RECEIVED
Feb 05 2024
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

The Honorable Maite Murphy

Appellate Case No.: 2023-001762

Andrey Gergel and Sonja M. Wyatt. ..... Respondents,

v.

Alexander Opoulous, III, Tina B. Opoulous, Sebrina Leigh Jones and Luxury Land and Homes, Inc. ..... Defendants,

Of whom Tina B. Opoulous, individually, and as personal representative for the Estate of Alexander Opoulous, III are the Appellants.

INITIAL BRIEF OF APPELLANTS

Stephan V. Futeral
SC Bar ID 66427
534 Johnnie Dodds Blvd., Suite 202
Mount Pleasant, South Carolina 29464
(843) 284-5500 Phone (843) 284-5501 Fax
sfuteral@charlestonlaw.net
Attorney for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

STATEMENT OF THE ISSUES ON APPEAL

I. DID THE LOWER COURT ABUSE ITS DISCRETION BY DENYING APPELLANTS' MOTION TO SET ASIDE THE JUDGMENT WHERE THE LOWER COURT, THE CLERK OF COURT, AND RESPONDENTS FAILED TO COMPLY WITH MANDATORY MEDIATION BEFORE TRIAL?

II. DID THE LOWER COURT ABUSE ITS DISCRETION BY DENYING APPELLANTS' MOTION TO SET ASIDE THE JUDGMENT WHERE APPELLANTS' MOTION WAS TIMELY, APPELLANTS HAD A MERITORIOUS DEFENSE, AND THE PREJUDICE TO OUR JUDICIAL SYSTEM OUTWEIGHS ANY PREJUDICE TO RESPONDENTS?

STATEMENT OF THE CASE

On April 3, 2017, Respondents filed an action for damages alleging that Appellants, realtor Sebrina Leigh Jones, and real estate agency Luxury Land and Homes, Inc. failed to comply with the Residential Property Condition Disclosure Act, S.C. Code Ann. § 27-50-10 *et seq.* [Complaint filed April 3, 2017] On March 2, 2018, the lower court issued a scheduling order wherein the parties were ordered to mediate this action on or before June 29, 2018. [Scheduling Order filed March 2, 2018] Instead of participating in mediation, on July 30, 2018, the parties entered into a Consent Order removing this case from the active trial roster pursuant to Rule 40(J), SCRCP. [Rule 40(J) Order filed July 30, 2018]

On March 27, 2019, Respondents filed a Motion to Restore this case to the active roster. [Motion to Restore filed March 27, 2019] On April 15, 2019, a Consent Order was filed relieving Appellants' legal counsel. [Consent Order filed April 15, 2019] Thereafter, Appellants proceeded *pro se*. The lower court restored this matter pursuant to Rule 40(J) on May 30, 2019. [Form 4 Order to Restore filed May 30, 2019]

On April 7, 2022, Respondents stipulated to dismiss the realtor Sebrina Leigh Jones.[1] [Stipulation of Dismissal filed April 7, 2022] Although the parties never participated in mandatory mediation, this case was tried on April 11, 2022. Thereafter, on May 6, 2022, the lower court filed a Form 4 Order entering judgment for Respondents in the amount of $196,000.00 in actual damages and awarded attorney's fees and costs of $21,382.95 for a total judgment of $217,382.95. [Form 4 Order Jury Award filed May 6, 2022]

On May 31, 2022, Appellants filed a Motion for Relief from Judgment Pursuant to Rule 60(b)(1), SCRCP on the grounds that trial was conducted without the parties participating in mandatory mediation. [Rule 60 Motion filed May 31, 2022] On June 8, 2022, Appellants filed a Motion to Stay Execution of Judgment Pursuant to Rule 62(b), SCRCP. [Rule 62 Motion filed June 8, 2022] On June 13, 2022, Respondents filed a memorandum in opposition to Appellants' Rule 60 Motion. [Memorandum filed June 13, 2022]

Approximately one year after Appellants filed their motions, and after several requests to schedule a hearing on Appellants' motions, on October 18, 2023, the lower court issued a Form 4 Order denying Appellants' motions without a hearing. [Form 4 Order Denying Motions filed October 18, 2023] Thereafter, on November 8, 2023, Appellants[2] filed and served this appeal.

STANDARD OF REVIEW

The decision whether to set aside a judgment lies within the lower court's discretion which will not be reversed on an appeal absent a clear showing of an abuse of discretion. Raby Constr., L.L.P. v. Orr, 358 S.C. 10, 594 S.E.2d 478 (2004). "An abuse of discretion occurs when the

---

[1] Respondents did not dismiss the real estate brokerage, Luxury Land and Homes, Inc. However, Respondents appear to have abandoned their claims against this party at trial, and the lower court entered judgment solely against Appellants.

[2] While waiting approximately a year for the lower court to schedule Appellants' motions, Appellant Alexander Opoulous, III passed away on October 12, 2023.

decision is controlled by some error of law or is based on findings of fact that are without evidentiary support." Degenhart v. Burriss, 360 S.C. 497, 500, 602 S.E.2d 96, 97 (Ct. App. 2004).

FACTS

Respondents entered into an Agreement to Buy and Sell Real Estate (the "Contract") with Appellants. [Trial Transcript dated April 11, 2022, pp. 72 – 73, 101] Appellants provided to Respondents a South Carolina Residential Property Condition Disclosure Statement wherein Appellants represented that they did not know about any problems, malfunctions, or defects regarding the property including moisture under the home. Prior to closing, Respondents obtained a comprehensive inspection report regarding the property's condition. [Trial Transcript dated April 11, 2022, pp. 84-85] Respondents' inspection report revealed problems regarding moisture under the home. [Trial Transcript dated April 11, 2022, p. 86] Additionally, sump pumps were openly visible to inspection in the property's crawl space. [Trial Transcript dated April 11, 2022, p. 27] Moreover, a cavity caused by water intrusion was openly visible to inspection. [Trial Transcript dated April 11, 2022, p. 36]

ARGUMENTS

I. THE LOWER COURT ABUSED ITS DISCRETION BY DENYING APPELLANTS' MOTION TO SET ASIDE THE JUDGMENT WHERE THE LOWER COURT, THE CLERK OF COURT, AND RESPONDENTS FAILED TO COMPLY WITH MANDATORY MEDIATION BEFORE TRIAL.

In South Carolina, "[a]ll civil actions filed in the circuit court . . . are subject to court-ordered mediation . . . ." Rule 3(a), SCRADR. Parties who file a civil action in South Carolina's circuit courts are reminded of mandatory mediation in no uncertain terms. Specifically, as set forth in the civil action cover sheet in this case and others like it, "SUPREME COURT RULES

REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT." [Civil Action Coversheet filed April 3, 2017]

Under our ADR rules, "[i]n circuit court cases subject to ADR in which no Proof of ADR has been filed on the 210th day after the filing of the action, the Clerk of Court shall appoint a primary mediator and a secondary mediator . . . ." Rule 4(c), SCRADR (emphasis added). Rule 6(a), SCRADR provides that, "[i]n cases subject to ADR under these rules, all attorneys should fairly and objectively inform their clients about mediation . . . ." Rule 4(c), SCRADR requires that "if the parties have not agreed to the selection of an alternative mediator, the plaintiff or the plaintiff's attorney shall immediately file with the Clerk of Court a written notice advising the court of this fact and requesting the appointment of two more mediators." (emphasis added).

Here, there is no dispute that: (1) this case was subject to mandatory mediation; (2) the Clerk of Court failed to appoint a primary and secondary mediator pursuant to Rule 4(c); (3) Respondents and their counsel failed to notify the court that no mediator was agreed upon by the parties pursuant to Rule 4(c); and (4) the lower court allowed the parties to try this case without mandatory mediation. In other words, despite the safeguards under our ADR rules to guarantee that the parties participated in mandatory mediation, the lower court still failed to ensure mediation before trial.

II. THE LOWER COURT ABUSED ITS DISCRETION BY DENYING APPELLANTS' MOTION TO SET ASIDE THE JUDGMENT WHERE THE APPELLANTS' MOTION WAS TIMELY, APPELLANTS HAD A MERITORIOUS DEFENSE, AND THE PREJUDICE TO OUR JUDICIAL SYSTEM OUTWEIGHED ANY PREJUDICE TO RESPONDENTS.

Because of the lower court's failings described herein, Appellants filed a motion seeking relief from the judgment. Rule 60(b)(1), SCRCP provides that "[o]n motion and upon such terms

as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for . . . [m]istake [or] inadvertence . . . ." Rule 60(b) further provides that the motion be made within a "reasonable time" but not greater than one year.

When determining whether to grant relief under Rule 60(b)(1), the lower court must consider: (1) the timing of the motion for relief; (2) whether the party requesting relief has a meritorious defense; and (3) the degree of prejudice to the opposing party if relief is granted. Wham v. Shearson Lehman Bros., Inc., 298 S.C. 462, 381 S.E.2d 499 (Ct. App. 1989). Regarding a meritorious defense, the moving party does not have to show they would prevail on the merits. Instead, a meritorious defense "need be only one which is worthy of a hearing or judicial inquiry because it raises a question of law deserving of some investigation and discussion or a real controversy as to real facts arising from conflicting or doubtful evidence." McClurg v. Deaton, 380 S.C. 563, 575, 671 S.E.2d 87, 94 (Ct. App. 2008) (quotations and citations omitted).

Here, the lower court abused its discretion when it denied Appellants' motion because the lower court's ruling was based on errors of law. Specifically, the lower court failed to analyze Appellants' motion according to the factors outlined in Wham. Instead, the lower court denied Appellants' Rule 60 Motion by holding that it would not impose sanctions upon Respondents under Rule 10(b), SCRADR.[3] [Form 4 Order Denying Motions filed October 18, 2023]

Regarding the Wham factors, Appellants filed their motion within a reasonable time and have a meritorious defense. Also, any prejudice to Respondents is far outweighed by the prejudice to South Carolina's justice system if our lower courts are permitted to disregard our Supreme Court's orders and mandatory procedural rules.

[3] Notably, Appellants did not make a motion for sanctions under Rule 10(b), SCRADR.

First, regarding timing, Appellants made their Rule 60 Motion less than thirty days after the judgment. Therefore, Appellants did not delay in making their motion.

Second, regarding a meritorious defense, Respondents had no right to rely on Appellants' disclosure statement, and the lower court should have dismissed Respondents' claims as a matter of law. The facts of the present case are strikingly like those in McLaughlin v. Williams, 379 S.C. 451, 665 S.E.2d 667 (S.C. Ct. App. 2008). In McLaughlin, the seller failed to answer questions on the Disclosure Statement concerning water intrusion in a crawlspace. Before closing, the buyer's home inspection uncovered water issues in the crawl space, but the buyer closed anyway. Weeks later, the buyer sued the seller for not disclosing the water intrusion issues. South Carolina's Supreme Court upheld the lower court's dismissal of the buyer's claims because the buyer had no right to rely on the Disclosure Statement where the buyer's inspections showed there were undisclosed damages. Id. Moreover, our Supreme Court held that even if the damage shown on the inspection was not in the exact location of the damage at issue, it would not matter because the buyer was on notice. Id.

Here, Respondents knew before purchasing the property, vis-à-vis their inspection report, that there was fallen insulation, fallen ductwork, and rusted ductwork under the home. [Trial Transcript dated April 11, 2022, p. 85] Additionally, Respondents knew there were moisture problems under the home. [Trial Transcript dated April 11, 2022, p. 86] Accordingly, under McLaughlin, Appellants had a meritorious defense that Respondents had no right to rely on the Disclosure Statement.

Third, regarding the degree of prejudice to Respondents, Appellants reiterate that Respondents and their counsel bear responsibility for the failure to mediate before trial. Regardless, any prejudice to Respondents is far outweighed by the potential harm to our judicial

process. South Carolina's commitment to mandatory mediation before trial in civil cases is not merely a procedural formality; it is a critical mechanism designed to facilitate the resolution of disputes in an efficient, equitable, and expeditious manner.

Mandatory mediation serves two important purposes. First, mandatory mediation embodies our judiciary's recognition that litigation is not always the most effective means of dispute resolution. By compelling parties to engage in mediation, South Carolina's civil justice system encourages the exploration of mutually beneficial solutions, thereby saving time, money, and court resources. Second, mediation offers a forum for parties to communicate directly and confidentially, thereby fostering a sense of agency in resolving their dispute.

Here, the lower court's failure to ensure mediation deprived Appellants of the opportunity to resolve their dispute before trial. Moreover, the lower court's failure to ensure mediation creates the public perception that our courts may selectively disregard mandatory procedural requirements. Ultimately, if this Court allows the judgment to stand in this case, then this Court risks the erosion of public confidence in the fairness and integrity of our legal process. Such erosion of the public's trust in our civil justice system outweighs any prejudice to Respondents.

CONCLUSION

The lower court erred in denying Appellants' Rule 60 Motion where: (1) the lower court failed to ensure mandatory mediation before trial; (2) Appellants' motion was timely; (3) Appellants had a meritorious defense; and (4) any prejudice to Respondents is outweighed by the prejudice to South Carolina's justice system if our lower courts are permitted to disregard mandatory procedural requirements. Accordingly, Appellants respectfully request that this Court reverse the lower court's order and relieve Appellants from the judgment in this case.

Respectfully submitted,

FUTERAL & NELSON, LLC

/s/Stephan V. Futeral

Stephan V. Futeral
SC Bar ID 66427
534 Johnnie Dodds Blvd., Suite 202
Mount Pleasant, South Carolina 29464
(843) 284-5500 Phone (843) 284-5501 Fax
sfuteral@charlestonlaw.net
Attorney for Appellants

Dated: February 5, 2024