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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

H. Steven DeBerry, IV, Circuit Court Judge

Case No. 2020-CV-21-01817

Appellate Case No. 2023-001713

Barbara Sarb.....Respondent/Appellant,

v.

Julie W. Phillips and Joseph M. Phillips.....Appellants/Respondents.

APPELLANTS/RESPONDENTS' FINAL RESPONSE BRIEF AS RESPONDENTS

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STATEMENT OF THE CASE

Appellants/Respondents Joseph and Julie Phillips (hereinafter "Sellers") crave reference to their Initial Brief as Appellants for their Statement of the Case and, to the extent same is incongruent with the Statement of the Case presented by Buyer, would rely on same as if fully set forth herein.

FACTS

Sellers crave reference to their Initial Brief as Appellants for their Statement of Facts and incorporates same as if fully set forth herein. In addition to the facts outlined in their Initial Brief, Sellers would state the following facts.

Sellers were the owners of a certain piece of real property located at 550 Wisteria Drive, Florence, S.C. 29501 (the "Property"). (*See* R. p. 15 at ¶ 9.) On June 13, 2019, the Sellers listed the Property for sale. (*See* R. p. 637, lines 9-13.) On June 13, 2019, the Sellers signed the disclosures (the "Disclosures") required under the *South Carolina Residential Property Condition Disclosures Act*, S.C. Code Ann. § 27-50-10 *et seq*, (the "Act"). (*See* R. p. 1065.) The Disclosure form provides: "this disclosure does not limit the *obligation* of the purchaser to inspect the property and improvements which are the subject of the real estate contract." (Id.) It continues "this

disclosure is not a substitute for obtaining inspections of on site and off site conditions." (Id.) Additionally, the Disclosures add "purchasers have the sole *responsibility* for obtaining inspection reports from licensed home inspectors, surveyors, engineers or other qualified professionals." (Id.)

On June 14, 2019, Respondent/Appellant Barbara Sarb (hereinafter "Buyer") made an offer to purchase the Property which was accepted on June 15, 2019 by the Sellers thus entering into a contract for the purchase of the Property ("Contract"). (*See* R. p. 406, line 22; R. p. 647 line 15 – p. 648 line 3; *see also* R. pp. 1061-1066.) The Contract, in part, provides "Buyer at Buyer's expense shall have the privilege and *responsibility* of inspecting the structure, square footage, environmental concerns including but not limited to mold, radon gas, lead-based hazards including lead-based paints, wetlands study, appurtenant buildings, heating systems, air conditioning systems, electrical systems, *plumbing systems, water supply systems, wastewater systems*, as well as appurtenant equipment of appliances." (R. p. 1055.) The Contract further incorporates the Disclosures by reference and through its merger clause. (R. p. 1057.) The Contract continues "if Buyer defaults in the performance of any of the Buyer's *obligations* under this contract" seller may: … "pursue any remedies available to Seller at law or equity" and "recover attorneys fees and ALL other direct costs of litigation if Buyer found in default/breach of Contract." (R. p. 1058.)

On June 21, 2019, Dodson Pest Control performed an inspection of the property. (R. p. 651, lines 19-25.) An Official South Carolina Wood Infestation Report ("CL-100") was generated as a result of the inspection. (*Id.*; *see also* R. pp. 1067-1069.) The CL-100 recommended to Buyer that she have the Property examined by a structural engineer or expert for their opinion as to the structural integrity of the property. (R. p. 1067.) The CL-100 further provided that Buyer should address any concerns regarding molds or fungi with medical providers or public health officials.

(*Id*.) Buyer chose to do neither; in fact, Buyer conducted no additional/specialized inspections that were recommended to her by Dobson. (R. p. 661, line 5 – p. 662, line 19.)

On June 25, 2019, Housemaster performed an inspection of the Property. (R. p. 654, lines 11-15; *see also* R. pp. 1071-1103.) The Housemaster report clearly indicates on the very first page that "all repair needs or recommendations for further evaluation should be addressed prior to closing." (R. p. 1072.) "It is the client's responsibility to perform a final inspection to determine the conditions of the dwelling and property at the time of the closing." (R. p. 1072.) The Housemaster report further states that the inspection is not designed to alert Buyer to any mold, mildew or air quality issues with the Property, but rather, Buyer should consult with an "environmental health specialist" concerning same. (R. pp. 1073.) Throughout the Housemaster report, the inspector recommends to Buyer that she have qualified specialty contractors (roofing, plumbing, HVAC, etc.) inspect certain elements of those systems. (R. pp. 1075, 1078, 1082, 1084, 1088, 1092, 1093, 1095, 1099, 1100-1102.) Again, Buyer chose to do none of these follow-up inspections that were recommended to her. (R. p. 661, line 5 – p. 662, line 19.)

Other than the standard CL-100 and standard home inspection, Buyer performed no inspection of the Property prior to purchase, including: a due diligence inspection (R. p. 661, lines 5-9); an ancillary inspection (R. p. 661, line 23-p. 662, line 6); a specialized inspection (R. p. 662, line 16); an air quality inspection (R. p. 662, lines 17-19); nor an environmental assessment (R. p. 663, lines 2-5). Buyer failed to conduct these inspections despite the Contract, the CL-100 and the Housemaster Report insisting that she do so and despite allegedly having chronic breathing issues. (*See generally* R. pp. 1053-1061, 1067-1070, 1071-1103; R. p. 687, lines 1-6; R. p. 687, lines 11-14.)

STANDARD OF REVIEW

An action for breach of contract seeking money damages is an action at law. *See* Silver v. Abstract Pools & Spas, Inc., 376 S.C. 585, 590, 658 S.E.2d 539, 541-42 (Ct. App. 2008). "In an action at law, on appeal of a case tried by a jury, the jurisdiction of this [c]ourt extends merely to the correction of errors of law, and a factual finding of the jury will not be disturbed unless a review of the record discloses that there is no evidence which reasonably supports the jury's findings." Sapp v. Wheeler, 402 S.C. 502, 507, 741 S.E.2d 565 (Ct. App. 2013) (*quoting* Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 85, 221 S.E.2d 773, 775 (1976).

A trial court's decision to award or deny attorneys' fees is subject to the abuse of discretion standard. Heath v. County of Aiken, 302 S.C. 178, 182, 394 S.E.2d 709, 711 (1990). However, the issue of "prevailing party" status is a legal question which is subject to *de novo* review. *See* Hueble v. S.C. Dep't of Natural Res., 416 S.C. 220, 231, 785 S.E.2d 461, 467 (2016). The specific amount of attorney's fees awarded "will not be disturbed absent an abuse of discretion." Layman v. State, 376 S.C. 434, 443, 658 S.E.2d 320, 325 (2008).

ARGUMENT

I. THE TRIAL COURT NOR THE JURY ERRED IN FINDING THAT BUYER BREACHED THE CONTRACT BY FAILING TO ADEQUATELY INSPECT THE PROPERTY PRIOR TO HER PURCHASE.

The elements for breach of contract include: "the existence of the contract, its breach, and the damages caused by such breach." Branche Builders, Inc. v. Coggins, 386 S.C. 43, 48, 686 S.E.2d 200 (Ct. App. 2009) (*citing* Fuller v. E. Fire & Cas. Ins. Co., 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962). The necessary elements of a contract are offer, acceptance, and valuable consideration. Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 406, 581 S.E.2d 161, 166 (2003).

A party's failure to perform/meet its obligation(s) under a contract is a breach of that contract. Road, LLC v. Beaufort Cty., 433 S.C. 164, 173; 857 S.E.2d 371 (S.C. App. 2021); Consignment Sales, LLC v. Tucker Oil Co., 391 S.C. 266, 268, 705 S.E.2d 73 (Ct. App 2010); Crenshaw v. Erskine Coll., 424 S.C. 287, 289, 818 S.E.2d 218 (Ct. App. 2018). Buyers cannot "close shut their eyes" by failing to examine a property as closely as they should have to protect their own, personal interests. *See* Watts v. Monarch Builders, Inc., 272 S.C. 517, 519-20, 252 S.E.2d 889, 891 (1979); J.B. Colt Co. v. Britt, 129 S.C. 226, 233, 123 S.E. 845, 848 (1924).

A finding of nominal damages is an appropriate remedy in a breach of contract cause of action where a breach has occurred. J & W Corp. of Greenwood v. Broad Creek Marina of Hilton Head, LLC, 441 S.C. 642, 669, 896 S.E.2d 328 (Ct. App. 2023). In fact, the law presumes the existence of nominal damages at the time a contract is breached. Grooms v. Med. Soc. of S.C., 298 S.C. 399, 402, 380 S.E.2d 855, 857 (Ct. App. 1989). "Requiring a party to 'prove' the amount of nominal damages is a legal oxymoron." J & W Corp. of Greenwood, 441 S.C. at 670 (*citing* 22 Am. Jur. 2d *Damages* § 8 (May 2023 update)). Nominal damages are minimal awards if actual damages are not sustained and/or not proven. Id.

Here, it is undisputed that the Disclosures and the Contract create binding agreements between Sellers and Buyer. (R. pp. 1053-1066.) Each of those agreements makes clear that Buyer had the "obligation" and "responsibility" (or "duty") to properly inspect the Property. (*Id*.) The Contract itself specifically states that Buyer had the duty to inspect the plumbing, water supply and wastewater systems. (R. p. 1055.) Furthermore, Buyer obtained the CL-100 and the Housemaster Inspection Report which both made clear that Buyer required additional inspections of the Property. (R. pp. 1067-1069, 1072, 1073, 1075, 1078, 1082, 1084, 1088, 1092, 1093, 1095,

1099, 1100-1102. Pl. Trial Ex. 6.) Buyer failed to do so and, as such, "close shut her eyes" resulting in a breach of the Contract. *See* Watts, 272 S.C. at 519-20.

As a result of Buyer's breach of the Contract, Sellers were immediately entitled to nominal damages. Id. The jury heard evidence of damages caused to Sellers by the breach, but ultimately, chose to award nominal damages. (R. p. 820, line 23 – p. 821, line 21; *see also* R. p. 3.) Pursuant to the Contract, nominal damages were a "proper remedy at law" available to Sellers and, counsel for Buyer acknowledged that at trial. (R. p. 1045, lines 12-13.) In fact, as the trial court properly conveyed to the jury, a finding of nominal damages was required upon their finding of a breach of contract. (*See* Initial Br of Respondent/Appellant as Appellant at p. 19 (*citing* R. p. 1046, lines 8-19).)

Sellers successfully proved that the Buyer breached the Contract and as a result, based on the evidence presented, the jury awarded nominal damages. Neither the finding of breach nor the award of nominal damages was in error as the verdict was reasonably supported by evidence.

II. BECAUSE BUYER BREACHED THE CONTRACT, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN AWARDING SELLERS THEIR ATTORNEY FEES AND COSTS.

As a general rule, attorney's fees are not recoverable unless authorized by contract or statute. See e.g. Hegler v. Gulf Ins. Co., 270 S.C. 548, 549, 243 S.E.2d 443, 444 (1978). If the award of attorney's fees is based upon a contract between the parties, the determination of reasonableness of those fees is left to the discretion of the trial court and will not be disturbed absent an abuse of discretion. See S.C. Elec. & Gas Co. v. Hartough, 375 S.C. 541, 550, 654 S.E.2d 87, 91 (Ct. App. 2007).

When determining the reasonableness of attorney's fees, the court should consider the following six factors: (1) the nature, extent, and difficulty of the case; (2) the time necessarily

devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services. Baron Data Systems, Inc. v Loter, 297 S.C. 382, 377 S.E.2d 296 (1989). The disparity in the amount of the damages award and the attorney fees award, by itself, does not invalidate the latter. *See* Rice v. Multimedia, Inc., 318 S.C. 95, 101, 456 S.E.2d 381, 385 (1995).

Buyer argues it was error for Sellers to be awarded attorneys fees and costs because the jury never properly found that Buyer breached the agreement. (See Br of Respondent/Appellant as Appellant at p. 19.) Buyer argues: a) that the issue of Buyer's breach was never properly submitted to the jury; b) the jury was never charged as to the counterclaim for breach of contract and c) the verdict form was improper. Buyer even quotes the trial court's curative instruction as error, to which no object was raised; but rather, to which counsel for Buyer consented. (*See* Respondent/Appellant's Initial Brief as Appellant at p. 19; R. p. 1045, lines 12-13.)

None of these issues were raised during trial or in Buyer's Motion for Directed Verdict (R. p. 914, line 8 – 934, line 7); nor in her post-trial motions (*See generally* R. pp. 127-130). Therefore, any issue concerning the charge to the jury (or lack thereof), the form/substance of the verdict form are not properly appealable. As Buyer argued in her Response Brief as Respondent:

> Our Courts "have adhered to the rule that where an issue has not been ruled upon by the trial judge nor raised in a post-trial motion, such issue may not be considered on appeal." *Pelican Building Centers of Horry-Georgetown, Inc. v. Button*, 311 S.C. 56, 60, 427 S.E.2d 673, 675 (1993); *see Marsh v. South Carolina Dept. of Highways and Public Transp*., 298 S.C. 420, 380 S.E.2d 867 (Ct. App 1989)

In the event such arguments are considered by this Court, they are wholly inaccurate. First, the counterclaim was properly submitted and charged to the jury as it was: argued to the jury by Buyer; argued to the jury by Sellers; and charged to the jury by the trial court. (R. p. 979, lines 11-20, R. p. 1006, lines 21-23; R. p. 1001, lines 20-22; R. p. 1024, lines 9-15). Second, as to the verdict form, the transcript reflects that the trial court and all concerned parties discussed and agreed-upon

the verdict form at trial with no objection; in fact, counsel for Buyer indicated "I'm okay with the verdict form." (R. p. 945, line 20.) Buyer seems to argue or suggest that the verdict form should have been a detailed questionnaire when it came to Sellers' counterclaim yet on her seven claims, the verdict form was acceptable though in the very same format.[1]

Because the jury found that Buyer breached the Contract, an issue properly before the jury, it was mandatory for the trial court to award Sellers their reasonable attorney fees and ALL costs. (*See* R. p. 1058.) In applying the factors outlined in Loter, the trial court did not abuse its discretion in awarding Sellers their attorney fees and costs pursuant to the Contract.[2]

Lastly, while the jury's award to Defendants was less than the fees charged, South Carolina law is clear that, when a contract calls for the payment of fees, disparity between those fees and the amount of the award is not a factor for the Court to consider. *See* Rice v. Multimedia, Inc., 318 S.C. at 101. Considering the totality of the circumstances, the award was proper and was not an abuse of the trial court's discretion.

III. THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING THE NON-PREVAILING PARTY FEES UNDER THE ACT OR, IN THE ALTERNATIVE, THE TRIAL COURT'S AWARD OF FEES WAS REASONABLE.

"The court *may* award *reasonable* attorney fees to the *prevailing party*." S.C. Code Ann. 27-50-65. The trial court abused its discretion by awarding attorney fees to a non-prevailing party.

In Heath v County of Aiken, the Supreme Court of South Carolina held that the "prevailing party" does not have to be successful on all issues; but rather, the court should look to the totality

[1] In a footnote, Buyer goes so far as to say that the jury was even required to pinpoint what part of the house Buyer failed to adequately inspect. (Brief of Respondent/Appellant as Appellant p 21 fn3.)

[2] Noteworthy is Buyer's reliance on the word "may" in the Contract provision outlining Sellers remedies to suggest the awarding of fees is by a court is discretionary. That "may" signals discretion to the Sellers in choosing their remedy(ies); not court discretion (which only comes into play in determining "reasonableness" of the fees. The Act, on the other hand, uses "may" to signal discretion to the court in even awarding fees; a different scenario than argued by Buyer out of context. (See R. p. 1058.)

of the final decision for who "successfully prosecutes the action or successfully defends against it" to determine the prevailing party. *See* Heath v. County of Aiken, 302 S.C. 178, 182, 394 S.E.2d 709 (1990))

Here, the Buyer received a favorable verdict on one out of the eight causes of action considered by the jury. (*See* R. pp. 1-3.) The Sellers received a favorable verdict in seven out of eight causes of action (including an award of damages under their counterclaim). (*Id*.) Receiving a favorable verdict on seven out of eight causes of action seems like the "successful defense" discussed in Heath. As such, it was an abuse of the trial court's discretion to award Buyer attorney fees on the basis of being a "prevailing party."

If this court finds that the trial court properly awarded fees, we must turn to whether the fees awarded were reasonable. The Buyer's legal team charged her $183,347.40 in fees (excluding a $62,077.60 "discount"); almost quadruple the amount of fees charged to the Sellers; very same case, very same evidence. (*See* Initial Brief of Respondent/Appellant at 3; *see also* R. pp. 135-313.) The trial court's decision to award Buyer the same fees as the Sellers recognizes the "reasonableness" of the fee amount charged to Sellers. The Act allows for possible recovery of reasonable fees, it does not, however, allow for the recovery of all fees; certainly not exorbitant, duplicative fees such as two partners within the same firm handling depositions, mediations and trial. (S*ee* R. pp. 135-313 (trial only: pp. 285-302.) Perhaps a more reasonable approach for the trial court would have been to award fees based on success rate: one-eighth of the total fees charged to the Buyer ($22,918.42).

CONCLUSION

Buyer argues she has no "duty" to inspect the property, without citation to one statute or case to support this legal conclusion. In fact, the duty does exist. Watts reminds us that buyers of

real estate are not stripped of their *responsibility, obligation, and duty* to inspect the property "as closely as they should have to protect their own, personal interests." Here, Buyer did not. She chose to ignore the Contract's warning and the advice given in her initial inspections. She chose to "close shut her eyes" to issues about which she later complains and as a result, she breached the Contract. It was not error for the jury and trial court to find the existence of a breach and to award damages based on the evidence presented at trial.

Likewise, because the jury and court found that Buyer breached the contract, the trial court was required to award reasonable attorney fees and all costs to Sellers. In so doing, the trial court was within its discretionary authority and did not abuse same.

On the other hand, the trial court was not required to award attorney fees to Buyer; but rather, had the discretion to do so. The trial court abused that discretion because the Act requires that, to be awarded fees, a party must have "prevailed", and Buyer did not prevail under Heath. Because Buyer was not the prevailing party, she should not have been awarded fees.

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