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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM SPARTANBURG COUNTY
IN THE COURT OF COMMON PLEAS

THE HONORABLE SHANNON M. PHILLIPS, MASTER IN EQUITY

Civil Action 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.

FINAL BRIEF OF RESPONDENT

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II. DID THE MASTER-IN-EQUITY CORRECTLY FIND RESPONDENT-SELLER'S TERMINATION OF THE PARTIES' CONTRACT TO BE TIMELY?

STATEMENT OF THE CASE

Appellant-Buyer, Daniel Schall, filed this action on June 13, 2018, seeking specific performance of a real estate purchase contract and breach of contract damages based on the Respondent-Seller's termination of a real estate contract. (R. pp. 17-32). The dispute arose from a contract for the sale of real property located in Spartanburg County. Lori Sealy, as Personal Representative for her parents' estates, answered on August 2, 2018, asserting a general denial as well as equitable defenses. (R. pp. 33-35). After a dismissal per Rule 40(j), SCRCP, and the subsequent restoration of the case, the matter was then referred to the Master-in-Equity for Spartanburg County by consent. (R. pp. 4-6).

The Master tried the case from June 26 to June 27, 2023. (R. pp. 100-244). The Master issued an order on August 23, 2023, finding that Respondent-Seller had properly terminated the contract, and, as a result, Appellant was entitled to no relief other than the return of the earnest money. (R. pp. 7-13). Appellant-Buyer moved to alter or amend. (R. pp. 45-94). Respondent-Seller filed a Memorandum in Opposition. (R. pp. 95-99). The Master heard the motion on October 31, 2023. (R pp. 259-275). The Master issued a short order denying the motion to alter or amend on November 2, 2023. (R. pp. 14-16). This appeal followed.

STATEMENT OF FACTS

The real property at issue in this matter is located in Spartanburg County, South Carolina. (R. p. 17; ¶ 5). On March 23, 2018, the parties entered an Agreement/Contract: To Buy and Sell Real Estate (General Use and Lots/Acreage) (the "Contract") regarding the property. (R. pp. 22-30). Both parties were represented by real estate agents working through C. Dan Joyner Realtors with Matthew Thrift serving as the Broker-In-Charge. (R. p. 8).

On April 23, 2018, Appellant-Buyer, through his real estate agent, notified Respondent-Seller via email, through her real estate agent, that the subject property had been damaged. (R. p. 682; R. p. 135, line 8 – p. 136, line 13). In that email, the real estate agent specifically noted that "someone has been there and has removed several plants and vegetation around the property," and "it looks like someone went and just scattered trash around the floor." (*Id.*) Appellant-Buyers's real estate agent also noted in that email that "the lock on the side building looks like it has been damaged some more. I understand this is tedious but the buyers will not close until these are addressed. Please let me know what you can do." (*Id.*) The Broker-in-Charge for both agents understood the April 23, 2018 e-mail to contain notice of damages to the property. (R. p. 682; R. p. 216, lines 1 –19; R. p. 217, line 20 – p. 218. line 7).

In the couple of days following that e-mail, Appellant-Buyer communicated with the realtors, the Broker-in-Charge, and Respondent-Seller that the damage to the property included the removal of "heirloom plants" and damage to "the locks, the doors, the hinges, the door frames, etc.." (R. p. 142, lines 6 – 25). Specifically, when asked, "And that is your choice of words. Damage has been caused to the property since we went under a contract," Appellant-Buyer replied, "Yes. " (R. p. 142, lines 23 – 25). Appellant-Buyer then demanded three thousand dollars as a concesssion for the lost vegetation. (R. p. 143, lines 1 – 4).

In response to the notice of damage from Appellant-Buyer, on April 28, 2018, Respondent-Seller executed a Notice of Termination and Release of Agreement/Contract to Buy and Sell Real Estate (Residential) and delivered them, through Matthew Thrift, the Broker-In-Charge, to Appellant-Buyer and his real estate agent on that same day. (R. pp. 143, line 19 – p. 144, line 7; R. p. 295). In that email, the broker-agent stated, "Seller is invoking section 13 of contract to buy and sell pursuant to buyer's email to seller on Monday April 23rd where buyer notified seller of casualties to the property via email." (R. p. 295; R.p. 116, lines 7 – 11).

Section 13 of the Contract, provides, in pertinent part:

> **13. 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. If Party does not Deliver Notice of Termination, the Parties proceed according to the Contract and Seller is to be responsible to (1) repair all damage, (2) remit to Buyer an amount for repairs, or (3) assign to Buyer the right to all proceeds of insurance and remit any deductible amount applicable to such casualty. If Buyer or Inspections caused the damage, Buyer is responsible for indemnifying Seller for damages. Brokers and Parties should ensure that they are protected by appropriate risk management strategies such as insurance.

(R. p. 276).

The term "other casualty" is not defined in the contract. However, the Broker-in-Charge explained that Respondent-Seller was advised that based on the allegations of damages occuring to the property after it went under contact, she had the right to terminate the contact under Section 13 and he did so on her behalf timely. (R. p. 218, line 23 – p. 219, line 21; R.p. 295)

ARGUMENT

STANDARD OF REVIEW

An action for specific performance of a real estate contract sounds in equity. *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 105, 531 S.E.2d 287, 290 (2000). "In an appeal from an action in equity tried by a judge, appellate courts may find facts in accordance with their own views of the preponderance of the evidence." *Wachovia Bank, Nat. Ass'n. v. Blackburn*, 407 S.C. 321, 328, 755 S.E.2d 437, 441 (2014) (*citing Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976)). "However, this [c]ourt is not required to disregard the findings of the trial judge who saw and heard the witnesses and was in a better position to judge their credibility." *Ingram*, 340 S.C. at 105, 531 S.E.2d at 291.

I. THE MASTER-IN-EQUITY CORRECTLY FOUND THAT RESPONDENT-SELLER VALIDLY TERMINATED THE REAL ESTATE CONTRACT UNDER THE CASUALTY CLAUSE.

After two days of trial, the Master-in-Equity found Respondent-Seller's Notice of Termination of the contract both proper and timely. (R. p. 9). Appellant-Buyer, in a series of e-mails and texts starting on April 23, 2018, and continuing until April 25, 2018, notified Respondent-Seller of alleged casualties to the property and argued for concessions on the contract because he believed Respondent-Seller to be violation of Paragraphs 3, 4, and 17 of the contract. (R. p. 142, line 6 – p. 143, line 4; R. p. 682; R. p. 683; R. pp. 688-689; R. pp. 276-284). Specifically, Appellant-Buyer claimed there had been theft of heirloom vegetation and additional damage to a lock on a building and the like. (R. p. 142, lines 6 – 25; R. pp. 688-689). Appellant-Buyer thought the losses were significant enough to demand contract concessions noting that the lost heirloom vegetation could not be easily replaced and further stating that its removal affected

"the beauty of the property and our ability to market the property in the way we intended when we submitted an offer to purchase the property." (R. p. 143, line 6 – p. 144, line 4; R. pp 688-689).

The Master-in-Equity concluded that the theft of the heirloom vegetation and damage to the lock on the building alleged by Appellant-Buyer were "sudden and unexpected losses caused by a third-party" for which Respondent-Seller then had the right to terminate the contract. (R. p. 10). In so ruling, the Master applied Section 13 of the contract pertaining to "Fire or Casualty or Injury" which permits termination of the contract if the property "is damaged wholly or partially by fire or other casualty prior to Closing." (R. pp. 276-284).

It is a well-settled principle of contract interpretation that absent a contractual definition to the contrary, contract language is given its ordinary and plain meaning. *Bardsley v. Gov't Emps. Ins. Co.*, 405 S.C. 68, 76, 747 S.E.2d 436 (S.C. 2013) (*citing Dean v. Am. Fire & Cas. Co.*, 249 S.C. 39, 41, 152 S.E.2d 247, 248 (1967) ("When the language of an insurance contract is free from ambiguity, the words used must be taken and understood in their plain, ordinary and popular sense...."). Here, where the contract does not define the terms "casualty" or "other casualty," both Respondent-Seller and the Master quite reasonably applied the plain and ordinary meaning to the term. The Master's Order specifically references the Black's Law Dictionary definition of the term "casualty" as a "thing injured, lost, or destroyed." *Casualty*, Black's Law Dictionary (9th Ed. 2009). Black's Law Dictionary defines the term "loss" as "[a]n undesirable outcome of a risk; the disappearance or diminution of value, [usually] in an unexpected or relatively unpredictable way." *Loss,* Black's Law Dictionary (9th Ed. 2009). Meriam-Webster Dictionary's definition of "casualty" includes "a person or thing injured, lost, or destroyed. *Casualty*, *Merriam-Webster.com.* Retrieved July 7, 2023, from www.merriam-webster.com/dictionary/casualty. A synonym for "injury" is damage. *Injury. Meriam-Webster.com*. Retrieved July 7, 2023, from

www.merriamwebster.com/thesaurus/injury. All those terms imply harm or damage to property that causes diminution of value in some way. This is a commonsensical understanding and interpretation of the word which both the Master-in-Equity and Respondent-Seller employed in determining the termination of the contract was justified under the terms of the contract.

This result is also justified by how South Carolina has generally defined "casualty" in its statutes, regulations, and in insurance contract interpretation. The term generally refers to an unforeseen event that results in damage or loss. For example, our insurance regulations define "Casualty Insurance" as "[t]hose forms of indemnity providing for payment for loss or damage, resulting from accidental or some unanticipated contingency, except fire and the elements." S.C. Code Regs. § 69-3. This definition suggests that "casualty" refers to an unforeseen event that results in damage or loss. In *Smith v. Ramsey,* 244 S.C. 168, 171-72, 135 S.E.2d 849 (S.C. 1964), our Court construed the word "loss" as "a comprehensive term and means any injury, destruction or damage resulting from the occurrence of the contingency insured against." Again, this definition is consistent with the suggestion that "casualty" is synonymous with a loss and refers to an unforeseen event that results in damage.

South Carolina Code § 36-2-613 and § 36-2-324, mention the term "casualty" in the context of goods that are lost or deteriorated, again suggesting that "casualty" refers to an unforeseen event that damages or destroys property. So, while there does not appear to be a single, universally applicable definition of "casualty" in South Carolina law, the authorities suggest that the term refers to an unforeseen event that results in damage or loss, and the Master's understanding and application of the term is entirely consistent with existing law.

This result is further supported by how other jurisdictions have defined "casualty" and "casualty loss" often equating those terms with "loss" and sudden damage. A 2014 decision from

the U.S. District Court for the Western District of Virginia addressed whether a loss caused by theft that damaged HVAC units constituted a casualty loss for purposes of the lease. *Acken v. Kroger Co.*, 58 F.Supp.3d 620 (2014). That court found that "for purposes of insurance coverage, 'casualty' is broadly defined," and "the theft of the HVAC piping constituted a casualty loss as a matter of law." *Id.* at 628.

In Connecticut, their Supreme Court used Webster's Dictionary to interpret "casualty" to mean "an unfortunate occurrence synonymous with mischance." *Buell Industries, Inc. v. Greater New York Mutual Ins. Co.*, 259 Conn. 527, 542 (Conn. 2002) (*citing Verdon v. Transamerica Ins. Co.*, 187 Conn. 363, 368, 446 A.2d 3 (1982)).

In North Carolina, "accident" and "casualty" are synonymous and are defined as "an unforeseen event, occurring without the will or design of the person whose mere act causes it; an unexpected, unusual, or undesigned occurrence; the effect of an unknown cause, or, the cause being known, an unprecedented consequence of it; a casualty." *Tayloe v. Indemnity Co.*, 257 N.C. 626, 627 (N.C. 1962) (*citing* Black's Law Dictionary, Third Edition.) *See also Wm. C. Vick Const. Co. v. Pennsylvania Nat. Mut.*, 52 F. Supp. 2d 569, 578 (E.D.N.C. 1999) (*citing Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 691, 340 S.E.2d 374, 377, (1986)).

Similarly, in Missouri, accidents and casualties are also synonymous and include "a mishap resulting in injury to a person or damage to a thing; a casualty." *American States Ins. Co. v. Mathis*, 974 S.W.2d 647, 650 (Mo. Ct. App. 1998) (*citing West v. Jacobs*, 790 S.W.2d 475, 477 (Mo. App. 1990); *Murphy v. Western and Southern Life Ins. Co.*, 262 S.W.2d 340, 342 (Mo. App. 1953)); *Flindemann v. Gen. Am. Life Ins. Co.*, 485 S.W.2d 477, 479 (Mo. App. 1972)).

Mississippi defines casualty as "a loss due to some sudden, unexpected, or unusual event. Casualty losses include losses caused by fire, storm, shipwreck, hurricane, flood, quarry blast, vandalism, sonic boom, earthquake or earth slide." 35 Miss. Code R. § 3-06-01-100. All the above examples from South Carolina and other jurisdictions support the Master's construction of the term "casualty" to mean damage or loss to the property.

Here, the Master's decision is amply supported by the record. Appellant-Buyer's real estate agent's email dated April 23, 2018, identified casualties to the property. (R. p. 682). Appellant-Buyer's subsequent text messages to Respondent-Seller and her agent, further detailed the alleged casualties to the property and he specifically sought contract concessions for the lost vegetation and demanded repairs to the damaged lock and removal of trash discovered on the property after entering the contract. (R. p. 142, line 6 –p. 143, line 4).

Applying the common understanding of the word "casualty," the items complained of by Appellant-Buyer amounted to "casualties" for which Respondent-Seller had the right to terminate the contract.

Again, Section 13 of the contract states, "[i]n case the Property is damaged wholly of 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 the other Party." To avoid arguments about the size or the extent of the casualty, the contract simply allows either party to properly terminate when the property is damaged, whether "wholly or partially," before closing. This provision is important because, in the occurrence of a casualty to the property, the seller may not be able to afford to remedy the loss and may prefer simply to terminate the contract, just as the Respondent-Seller did in this case.

Appellant-Buyer's *ex post facto* arguments that the April 23, 2018, e-mail and the subsequent text messages exchanged were not "intended" to provide notice of damage are spurious and self-serving at best. While Appellant-Buyer claimed at trial that his communications to Respondent-Seller regarding the damage to the property were intended merely to create a "reasonable record of the property," (R. p. 114, line 14 – p. 115, line 1), in reality, he was claiming actual damages and demanding contract concessions as a result. (R. p. 142, line 6 –p. 143, line 4; R. p. 682; R. p. 683). In that email, the real estate agent specifically noted that "someone has been there and has removed several plants and vegetation around the property," and "it looks like someone went and just scattered trash around the floor." (R. p. 682; R. p. 135, line 8 – p. 136, line 13). Appellant-Buyers's real estate agent also noted in that email that "the lock on the side building looks like it has been damaged some more. I understand this is tedious but the buyers will not close until thse are addressed. Please let me know what you can do." (*Id.*) The Broker-in-Charge for both agents understood the April 23, 2018 e-mail to contain notice of damages to the property. (R. p. 682; R. p. 216, R. p. 217, line 19 – p. 218, line 7).

That Appellant-Buyer belatedly concluded there had been no actual theft of heirloom vegetation but rather a completion on a natural blooming cycle (R. p. 170, line 22 – p. 171, line 6), is immaterial. That Appellant-Buyer later concluded the broken lock and door damages were personal property issues that would have conveyed without redress is also immaterial. That Respondent-Seller herself would have not considered naturally dying wildflowers or broken locks and hinges "casualties" is likewise immaterial. At the time of the termination of the contract, Appellant-Buyer himself was asserting damage, i.e. casualty, to the property occurring since the formation of the contract and he himself was demanding concessions for it. (R. p. 142, lines 14 – p. 143, lines 4; R. p. 145, lines 5 – 16; R. p. 682; R. pp. 688-689).

Respondent-Seller became aware of those assertions and demands, and those, in and of themselves, were sufficient for her to terminate the contract under Paragraph 13. (R. p. 202, line 19 – p. 203, line 23; R. p. 218, line 23 – p. 221, line 21; R. pp. 295-298). The Master properly concluded Appellant-Buyer believed the losses to be of significant monetary value to such an extent that he specifically sought contract concessions for the alleged lost vegetation and demanded repairs to the damaged lock following the formation of the contract. (R. pp. 9-10; R. pp. 688-689). Therefore, the Master properly ruled the Notice of Termination justified per the terms of the contract and should be affirmed by this Court.

II. THE MASTER-IN-EQUITY CORRECTLY FOUND RESPONDENT-SELLER'S TERMINATION OF THE PARTIES' CONTRACT TIMELY.

Having properly found that that Respondent-Seller was entitled to terminate the contract, the Master-in-Equity also correctly found that the Notice of Termination was timely. Appellant-Buyer's communications regarding the damage/casualties to the property began on April 23, 2018, (R. p. 682), and were amplified via text messages among the agents and parties on April 24 & 25, 2018. (R. p. 142, line 6 – 25; R. p. 202, line 19 – p. 203, line 23). Respondent-Seller did so on April 28, 2018, well within the five (5) day termination period required by the contract. (R. p. 295 -298; R. p. 143, line 19 – p. 144, line 7). That Notice of Termination specifically referenced it as a response to the April 23, 2018, e-mail. (*Id.*)

Appellant-Buyer's attempts to conflate his complaints about debris on the property and debris removal negotiations (which began on April 6, 2018) are also spurious and designed to mislead the Court. The contract was terminated based on Appellant-Buyer's allegations of damage to the property occurring postdate of contract with those allegations first being made via e-mail on

April 23, 2018. (R. p. 682). The disputes over debris removal were not ultimately the cause for the termination of the contract nor were they the basis for the Master's decision.

Appellant-Buyer's belated objections to the introduction and consideration of the subsequent text message threads that may have contained comments from his wife are not properly before this Court. Appellant-Buyer did not raise any such objections or issues at trial, and he only belatedly objected to them in his Rule 59(e) motion. Issues not raised prior to judgment or during a trial cannot properly be presented for the first time in a Rule 59(e) motion. *Patterson v. Reid*, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995) ("A party cannot for the first time raise an issue by way of a Rule 59(e) motion which could have been raised at trial."). The Master properly refused to alter or amend her Order based on the belated evidentiary objections and arguments under Rule 59(e) and, likewise, those issues are not preserved for this Court's review. "Accordingly, we find this issue is not preserved for appellate review." *Miller Constr. Co. v. PC Constr. of Greenwood, Inc.*, 418 S.C. 186, 206, 791 S.E.2d 321 (Ct. App. 2016) (citing *Patterson, supra*).

Similarly, Appellant-Buyer's belated objection to notices under the contract being conveyed via text message raised at footnote 5 of Appellant's Brief is also not preserved for appellate review. No such objections or arguments were raised at trial or even in Appellant-Buyer's Rule 59(e) motion. Therefore, this Court cannot consider an issue raised for the first time on appeal. *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) ("It is 'axiomatic that an issue cannot be raised for the first time on appeal.'" (*quoting Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)). The Court should note that, in any event, the Master's Orders never relied on Notice being provided via text message but rather relied on the email sent April 23, 2018, (R. p. 682) providing notice of damage to the property and the email dated April

28, 2018, sending the Notice of Termination. (R. pp. 295- 298). Such electronic communications are specifically authorized by the contract at paragraph 34. (R. p. 276) ("electronic writing and will be effective as of delivery to the Notice address/email/fax written below). The Notice was clearly within the five (5) day window and thus, the Master correctly found it to be timely. This Court should affirm in all respects.

CONCLUSION

Because the Master-In-Equity correctly found the real estate contract properly and timely terminated, Appellant-Buyer was not entitled to specific performance or any other contract remedies. This Court should affirm the Master's decisions in all respects.

Respectfully submitted,

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APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Shannon M. Phillips
Circuit Court Judge

C.A. 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

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PROOF OF SERVICE

I certify that I have served the *Final Brief of Respondent* on all attorneys of record by electronic mail on August 26, 2024, addressed to:

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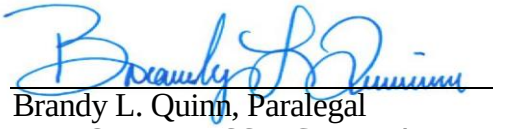

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August 26, 2024

VIA EMAIL AND U.S. MAIL
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RE: *Daniel Schall v. Lori Sealy, as Personal Representative for the Estate of Claude L. Mullwee a/k/a Claude Lee Mulwee, and the Estate of Deloris Robinson Mulwee*
C.A. No.: 2018-CP-42-02034
Appellate Case No.: 2023-001861

Dear Ms. Kitchings:

We represent the respondent in the above-referenced matter. Enclosed for filing, please find *Final Brief of the Respondent* in electronic form, together with our Proof of Service for the same. Pursuant to your correspondence dated July 12, 2024, a bound copy of the *Final Brief of Respondent* has been mailed to your attention via U.S. Postal Service Priority Mail Tracking Number 9405511206205826686248.

Please do not hesitate to contact me should you have any questions or concerns regarding the enclosed documents. Thank you in advance for your attention to this matter.

Sincerely,

Ryan F. McCarty

RFM/blq
Enclosures

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