

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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Appeal from Marlboro County
Court of Common Pleas
Civil Action No. 2021-CP-34-00163

SC Court of Appeals

The Honorable Michael S. Holt, Circuit Court Judge

Appellate Case No. 2023-000919

Ronald David Kirby, Jr. Appellant,

v.

Todd Provencher Respondent.

REPLY BRIEF OF APPELLANT

Florence, South Carolina

TURNER, PADGET, GRAHAM & LANEY, P.A.

January 26, 2024

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WHERE BOTH APPELLANT-SELLER'S DEPOSITION TESTIMONY AND APPELLANT-SELLER'S AFFIDAVIT SHOW THAT APPELLANT-SELLER WAS PREPARED TO PRESENT A FEE SIMPLE WARRANTY DEED TO THE RESPONDENT-BUYER ON THE DESIGNATED DATE OF CLOSING, PER THE CONTRACT'S ONLY RELEVANT REQUIREMENT, *IT WAS ERROR* FOR THE TRIAL COURT TO CONCLUDE, AS A MATTER OF LAW, THAT THE CONTRACT HAD BEEN VIOLATED AND *IT WAS ERROR* FOR THE TRIAL COURT TO THEN GRANT SUMMARY JUDGMENT FOR THE RESPONDENT-BUYER.

A. Respondent's Brief Again Mischaracterizes Facts From The Limited Record

In Respondent's Brief, the buyer Provencher again claims that Seller "admitted that he did not have title to the real property on the day of the closing and there was a cloud on the title as to some lots." Respondent's Brief, p.2. In support of this claim, buyer cites to pages 16 and 17 (R.pp. 82-83) of the Seller Kirby's deposition. No such admission is made in this testimony; rather, the buyer explains (as outlined in Appellant's Brief, Sections B (1) and B (3)) the property acquisition history and attorney substitution in the prior weeks that led up to the closing.

Some of the same discussion is referenced in items 1, 2, 3, and 4 on pages 7-8 of Respondent's Brief and again mischaracterized as either an "admission" or "concession" that Seller did not have title, did not have clear title, or had clouded title. This is not accurate. Read in its full context, the only person's testimony in the record, the Seller, shows that the initial attorney (Harry Easterling of the Goldberg Easterling firm in Bennettsville) chosen to prepare the deeds was not familiar with the Sandhills Recreation Club, Inc. and was not familiar with the persons authorized to act on the corporation's behalf and therefore that single attorney chose not to conclude the work. This prompted the email discussed in Section B below.

B. Respondent's Brief Reliance Upon A Preliminary Staff Email Misplaced As Buyer Moved Weeks Beyond That Toward Closing

In his Respondent's Brief, the buyer Provencher makes much reference to a February 1, 2021 e-mail from the staff of attorney Harry Easterling indicating that "we cannot certify title to the properties on Mays Pond." Brief pages 3 (twice), 4, 5 and 6.¹ This e-mail also confirms, however, that contact had been made with "the group that Mr. Kirby is buying those [lots] from to see if they can fix the issues." The issues were addressed by a more local attorney (Cheraw attorney Thomas E. Ingram, Jr.) familiar with the property² and things moved forward.³ Thus, the email became moot.

As addressed in the Appellant's Brief, footnote 2 and pages 9-10, the closing for the Sandhills lots was shifted to Chesterfield attorney Tom Ingram from Bennettsville Attorney Easterling because Ingram was familiar with the property and the corporate entity (Sandhills Recreation Club, Inc.) and the corporation's authorized agents because he had done deeds and titles in that area before – including two (2) of the lots to be re-conveyed to Respondent buyer.

Respondent's Brief does not address that same e-mail's indication that the Marlboro Store property was "fine" and ready to close. A transaction that was also abruptly abandoned by the

¹ As thoroughly discussed in Appellant's initial Brief, §A pp. 6-7, nothing in this Connecticut-derived sales contract actually used the phrase "certified title." The contract only required fee simple conveyances and insurability of title – apparently never sought as things moved forward.

² While the subject property on Mays Road in the Sandhills Recreation Club Area was located in Marlboro County with a Bennettsville address; it actually lies closer to the town of Cheraw in Chesterfield County.

³ As described herein, moving forward toward the closing included the buyer traveling from "up north" to South Carolina for the weekend of the planned closing – after the February 1st email. (Kirby Deposition, R.p.84 line 1— p. 85 line 11).

Respondent. (Kirby Deposition, R.p. 82 lines 7-8 (“And he backed out the day of the closing with Goldberg Easterling [law firm] on the 12th.”); R.p. 132 lines 2-10).

Respondent’s Brief also does not address the sworn affidavits and deposition testimony confirming the Respondent’s agreement to have the Sandhills closing two (2) weeks after that e-mail, on February 15th, at attorney Ingram’s office. The Brief also does not address the Respondent’s actual follow-up travel, after that e-mail, to South Carolina for closings on the 13th and 15th – actually planning to stay at the subject Sandhills cabin and taking steps to have the electricity service activated. (Kirby Deposition, R.p. 84 line 15 – R.p. 85 line 11; R.p. 89 line 23 – R.p. 90 line 10; R.p. 91 line 5- R.p. 92 line 4; R.p.119 lines 8-12;). Moreover, in response to testimony that the Respondent never actually asked for any title search or title certification or title insurance, the record only offers one e-mail that one law firm could not provide an undefined, extracontractual “certification.”

C. Respondent’s Brief Reliance Upon Deeds He Never Saw Also Misplaced ; Rather, Supports Implication Buyer Backed Out For Extracontractual Personal Reasons

In his Brief, Buyer also repeatedly references the deed-labeling “Title Not Abstracted”, Respondent’s Brief page 4, *on deeds he never saw* – because he never went to Attorney Ingram’s for the agreed closing on February 18, 2021⁴ – even though deposition testimony confirmed he traveled from Connecticut that week in anticipation of closing and planning for utility activation at the cabin -- only to back out at the last moment for suspect reasons. (Kirby Deposition, R.p. 84 line 15 – R.p. 85 line 11; R.p. 89 line 23 – R.p. 90 line 10; R.p. 91 line 5 – R.p. 92 line 4). The previously unseen deed-labeling “Title Not Abstracted” *was not* and *could not* have been the basis for the buyer’s withdrawal; and there is no evidence in this record to show that it was such a basis.

⁴ The deeds were ultimately produced in discovery in this litigation.

The post-litigation production of these deeds really only serves to confirm that the seller was prepared to convey the properties in fee simple as contractually required.

D. A Trio of Red-Herrings

Just as the lack of pre-recording of the buyer's acquisition deeds was a red-herring not known to the seller when he backed out (discussed in Appellant's Brief, p.

10), the deed-labeling is another red-herring. Moreover, the unseen deed-labeling corroborates the only testimony in this record – testimony that buyer never requested title insurance (see Appellant's Brief, Argument (B)(2). Likewise, item 10 of Respondent Buyer's Brief, page 9, references testimony from the Seller of his understanding that attorney Ingram generally does not abstract title in neighboring Marlboro County. Whether an accurate understanding or not, the red-herring irrelevance of this testimony is clear from the Seller's initial answer "he [Ingram] wasn't requested to [check title]." (Kirby Deposition R.p. 88 lines 3-4); *see also* (Kirby Deposition R.p. 86 lines 6-13) ("he never requested title to be checked.").

CONCLUSION

The record before the trial court did not support the conclusion that the seller Kirby violated the terms of the land sale agreement *at all* – much less as a matter of law. To the contrary, the *only* evidence in the record demonstrates that seller Kirby was prepared to transfer fee simple title in the South Carolina property by warranty deed to the buyer on the agreed date of the closing – in compliance with the Contract requirement. There is no evidence of title defect, refused title insurance – or even requested title insurance. Moreover, the actual evidence in the trial court suggests the true reason the buyer backed out of the transaction was extracontractual – a non-party brother’s interference. The summary judgment of the trial court should be reversed and the matter remanded for further adjudication.

Florence, South Carolina

TURNER, PADGET, GRAHAM & LANEY, P.A.

January 26, 2024

s/ Jon Rene Josey

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