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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Shannon M. Phillips, Master-In-Equity

Case No. 2018-CP-42-02034
Appellate Case No. 2023-001861

Daniel E. Schall .....Appellant,

v.

Lori M. Sealy, as Personal Representative for the Estate of Claude L. Mullwee a/k/a Claude Lee Mulwee, and the Estate of Deloris Robinson Mulwee .....Respondent.

REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

This appeal presents the Court with a straightforward question: was the parties' real estate contract properly terminated? The issues on appeal all flow from that question. In her respondent's brief, Lori Sealy as personal representative for her parents' estates ("Sealy" or "Seller"), seeks to confuse the facts and ignore the language of the parties' contract in hopes of avoiding her obligations under the contract. Daniel Schall ("Schall" or "Buyer") takes this opportunity to set the record straight.

ARGUMENTS IN REPLY

Daniel Schall is the Buyer. Jennifer Schall is not. Under the parties' contract, Buyer waived due diligence, but retained inspection rights and the right to "make reasonable record of the Property" and to "make reasonable visual observations of Property." (R. at 276-84, ¶¶8,12). Sealy, wanting out of the contract, has misconstrued Buyer's efforts to require compliance with the contract and make a reasonable record of the Property with a "Notice of damage" under paragraph 13, which provides in part as follows:

> **FIRE OR CASUALTY OR INJURY: In case the Property is damaged wholly or partially by fire or other casualty prior to Closing, Parties will have the right for 5 Business Days after Notice of damage to deliver Notice of Termination to other Party.**

(*Id.*, ¶13). There is no document in the record titled "Notice of damage." There is no allegation of fire.

The Master identified two items in support of her determination that paragraph 13 was triggered by an "other casualty": (1) "theft" of vegetation, and (2) damage to a padlock on a building. (R. at 9). Neither party believed that either the vegetation or the padlock constituted a casualty. (R. at 116:19-17:8, 169: 1-3 (Q: "So is it your testimony that a few plants and an already broken lock would constitute a casualty loss?" A [Seller]: "No sir.")). In addition, this finding

mischaracterizes the parties' correspondence and ignores the definition of "Property" in the contract. Under the contract, "Property" is "any and all parcel of land, appurtenant interests, improvements, landscape, systems, and fixtures[.]" (R. at 276-84, ¶3). The parties agreed that "no personal property will transfer as part of this sale." (*Id.*).

There had been much back and forth between the parties and their agents between the time of contracting and the purported termination, as well as messages from Jennifer Schall. (*See* R. at 90-91, 93-94, 668-80, 682, 690-92). The email that Sealy contends was a "Notice of damage" on April 23, 2018 is merely another message in that series, following up on a question from the day before, and states in pertinent part:

> It is clear that someone has been there and has removed several plants and vegetation from around the property. Below are just some of the photos of what was once there and has been removed.
>
> Their cleanup guy quoted them at around $3,000 to have all of the debris removed from the previous location specified. They have also requested that the remaining trash in the home [be] removed as well. It looks like someone went and just scattered the trash around the floor. The lock on the side building looks like it has been damaged some more.

(R. at 90-91, 295-98, 682). Nothing in the April 23 email was new. (*See* R. at 90-91, 682 (referencing vegetation question), 93-94, 668-80 (text chain with Jennifer Schall and Thalia Moffitt including questions about securing the property and vegetation)).[1]

[1] It is this chronology that gives rise to Schall's argument that even if there had been a "Notice of damage," the purported termination was not timely. Schall notes that these arguments were raised following this non-jury trial in his post-trial motion. Rule 52, SCRCP ("When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the trial court an objection to such findings or has made a motion to amend them or a motion for judgment."). Schall further notes that he does not object to the introduction and consideration of Defendants' Exhibits 1 and 3 and Plaintiff's Exhibit 15, but simply discovered in preparing his post-trial motion that the public index did not contain the complete exhibits. He submitted the correct exhibits with his post-trial motion. (R. at 45-94).

The April 23 email included photographs showing that the referenced vegetation, three irises and a tulip that had completed their bloom cycle, was still there; therefore, there was no theft. (R. at 90-91). The photographs also showed that the lock in question was a padlock, which is personal property and not Property for purposes of Paragraph 13. (*Id.*). Schall never referenced any "casualty" to the Property. (R. at 116:16-22). As such, on its face, there is no suggestion that the "Property [was] damaged wholly or partially by fire or other casualty prior to Closing" for purposes of triggering a termination right.

With respect to the subsequent text messages, a review of the text chain shows that the messages discussed were from Jennifer Schall, not Buyer. (R. at 87-89, 688-89). Schall properly raised these arguments in his post-trial motion. Rule 52, SCRCP. Schall did not believe there had been any casualty, did not believe he had sent a "Notice of damage," and remained and remains willing, ready, and able to close on the Property. (R. at 87-89, 93-94, 116:19-17:8, 127:20-23, 668-80,688-89).

In addition, Schall did not demand any concession or assign any monetary value for the "lost vegetation" as suggested in the Facts section of Sealy's brief. Instead, that amount was mentioned by Jennifer Schall as consideration for closing early and mowing, among other things. (R. at 87-89, 688-89). Buyer did not seek concessions and did not believe there had been a casualty. Buyer's only concern was that Seller comply with the contract.

In fact, Seller was looking for a way out of a contract she had no intention of fulfilling. She did not believe the padlock or the plants were casualties. (R. at 165:7-11, 169:1-3, 170:22-71:8). The padlock was not Property, and the plants were not stolen. There were no "sudden and unexpected losses caused by a third party" as found by the Master. (R, at 10). There was no loss of Property. As such, the Property was not "damaged wholly or partially by fire or other casualty

prior to Closing" for purposes of triggering a termination right, and the Master erred in finding otherwise.

Seller has argued that any damage, even a *de minimus* one is an "other casualty" for purposes of the parties' agreement. As argued above, there was no damage to the Property. Moreover, there is no indication of an accident, mishap, or any sudden, unforeseen, or unexpected loss. Thus, under any of the definitions urged by Seller, there was no "other casualty" for purposes of triggering a right to terminate.

Further, the face of the parties' agreement shows that "damage" and "casualty" are not synonymous. For example, paragraph 17 gives Buyer the unilateral right to terminate the contract if Seller removes vegetation from the Property. If Seller's construction of the parties' agreement were correct, that would render paragraph 17 superfluous. The better approach is one that gives meaning to the parties' contract as a whole. *See Reyhani v. Stone Creek Cove Condo. II Horizontal Prop. Regime*, 329 S.C. 206, 212, 494 S.E.2d 465, 468 (Ct. App. 1997) ("Documents will be interpreted so as to give effect to all of their provisions, if practical."); *Brady v. Brady*, 222 S.C. 242, 72 S.E.2d 193 (1952) ("It is fundamental that in the construction of the language of a [contract], it is proper to read together the different provisions therein dealing with the same subject matter, and where possible, all the language used should be given a reasonable meaning."). Moreover, if Seller's position were correct, any real estate contract with this form language could be cancelled on any mention of something changing on the property. That is surely not the intent of the language.[2]

[2] It goes without saying that an expanded concept of the term "casualty" to include any damage could have massive implications for the insurance industry, which assesses risks based on its assessments of "casualties" as that term is popularly understood.

In the absence of any right to terminate, the Master erred in ordering that the earnest money be returned to Schall, and that all matters raised "are now resolved, and this matter is hereby ended and stricken from the calendar." To the contrary, Schall is entitled to specific performance, special damages, and attorney's fees. Sealy does not respond to Schall's arguments about the appropriate remedy and instead responds solely as to the validity of the purported termination.

CONCLUSION

For these reasons and those presented in Schall's appellant's brief, the Master erred in finding the parties' agreement had been properly terminated and erred in failing to award specific performance, damages, and attorney's fees. This case should be reversed with a finding that Schall is entitled to specific performance and an award of special damages and attorney's fees and costs. The Court may order an award of special damages based on the record or, alternatively, remand this issue for determination by the Master. Schall asks that the issue of the amount of the attorney's fees and costs be remanded to the Master.

Respectfully submitted,

s/ Sarah P. Spruill
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