STATE OF SOUTH CAROLINA COUNTY OF HORRY	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT CIVIL ACTION NO: 2009-CP-26-1909
Randy A. Beverly, LLC and Donald Godwin, LLC, Plaintiffs, vs. Bucksville Farms, Inc., Defendant & Third Party Plaintiff vs. Randy A. Beverly and Donald Godwin, Third Party Defendants & Fourth Party Plaintiffs, vs. Benjamin J. Creel, individually and as surviving director of Bucksville Farms, Inc., Fourth Party Defendant.	**FINAL JUDGMENT PURSUANT TO RULE 53(e), *SCRCP***

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SC Court of Appeals

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This matter came before the Court on January 12-13, 2012 for a properly noticed and scheduled hearing by the parties' consent to an Order of Reference recorded June 22, 2010 and pursuant to Rule 53 of the *South Carolina Rules of Civil Procedure*, for a for a full and final hearing with any appeal to the SC Supreme Court or the SC Court of Appeals as provided by the *SC Rules of Appellate Procedure*. Present at trial were Randy A. Beverly and Donald Godwin, as principals of the Plaintiffs and individually as Third Party Defendants & Fourth Party

Plaintiffs, together with their attorney, J. Dwight Hudson. [Hereinafter referenced as Beverly and/or Godwin or as Plaintiffs] Also present at trial was Benjamin J. Creel, individually and as surviving director or principal of Bucksville Farms, Inc. [Hereinafter referenced as Creel or Defendant] Based upon the record in this cause, the testimony of a number of witnesses, the evidence properly introduced at Trial, and the proposed Orders subsequently submitted by the parties, as well as the law of South Carolina, I find that Judgment should be entered as hereinafter provided.

Factual Findings

This action arises from a real estate sales agreement dated October 2, 2005 between the parties whereby the Plaintiffs agreed to buy and the Defendant agreed to sell an approximately 317.5 acre tract of land in Horry County, parts of which contained fairly substantial wetlands. The agreement contemplated a series of four (4) closings or takedowns to take place approximately a year apart. (Defendant's Exhibit 33) Of the anticipated takedowns, two (2) occurred. The problems culminating in the filing of this action occurred after the second takedown and meant that the third and fourth takedowns never occurred and this action was filed. During the pendency of this action, the Defendant sold the disputed part of the property to a third party.

As noted above, the contract between the parties was dated and signed on October 2, 2005 and is entitled "**Agreement To Buy And Sell Real Estate In Multiple Closings.**" In addition to other provisions which I do not find directly relevant to the determination of this matter, the Contract between the parties, which was drafted by the Defendant's (Seller's) Attorney, contains the following provision as to default and remedy:

> 20. <u>Default and Remedy</u>: If Purchaser has breached its covenants and agreements hereunder and has failed, refused or is unable to consummate the purchase and sale contemplated herein by the Closing Date, Seller shall be entitled to either: ***(i) retain the Earnest Money paid by Purchaser as and for Seller's liquidated damages for Purchaser's default or (ii) seek specific performance of this Agreement against the Purchaser.*** Notwithstanding the aforesaid, nothing herein shall be deemed to limit Seller's remedies for indemnification under Section 11. If Seller has breached its covenants and agreement under this Agreement and has failed, refused or is unable to consummate the purchase and sale contemplated herein by any Closing Date, Purchaser shall be entitled to: (i) terminate this Agreement and receive a full refund of the Earnest Money, or (ii) seek specific performance of this Agreement against the Seller, or (iii) in the event of a willful or intentional breach by the Seller, Purchaser may pursue any other remedy at law or in equity.

All of the parties had known each other for a number of years and Creel is Beverly's nephew, the son of Beverly's late sister. Creel is also a licensed attorney who is not currently engaged in active practice. In the way of people who know each other well, for quite some time matters were arranged and conducted with more regard to their personal circumstances than the terms of the agreement. The Court finds that neither the seller nor the buyer abided by the strict terms of the contract for quite some time.

However, prior to the third takedown the personal and financial circumstances of the parties had changed. The Plaintiffs, (the buyers) needed bank financing for the third take down and the bank required a wetlands delineation. For that reason, Beverly & Godwin were insisting on compliance by Creel with a contractual provision requiring Creel to provide a boundary survey including a wetlands delineation for the third piece before it could be taken down. Creel took the position that the buyers had arranged for the delineation of the first two tracts and that either (a) an estimate of wetlands done for Beverly and Creel by the same surveyor who delineated the first two pieces should suffice or (b) an error by the surveyor that resulted in an

Army Corps certification of wetlands on the remaining land which the surveyor testified had not been actually surveyed, tested and delineated should suffice.

The instant action was filed by Randy A. Beverly, L.L.C. and Donald Godwin, L.L.C. against Bucksville Farms, Inc. on February 26, 2009 as a Declaratory Judgment action, seeking, *inter alia*, a determination that the contract had terminated and that no party was in any way bound by its terms or provisions, and the contract was completely ended.

As noted above, it is undisputed that during the pendency of this action, the seller, Creel and/or Bucksville Farms, sold the remainder of the property covered by the disputed contract to a third party for consideration stated on the deed which is of record with Horry County and which was introduced and admitted into evidence in this action.

Conclusions of Law

Three facts make it unnecessary to rule upon most of the complicated facts and issues regarding wetlands, surveys, and other matters regarding this case. Those facts are: (1) the parties' signed a contract that contains a provision about default and remedy and that contract was introduced and admitted into evidence; (2) the parties' contract was drafted by the Defendant – Creel's – attorney; and (3) After the plaintiffs – Beverly and Godwin – filed this DJ action and while this case was pending, Creel sold the disputed remainder of the land for value to a third party and that deed is of record and was admitted in this case.

In addition to the testimony, the parties submitted extensive materials, memorandums and proposed orders. All submitted material was reviewed and considered, along with the exhibits properly introduced at trial. At trial all exhibits and testimony were taken subject to a later ruling as to objections. The Court now denies the admission of exhibits and testimony not properly introduced.

South Carolina law regarding issues of contracts and/or land sales contracts is clear, and application of the law to the facts of this case leads to a decision that the contract is terminated and no damages shall be awarded.

In this state, the foremost rule of contract interpretation is ascertaining and giving legal effect to the parties' intentions as determined by the language of the contract. McGill v. Moore, 381 SC 179, 672 SE2d 571 (2009) If the contract language is clear and unambiguous, that language determines the force and effect of the contract. Alexander's Land Company, L.L.C. v. M&M&K Corporation, 390 SC 582, 703 SE2d 207 (2010) Construction of a clear and unambiguous contract presents a question of law for the Court. US Bank Trust National Association v. Bell, 385 SC 364, 684 SE2d 199 (Ct. App. 2009) Any ambiguity in an agreement must be resolved against the drafter. WDI Meredity & Co. v. American Telesis, Inc., 359 SC 474, 597 SE2d 885 (2004)

The parties' **Agreement To Buy And Sell Real Estate In Multiple Closings!'** contains the following provision as to default and remedy:

> 20. Default and Remedy: If Purchaser has breached its covenants and agreements hereunder and has failed, refused or is unable to consummate the purchase and sale contemplated herein by the Closing Date, Seller shall be entitled to either: (i) retain the Earnest Money paid by Purchaser as and for Seller's liquidated damages for Purchaser's default or (ii) seek specific performance of this Agreement against the Purchaser. Notwithstanding the aforesaid, nothing herein shall be deemed to limit Seller's remedies for indemnification under Section 11. If Seller has breached its covenants and agreement under this Agreement and has failed, refused or is unable to consummate the purchase and sale contemplated herein by any Closing Date, Purchaser shall be entitled to: (i) terminate this Agreement and receive a full refund of the Earnest Money, or (ii) seek specific performance of this Agreement against the Seller, or (iii) in the event of a willful or intentional breach by the Seller, Purchaser may pursue any other remedy at law or in equity.

Under the terms of the cited provision, which was drafted by the seller, (Creel's) attorney, in the event of a default or breach both parties are entitled to two (2) potential remedies – Specific Performance or retention of the Earnest Money. Only the purchasers (plaintiffs Beverly & Godwin) are entitled to seek damages outside of the Earnest Money, and such damages are to be awarded only if the seller (Creel) breached the agreement willfully or intentionally, which I do not find. Under these facts, I find that both parties were under certain constraints imposed by a dwindling economy and a very difficult real estate market, and the Court Finds that the parties' actions compelled by those factors were not "willful" or "intentional" within the meaning of the default and remedy provision of the agreement.

It appears that the contract contemplated that the Earnest Money ($50,0000) would serve as the fund for liquidated damages available to either party in the event of default, breach, or the other party had failed, refused or was unable to consummate the purchase and sale by the closing date. However, it appears that the Earnest Money was actually transferred to Creel as part of the prior closings and that this was done and the prior closings completed, without objection or protest as to the application of the said Earnest Money funds which should have been held until the last closing, at the conclusion of the agreement. For this reason, it is unnecessary that this Court look to the award of the Earnest Money as damages to either party, since all parties accepted the money previously being credited or transferred to Creel.

ORDER OF THE COURT

BASED ON THE RECORD IN THIS CAUSE, UPON THE LAW OF THE STATE OF SOUTH CAROLINA AND UPON THE FOREGOING, IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1) Because Bucksville Farms, Inc. and/or Creel on behalf of Bucksville Farms elected to sell the remainder of the real property subject to the present Agreement

after litigation had been filed and while this matter was pending, the remedy of Specific Performance is no longer available to either party;

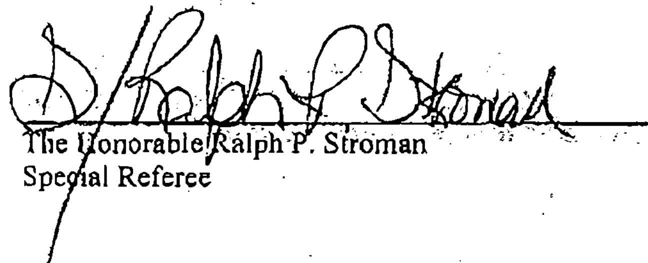
2) Despite the provisions of the **Agreement** as to Earnest Money being held to serve as a fund for liquidated damages available to either party in the event of breach, the parties hereto chose to have the Earnest Money transferred to the seller, Bucksville/Creel, during one of the first two closings. Therefore, the Earnest Money is unavailable as damages to any of the parties and that unavailability was by the joint consent and agreement of the parties hereto;

3) Paragraph 20 of the **Agreement To Buy And Sell Real Estate In Multiple Closings** gives only the purchasers, Beverly and Godwin, the right to pursue damages in addition to the Earnest Money. (The Court notes that this agreement was drafted by the attorney for the seller.) However, the purchasers only have the right to seek any other remedy at law or in equity if there was a willful or intentional breach by the Seller and this Court does not find any such willful or intentional breach.

4) Based upon the foregoing, the Court declares that pursuant to South Carolina law and Paragraph 20 of the parties **Agreement To Buy And Sell Real Estate In Multiple Closings**, that the said **Agreement To Buy And Sell Real Estate In Multiple Closings**, entered into by the parties hereto on October 2, 2005 is fully and completely ended and terminated and no party has any further rights, responsibilities, duties, liabilities, benefits, expectations or claims of any type relative to the same, and the said **Agreement** is **declared to be concluded**; and

5) No party is awarded damages and all parties are to pay their own attorney's fees and costs.

AND IT IS SO ORDERED.



The Honorable Ralph P. Stroman
Special Referee

Dated:

05/14/12

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STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

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FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO: 2009-CP-26-1909

Randy A. Beverly, LLC and Donald Godwin, LLC,

Plaintiffs,

vs.

Bucksville Farms, Inc.,

Defendant & Third Party Plaintiff

vs.

Randy A. Beverly and Donald Godwin,

Third Party Defendants & Fourth Party Plaintiffs,

vs.

Benjamin J. Creel, individually and as surviving director of Bucksville Farms, Inc.,

Fourth Party Defendant.

ORDER

HORRY COUNTY
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MELANIE HUGGINS-WARD
CLERK OF COURT

Defendant/Third Party Plaintiff & Fourth Party Plaintiff(s), Bucksville Farms, Inc. and/or Benjamin J. Creel, individually and as surviving director of Bucksville Farms, Inc, filed and served a **Motion For Reconsideration** dated May 23, 2010. This motion came on for a hearing before me on July 25, 2012. At the conclusion of the hearing on that date this motion was taken under advisement.

After a careful, thorough, and complete review of relevant law and of the record, including the motion as well as all parties' returns, replies and/or responses thereto, I find that there is no basis for granting the motion and find it appropriate to deny the motion.

IT IS THEREFORE ORDERED that the **Motion For Reconsideration** is denied.

AND IT IS SO ORDERED.

The Honorable Ralph P. Stroman
Special Referee

Dated:
August 8, 2012