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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

The Honorable Frank R. Addy, Jr., Circuit Court Judge

Appellate Case No.: 2022-000470
Case No. 2021-CP-10-04342

Levi Grantham, LLC,.. Appellant,

v.

Kathy Wright Mitchell, ……………………………………………………………….Respondent.

RESPONDENT'S PETITION FOR REHEARING

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Attorney for Respondent, Kathy Wright Mitchell

RESPONDENT'S PETITION FOR REHEARING

On May 22, 2024, the Court of Appeals filed Unpublished Opinion No. 2024-UP-185 in this case reversing the decision of Frank R. Addy, Circuit Court Judge, which granted Respondent summary judgment against Appellant. This Petition represents Respondent's request of the Court of Appeals to rehear its PER CURIAM opinion and enter judgment in favor of Respondent by affirming Judge Addy's decision.

ISSUE I

The Court of Appeals misapprehended the law regarding the phrase "Time is of the Essence," found twice in the parties' contract to buy and sell real estate, and rendered the phrase inconsequential by ruling that a genuine issue of material fact existed regarding the *reasonableness* of Appellant's inactions in failing to timely consummate and close the contract.

ARGUMENT

The Appellant's failure to complete its contractual obligation to purchase Respondent's real property in a timely manner was a substantial and fundamental breach of the parties' contract. Their contract specifically required the Respondent to close within 30 days after its completion of the inspection period and gave the Respondent the ability to have one additional 30 day extension after that. (R. pp. 25-26, §§ 8 & 13). That "time was of the essence" with regard to the subject purchase

agreement appears in bold, underlined print twice in the contract in paragraphs 13 and 33. (R. pp. 26, 28).

The case law, relied upon in the Court of Appeal's unpublished opinion regarding the reasonableness of Appellant's inactions, are cases where the subject contracts did not contain the important and consequential phrase "Time is of the Essence."

The cited case of Hobgood v. Pennington, 300 S.C. 309, 387 S.E. 2d 690 (Ct. App. 1989) presented a factual situation where the court found the question of reasonableness becomes a question of fact "[w]here time is not originally of the essence." The court in Hobgood stated at S.C. 311, S.E.2d 691, "Importantly, the contract does not provide a provision that time is of the essence." Nor did the Hobgood case involve a claim of breach of contract between a buyer and seller. Instead, the case was one for intentional interference with a contract. The question of whether a valid contracted existed at the time of the alleged interference involved a factual situation where the Gastonia Group, seller of the first piece of property, contracted to sell the property to Hobgood, the buyer. The Gastonia Group several months later sold the property to the Coxes, and contended that the first contract with Hobgood had expired. The Gastonia Group claimed that it was not able to close on the date stated in the contract with Hobgood because it was not able to satisfy a requirement to obtain a certificate of occupancy for the property. The certificate of

occupancy was obtained only eleven (11) days after the appointed time to close in the contract had expired. The court of appeals ruled that a question of fact arose as to the reasonableness of the mere 11 day period in a contract where there was no provision stating that time was of the essence.

The cited case of Faulkner v. Millar, 319 S.C. 216, 460 S.E. 2d 378 (1995) also concerned a contract to buy and sell real estate that did not include a provision stating that "time is of the essence." In that case, the seller was attempting to enforce a provision in the contract which required the buyer to inspect the property within ten (10) days of the making of the contract, which the buyer did. After finding problems during the timely inspection, the buyer gave notice of termination of the contract to the seller seven (7) days after the 10 day inspection period. The notice of termination was rejected by the seller as being untimely. The Supreme Court concluded that even without the "time is of the essence" language, it was reasonable for the buyer to terminate the contract only a mere seventeen (17) days after the creation of the contract.

Because "Time is of the essence" was conspicuously stated twice in the subject contract in this appeal, the cases relied upon by this court in its decision are inapposite, and do not represent an accurate reflection of the facts in this case and the law applicable thereto. In the present case, the seller waited over one year after the making of the contract for the buyer to close. (R. p. 46). Still, after the passage

of one year, the buyer gave no indication of when it would close and did not respond to Respondent's inquiries. The passage of time in both the Hobgood and Faulkner cases, 11 days and 7 days respectively, represent time periods that are less that that given to Appellant by the circuit court after its ruling on the summary judgment motion, which motion hearing took place more than 13 months after the contract between the parties was made.

The case of Bishop v Tolbert, 249 S.C. 289, 153 S.E. 2d 912 (1967) relied upon by this court in its decision, is a more worthy reflection of the law applicable to the facts of this case. It states that "generally, time is not of the essence of a contract to convey land unless made so by express terms, or by implication from the nature of the subject matter, the object of the contract, or the situation or conduct of the parties." The present case represents one where the contract contains the phrase in express terms. Time is also made of the essence in the present case by implication from the object of the contract, that is, for Appellant to buy and Respondent to sell Respondent's real estate; and by the conduct of the parties. The record in this case is uncontroverted, where the Respondent expressed her readiness, willingness and ability to perform the contract and allowed the Appellant months, and now years, to perform its obligation to purchase the property. (R. p. 45).The law implies in every contract a covenant of good faith and fair dealing, and an agreement by the parties to a contract to do and perform those thing that according to reason and justice they

should do in order to carry out the purpose for which the contract was made. Commercial Credit Corp. v. Nelson, 247 S.C. 360, 367, 147 S.E.2d 481, 484 (1966).

When the express terms of the contract state that "time is of the essence," the case becomes one of breach of contract. The circuit court, after considering the facts of the case, determined that there were no material facts in dispute with regard to the Appellant's obligation to close on the sale. (R. p. 7). The summary judgment hearing took place on March 31, 2022, more than one year after the signing of the contract on February 11, 2021, and more than 263 days after July 11, 2021, the date the contract called for a closing, with time being of the essence, with no definitive closing date is set, with little or no communication from the buyer, led the circuit court to only one conclusion. Whether an amount of time to do or not do a particular act is a reasonable amount of time is a question of law when the facts are undisputed and susceptible of only one reasonable inference. Crawford v. Southern Ry. Co., 101 S.C. 522, 86 S.E. 19 (1915) (whether notice was given within a reasonable time is a question of law when the facts are undisputed and susceptible of only one reasonable inference.). It is not sufficient that one create an inference which is not reasonable. Similarly, it is not sufficient that one create an issue of fact that is not genuine. Main v. Corley, 281 S.C. 525, 526-27, 316 S.E. 2d 406, 407 (1984); Durkin v. Hansen, 313 S.C. 343, 346, 437 S.E. 2d 550, 552 (Ct. App. 1993).

The circuit court determined that the Appellant's refusal or unwillingness to close on the Agreement to Buy and Sell the subject property represented a substantial and fundamental breach of the contract which defeated the purpose of the contract. (R. p. 7). The circuit court, in its March 31, 2022 order granting Respondent summary judgment even went further to give the Appellant one more chance to close on the contract at the contract price; that is, until April 15, 2022. (R. pp. 7 – 8). The Appellant did not respond.

Considering the facts presented in this case, summary judgment was appropriate. The express language in the contract, the object of the contract, the passage of time, and the conduct of both parties presented plain, palpable and indisputable facts on which reasonable minds could not differ.

CONCLUSION

For the reasons stated above, Respondent respectfully requests this court to consider and grant her Petition for Rehearing, and grant such relief as may be allowed by Rules 221 and 240 SCACR; such relief including an affirmance of the March 31, 2022 order of the circuit court which granted Respondent summary judgment in this case.

Respectfully Submitted,

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Attorneys for Respondent, Kathy Wright Mitchell

June 5, 2024

Charleston, South Carolina

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CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the Appellant in the foregoing matter with a copy of Respondent's Petition for Rehearing via electronic mail only, addressed as to him as follows:

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5th Day of June, 2024
Charleston, South Carolina

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5th Day of June, 2024
Charleston, South Carolina