, did you provide to the Jenkins family, the sellers, any preapproval prior to January 17th -- on or before January 17th showing that you had been approved a loan?

A. I don't believe so. I was still working with some folks.

Depo. of Knapp, R. 247, p. 33, ln. 22- p. 34, ln. 3.

Q. ... As of January 17th, 2022, did you have any written preapproval letter from any lender showing that they were ready, willing, and able to provide you the funding to buy the property?

A. No written letter, no.

Depo. of Knapp, R. 249, p. 40, ln. 13-18.

Q. And you testified a few minutes ago that you had been rejected by First Citizens.

A. Right.

Q. And as I understand it, you also had a rejection by My Veterans United because it was the kind of property they wouldn't lend money on, right?

A. Correct.

Q. Did you tell the sellers about either of those rejections?

A. I don't believe so.

Depo. of Knapp, R. 251, p. 42, ln. 10-20.

In fact, even as of the date of the hearing on Respondent's motion for summary judgment, Knapp, who went bankrupt in 2021, was unable to provide any proof he could afford to buy the Property. After the missed closing date, Knapp through his counsel continued to act disingenuously as to Knapp's ability to pay for the property. "I have a call in to Mr. Knapp to get authorization for you to speak with his loan broker to confirm the loan application. As soon as I hear back from him I will forward you the loan broker's contacts so you can do your diligence." Email of Adler, March 9, 2022. This contemporaneous email was either untrue or some of Knapp's assertions here regarding his financing here are questionable.

Knapp added a contingency to the contract to allow him to terminate it if he was unable to obtain a septic tank permit from the SC Department of Health and Environmental Control. R. 36. However, although the initial contract was scheduled to close on February 10, 2022, he did not

apply for a permit until February 7, 2022, and did not have one obtained by the closing extension date. R. 135.

All parties acknowledge that there does not exist on file in the public records any claim or lien on the property which would render the title unmarketable. In fact, when Knapp first refused to close, the Respondents were able to obtain a title insurance policy for the property for Knapp's benefit. R. 56-64. Regardless, Knapp refused to close because he contended title to the property was unmarketable claiming that an old cemetery was located on the adjacent property and a Google maps picture obtained from the internet purported to show a path to the cemetery across the Property. R. 24-25; 40; 110.

Yet, Knapp acknowledged the cemetery was not on the Property he contracted to purchase and that the alleged path was not present on the Property:

- Q. At the very bottom is an e-mail dated February 2nd, 2022, at 8:52 from you to Robert, which I guess is Robert Young?
- A. Yes, sir.
- Q. Tell me if I read this correctly. Robert, we verified today that the graves are not on the property. There is one corner pin missing next to the left rear at the marsh. The latest survey dated November of 2020 only shows 6.69 acres. Need to get that nailed down ASAP. Marc Knapp. Did I read that correctly?
- A. Yes, sir.
- Q. Did you write that e-mail?
- A. Yes, sir.
- Q. Did you, in fact, verify on or about February the 2nd, 2022, that the graves were not on the same property that you promised to buy?
- A. Yes, sir.
- Q. Did something happen between February 2nd and today that makes you think that the graves are actually on that property?
- A. No, sir.
- Q. Do you know the graves aren't on the property?
- A. Let me clarify.
- Q. Answer my question first and then you can explain it. Do you know that the graves are not on the property that you contracted to buy?
- A. I believe they're not.

Depo. of Knapp, R. 207-208, p. 75, ln. 11- p. 76, ln. 15.

Further, Knapp testified that he did not find a path on the property when he visited it. In fact, to access the property during his due diligence, Knapp was required to cut his own path across the property. R. 223-224.

Knapp did not close on February 24, 2022, and the Jenkins declined to extend the closing date in part because he refused to provide any proof of financing. Knapp sued. The parties exchanged full written discovery and Mr. Knapp was deposed. The case was referred to the Master-in-Equity for Charleston County, who granted Respondents' motion for summary judgment. This appeal followed.

ARGUMENTS

1. Appellant's argument that the trial court should not have heard Respondents' summary judgment motion is not preserved for review.

At the motions' hearing, Appellant did not object to hearing the Respondents' revised motion to dismiss and/or for summary judgment. Because of this error, the issue is not preserved for review.¹

Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review. At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge. It is axiomatic that an issue cannot be raised for the first time on appeal. Imposing such a requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.

Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011). Knapp did not object before the Master-In-Equity to hearing Respondents' revised motion to dismiss and/or for summary judgment. R. 288. It is undisputed that Knapp had the required ten days notice of the motion. In fact, he submitted an affidavit in opposition to the motion and argued against it in full.

¹ Respondents only response to Appellant's argument regarding Rule 12(b)(6) is that the position became mute when the trial court granted summary judgment.

R. 83-86; 288-292. It was not until after the court's formal order was filed that he raised the issue to the court in his motion to alter or amend and even then, he did not argue that the motion should not have been heard. R. 270. The issue is not preserved.

SCRCP Rule 56(f) states a specific method by which a party must assert summary judgment is premature:

Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just.

Rule 56(f), SCRCP.

Knapp did not file any affidavit stating what information he required to create a genuine issue of material fact. Even in his brief, he makes no assertion of what information or discovery would change the result. Perhaps this is because the Master's judgment is based almost exclusively on the contract between the parties and Knapp's own admissions of his inability to obtain financing and comply with the contract terms.

Prior to the motion being heard, both parties exchanged interrogatories and requests for production. Knapp has not, and cannot, make any assertion that the Respondents withheld any document or information from him. Knapp's deposition was taken. Knapp has not, and cannot, make any assertion that any testimony from either of the three Respondents would create a genuine issue of material fact. The Respondents were not charged with obtaining financing, or applying for a septic tank permit, or maintaining the public records that create marketable title.

Knapp failed to preserve this issue for review. He further failed to state why judgment should not have been granted on his claims. As argued below, the Master's grant of summary judgment as appropriate.

2. The Master properly granted judgment as a matter of law on all of Knapp's claims based on Knapp's own admissions of having failed to comply with the contract terms.

The record before the court based on Knapp's admission is that he failed to comply with his obligations under the contract. As such, he was the first to breach the contract. While there was no breach by the Respondents, assuming there was, the law does not allow him to complain. For these reasons, the Master properly granted summary judgment in the Respondents' favor.

When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRPC. Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law. Rule 56(c), SCRPC. When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party.

Fleming v. Rose, 350 S.C. 488, 493–94, 567 S.E.2d 857, 860 (2002). No genuine issue of fact exists as to Knapp's initial breach of the contract and Knapp has failed to show any fact question that can be found if the Master's order is reversed. Accordingly, the Master's grant of summary judgment should be affirmed.

1. Knapp's failure to comply with the Financing Contingency

Knapp contracted to (1) apply for financing for raw land by January 10, 2022; (2) provide a pre-approval letter by January 17, 2022; (3) obtain a loan for 80% of the purchase price by the closing date (February 10, 2022); (4) notify the Jenkins that he was changing Lenders; and (5)

inform the Jenkins that he had been denied financing by a Lender so they could terminate the contract. R. 32.

Knapp applied for financing from four different lenders. The first was a Veterans Affairs lender, that would not finance the purchase of raw land. R. 241-251. His second application was by his daughter, to whom Knapp claimed he would assign the contract. However, she was not approved for the 80% the contract required. R. 184-185. Knapp provided an AgSouth Bank email dated February 2, 2022, (after the contractual deadline) claiming that Lauren Knapp was approved for \$145,000.00 in financing, less than the 80% the contract required. The third application was with First Citizens Bank. Knapp was denied financing by it. The last application was with a private lender named Ken Koos. Mr. Koos provided an affidavit stating he was willing to lend Knapp's business \$225,000 and that he had agreed to do so sometime undefined in January. R. 85-86. However, in an email from Koos to Knapp dated March 22, 2022—almost a month after the extended closing date—Koos wrote, “Marc, my partner has been out west out backing it with limited reception and internet. I will discuss the proposed deal with him tomorrow, Thursday the latest. However, the deal has my vote.” R. 192. This contemporaneous email indicates, at best, a contingent offer after the contractual deadline.

Knapp, who went through Chapter 7 bankruptcy the year prior to entering into this contract (R. 294), further admitted that he changed lenders without informing the Jenkins (R. 251), that he did not have a pre-approval of a loan from a lender by January 17, 2022, that he was denied financing by a lender (First Citizens) and did not inform the Jenkins, and that he did not have approved financing for 80% of the purchase price. R. 251. By these admissions, Knapp violated several provisions of the Financing Contingency. The clear intent of the contingency is to allow the buyer an opportunity to obtain financing, while allowing the seller the right to end the contract

if it comes clear that the buyer cannot afford or buy the property. Based on Knapp's admissions, the record here is unequivocal that he was unable to obtain a loan for the 80% of the value and that his opportunity to obtain financing was, at best, limited. Knapp hid this information from the Jenkins and kept from them the ability to move on from the contract.

Being first to breach the contract, Knapp cannot complain of any other nonperformance. "Where a contract is not performed, the party who is guilty of the first breach is generally the one upon whom all liability for the nonperformance rests." *Silver v. Abstract Pools & Spas, Inc.*, 376 S.C. 585, 594, 658 S.E.2d 539, 543 (Ct. App. 2008). By not complying with the Finance Contingency, Knapp was the first to breach the contract. While there is no evidence the Respondents violated the contract at all, even if there were, Knapp's admitted failure to comply with the Finance Contingency alleviates any of the respondents' obligations.

Further, Knapp was not ready, willing, and able to perform on the date of closing and Knapp's specific performance claim fails. "In order to compel specific performance, a court of equity must find: (1) there is clear evidence of a valid agreement; (2) the agreement had been partly carried into execution on one side with the approbation of the other; and (3) ***the party who comes to compel performance has performed his or her part, or has been and remains able and willing to perform his or her part of the contract.***" *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 106, 531 S.E.2d 287, 291 (2000)(emphasis added). Even on the day of the hearing, Knapp could not say he had the required 80% loan to purchase the land. Because of the breaches of the Financing Contingency, Respondents were entitled to terminate the contract, mooting the declaratory judgment claims. As a result, summary judgment was appropriate.

2. Knapp's failure to apply for a septic tank permit.

Knapp asserts the contract was contingent on his obtaining a septic tank permit from SCDHEC, which was not issued by closing. Knapp's claimed below the Respondents must extend the closing date until the permit was issued. R. 223. He points to no law or contractual provision for this assertion. If the contingency was not met, he was not obligated to close. The law does not provide Knapp the right to require the Respondents to modify the contract to suit his whims.

Regardless, any delay in the issuance of the permit lies squarely with Knapp. Knapp did not apply for the permit until February 7, 2022, three days before the initial closing date. R. 221. The contract states time is of the essence and, even with an extended time to close, he did not obtain a permit by February 24, 2022, the second closing date. R. 226. Again, if the permit was not issued, Knapp did not have to close.

Knapp attributes his failure to a missing survey pin on the property, which he claims the Respondents were obligated to fix. Yet the contract states that the seller agrees to take the Property as-is. "As-is means the Buyer buys the Property for the Purchase Price while Seller maintains the Property from the Effective date through Closing subject to normal wear and tear without repair or replacement and sells the Property for the Purchase Price unless otherwise agreed upon...". Contract, ¶8. R. 33. Knapp asserts this provision does not apply because he is buying raw land. Nothing in the contract supports this contention. The Property is defined as 5895 Maybank Highway, which all parties acknowledge as raw land. R, 30. The Master properly interpreted the contract as not requiring the Respondents to make any repairs or do any other work to the Property prior to closing. Again, if Knapp could not obtain a permit by closing, his remedy was to either terminate the contract because the contingency

was not met or negotiate an extension of the closing if the Respondents were amenable. The Master's grant of summary judgment was appropriate.

3. There is no evidence that title to the property was not marketable and, if it was not, Knapp's remedy was to terminate the contract.

Last, Knapp alleges there are questions about the marketability of the Property's title. There is nothing in the record to support this claim. Rather, even Knapp is required to admit that the public record shows no encroachment, lien, or other encumbrance that sullies the title. R. 197. In fact, when Knapp raised questions about the title, the Respondents obtained a title insurance policy for the Property in Knapp's benefit. R. 196.

Rather, Knapp alleges that a cemetery located on a neighboring property presents a potential encroachment. The problem with this allegation is that two surveys of the Property show the cemetery on the adjacent land and Knapp himself admitted that, (R. 199-201) having walked the Property, the cemetery is not on it:

- Q. Do you know the graves aren't on the property?
- A. Let me clarify.
- Q. Answer my question first and then you can explain it. Do you know that the graves are not on the property that you contracted to buy?
- A. I believe they're not.

Depo. of Knapp, R. 208, p. 76, ln. 11- p. 76, ln. 15.

Knapp next alleges that an internet picture from Google maps of the Property appears to show a path across the land. R. 25. No law has been presented that states an internet picture is a valid claim to Property. Knapp acknowledges there is no writing regarding some third party having a right of way over the Property. And, Knapp acknowledges that, having visited

the Property, the path does not exist—Knapp had to cut his own path to access the property to map out where his proposed septic system would be. R. 207.

Knapp frames this position as asserting the Respondents believe Knapp is required to take the property “as-is.” Respondents challenge Knapp to show one place where the Respondents say such a thing—he can’t. Respondents position is that the title is marketable and insurable. But, if Knapp is not satisfied with the title—he can walk away from the contract and terminate the deal. Respondents did not contract with Knapp to clear the title for him even if there was a valid claim to it.

Instead, Knapp, a bankrupt and failed businessman who cannot afford to buy the Property, concocted these claims to hold the Respondents and their Property hostage until either he can afford it or the Respondents give him something to which he is not entitled. Why else would he sue to force the sale of property that he claims someone else might have an interest in? This effort is a scam, not a serious legal dispute. The Master saw this and rightfully granted summary judgment to bring this charade to a conclusion. This court should affirm the Master’s order.

CONCLUSION

There is no genuine issue of material fact on any of Knapp’s claims. Knapp flat out cannot afford to buy the property and he hid this from the Respondents, regardless of the contractual agreements he made with them. Knapp’s claims regarding a septic tank permit he waited to the last minute to apply for not being issued and a title with specious deficiencies are just a subterfuge for his inability to afford the land. The Master recognized this, and this court should, as well. The Master’s grant of summary judgment should be affirmed.

WHEREFORE the Respondents pray for the relief requested herein and such other relief as the Court deems just, prudent, and proper.

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