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Jul 17 2024

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Walton J. McLeod, Circuit Judge

Appellate Case 2021-000033
Case No. 2018-CP-32-04329

John Deere Construction & Forestry Company, Respondent,

v.

North Edisto Logging, Inc. and Paul Gunter, Appellants.

PETITION FOR REHEARING

July 17, 2024

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The Court misapprehended the authority of *Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469, 487, 514 S.E.2d 126, 135 (1999) and *Parks v. Lyons*, 219 S.C. 40, 48, 64 S.E.2d 123, 126 (1951) on the existence of a default absolving a party from any duty of good faith and fair dealing, both before and after default.....1

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STATUTES

None

OTHER AUTHORITIES

None

INTRODUCTION

This Court issued its decision in this appeal which was filed July 3, 2024. Appellant was not notified of this decision, via email, on July 3, 2024.

ARGUMENT FOR REHEARING

The Court misapprehended the authority of *Swinton Creek Nursery v. Edisto Farm Credit*, ACA, 334 S.C. 469, 487, 514 S.E.2d 126, 135 (1999) and *Parks v. Lyons*, 219 S.C. 40, 48, 64 S.E.2d 123, 126 (1951) on the existence of a default absolving a party from any duty of good faith and fair dealing, both before and after default .

The Court affirmed the trial court's grant of summary judgment on the counterclaim for breach of the implied duty of good faith and fair dealing, but not on the sole basis stated in the trial court's order, which was that a breach of the implied duty of good faith and fair dealing is only actionable if there is also a breach of an express term of the contract.

Rather, this Court affirmed based on *Swinton Creek*, which noted the existence of a default in May of 1991 was uncontested. (See *Swinton Creek* 334 S.C. at 487). Nothing in *Swinton Creek* or in *Parks* suggests that a default relieves a part of the burden of acting fairly and in good faith retroactively to a period before the default occurred.

In this case, the existence of a late payment does not constitute a default without John Deere electing to declare a default. See Contracts in the record, e.g. R. at page 17 ¶ 10(b). The decision of whether and when to declare a default is John Deere's. Paragraph 9 of the contract provides "We may determine you to be in default..." (R. p. 17).

The Record also contains John Deere's declaration of a default as of December 10, 2018, which is quoted in this Court's July 3 Decision. Therefore the authority of *Swinton Creek* and *Parks* does not immunize John Deere from good faith and fair dealing scrutiny for any of its conduct before December 10, 2018.

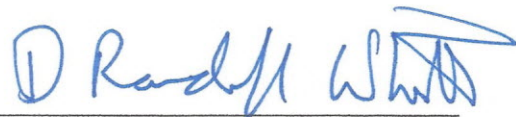
Examples of conduct that occurred long before this cutoff include the loan origination issues from 2015 and the issues related to the October 8, 2015 letter quoted in this Court's decision and the subsequent actions and inactions related to a modification of the loans.

CONCLUSION

The authority of *Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469, 487, 514 S.E.2d 126, 135 (1999) and *Parks v. Lyons*, 219 S.C. 40, 48, 64 S.E.2d 123, 126 (1951) do not provide a basis for using a default to immunizing conduct that occurred before the default from scrutiny on good faith and fair dealing principles.

For the foregoing reasons, this Court should grant rehearing, and reverse the trial court's order granting summary judgment on the claim for breach of the duty of good faith and fair dealing as to any conduct that occurred before December 10, 2018.

Respectfully submitted,



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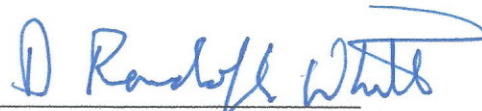
PROOF OF SERVICE

I certify that I have served the Petition for Rehearing on Respondent listed above via emailing a copy of it on July 17, 2024, addressed to their attorney of record as follows:

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July 17, 2024

Petition for Rehearing

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To: ahwooten@wardandsmith.com; paf@wardandsmith.com; mchoward@wardandsmith.com

Date: Wednesday, July 17, 2024 at 05:21 PM EDT

Amy and Paul,

Good Afternoon, attached and served upon you are the petition for rehearing and proof of service that I will be filing with the Court of Appeals shortly.

Regards,
Randy Whitt



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1MB



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236.6kB