

THE STATE OF SOUTH CAROLINA
In the Court of Appeal

ORIGINAL

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

Case No.: 2005-CP-10-2434

Ashley River Properties II, LLC, as assignee of
Lunar Systems, LTD and Ashley River Properties II, LLC. in its own right, ...Respondents

v.

Ashley River Properties One, LLC, successor in the interest to Ripley Light Yacht
Club, LLC and Ripley Light Development, LLC.....Appellant

Ashley River Properties, Once, LLC, Third-Party
Plaintiffs.....

v.

Lunar Systems, LTD and Thomas J. Lussier, Third-
Party Defendants.....

FINAL BRIEF OF THE RESPONDENTS, LUNAR SYSTEMS, LTD
AND THOMAS J. LUSSIER

Frank M. Cisa
Cisa & Dodds, LLP
858 Lowcountry Blvd., Suite 101
Mt. Pleasant, SC 29464
Phone: (843) 881-6530
Fax: (843) 881-5433
E-mail: frank@cisadodds.com
Attorneys for the Respondent, Lunar Systems, LTD
and Thomas J. Lussier

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STATEMENT OF THE CASE

Lunar Systems, LTD., (“Lunar”) commenced this action on June 7, 2005 against the Respondent, Ashley River Properties, II, LLC (“ARP- II”) and the Appellant, Ashley River Properties, I, LLC (“ARP-I”) (R.pp.0026-0030, Complaint). Lunar filed an Amended Lis Pendens on June 7, 2005 against two parcels of real property in Charleston County, South Carolina, one belonging to ARP-II and the other belonging to ARP- I. (R.pp. 0021-0023, Amended Lis Pendens and R.p.0005 Order, paragraph 10)

Lunar alleged in its lawsuit that ARP-II and ARP-I breached a Real Estate Purchase Agreement (R.pp. 0265-0281) and sought a declaratory judgment that Lunar owned an interest in the real property owned by ARP-I and ARP- II or, in the alternative, that it had a security interest or equitable mortgage on the property securing the return of its \$325,000.00 earnest money deposit. (R.pp. 0003-0004, Order, paragraph 1).

On December 20, 2007, ARP-II, paid Lunar \$325,000.00 and gave it a note in the amount of \$175,000.00 in exchange for an Assignment of Lunar’s claims against ARP- I (R.p. 0005, Order, paragraph 18 and Assignment R.pp. 0325-0327)

By Order of Judge Thomas L. Hughston, Jr., filed on May 19, 2010, ARP- II was substituted as Plaintiff in this action; ARP-I was granted leave to amend its Answer to add defenses and assert counterclaims and third party complaint; and the Amended Lis Pendens was cancelled. (Rp.0003, Order).

On June 14, 2010, ARP- I filed its amended Answer to Amended Complaint, Counterclaim and Third-Party Complaint wherein ARP- I alleged an abuse of process claim against ARP- II, Lunar and Thomas J. Lussier, the president of Lunar. (“Lussier”) (R.pp.0036-

0058), Answer to Amended Complaint, Counterclaim and Third-Party Complaint).

A non jury trial was held on January 22 and 23, 2013 before Judge Deadra L. Jefferson (R.p. 0002 Order and R.p. 0097, Transcript of out of Order Witness). Among other things, Judge Jefferson considered ARP-I's claim against Lunar and Lussier for abuse of process as it relates to the filing of the Amended Lis Pendens on ARP-I's property and by Order dated and filed on April 26, 2013, Judge Jefferson denied ARP-I's abuse of process claims on the merits. (R.pp.0011-0114, Order).

On May 9, 2013, ALP-I filed a Motion to Alter or Amend Judgment under Rule 59(e) of the SCRCP. By Order dated and filed on July 25, 2013, Judge Jefferson denied ARP-I's motion. (R.pp. 0015-0018, Order Denying Motion to Alter or Amend).

A Notice of Appeal was served on counsel for ARP-II and counsel for Lunar and Lussier on September 4, 2013 (R.p. 0095, Notice of Appeal).

STATEMENT OF THE FACTS

On March 8, 2001, Lunar entered into a Real Estate Purchase Agreement (R.pp. 0265-0281) to purchase a condominium proposed to be built on property owned by ARP-II and ARP-I, paying \$325,000.00 as an earnest money deposit (R.p. 0005, Order, paragraph 7).¹ The condominium was never constructed (R.p. 0005, Order, paragraph 8). The contract provided in the early purchase addendum that the property owned by ARP-I and ARP-II serves as collateral to secure the repayment of the earnest deposit in the event the condominiums were not

¹The contract was between Lunar and Ripley Light Yacht Club, LLC, however, ARP-I is the successor in interest to Ripley Light Yacht Club, LLC and Ripley Light Development, LLC. (Rp. 0189, L 11-15)

constructed. (R.p. 0280, Early Purchase Addendum, paragraph B; (R.p. 0005, Order, paragraph 9).

In 2005, Lunar brought this lawsuit against ARP-II and ARP-I seeking to recover its deposit plus accrued interest (R.pp. 0026-0030, Complaint). Lunar filed an Amended Lis Pendens on the property owned by ARP-I and ARP-II which was identified in the Contract. (R.pp. 0021-0023, Amended Lis Pendens) The Contract provides that property owned by ARP-I and ARP-II serves as collateral for repayment of Lunar's deposit in the event the condominiums were not built. (R.p. 0005, Order, paragraph 9).

On December 20, 2007, Lunar entered into an Assignment Covenant Not To Sue and Full Final And Complete Release with ARP-II. (R.pp. 0325-0327, Assignment). Pursuant to the Assignment, ARP-II paid Lunar \$325,000.00 and gave Lunar a Note in the amount of \$175,000.00 in exchange for an Assignment of Lunar's claims against ARP-I. (Assignment Agreement, R.pp.0325-0327; and R.p. 0007, Order, paragraph 8). After the Assignment Agreement was executed ARP-II took over the original lawsuit against ARP-I and Lunar had no further involvement in the suit until it was brought in by the Third-Party Complaint filed by ARP-I (R.p. 0106, L.6-20).

On June 14, 2010, ARP-I filed its Answer to Amended Complaint, Counterclaim and Third-Party Complaint against Lunar and Lussier seeking recovery for abuse of process based on Lunar's filing of the Amended Lis Pendens back on June 7, 2005. (R.pp. 0036-0058, Answer to Amended Complaint, Counterclaim and Third-Party Complaint).

By Order Filed on April 26, 2013, Judge Jefferson dismissed ARP-I's abuse of process counterclaim against ARP-II and its Third-Party claim for abuse of process against Lunar and

Lussier finding that “Lunar’s contract provided that ARP-I’s property was collateral for the repayment of Lunar’s deposit. Therefore, Lunar was within its rights to file the Lis Pendens initially.” (R.p. 0012, Order, paragraph 15) Judge Jefferson further found that ARP-I’s testimony as to damages was at best speculative and that ARP-I had not proven any damages on its abuse of process claim. (R.p. 0013, Order, paragraph 16).

By Order dated and filed on July 24, 2013, Judge Jefferson denied ARP-I’s Motion to Alter or Amend (R.pp. 0015-0018, Order Denying Motion to Alter or Amend).

ARGUMENT

I. The trial Court did not err in denying ARP-I’s abuse of process claim against Lunar and Lussier as Lunar had a right to file the Amended Lis Pendens.

A. SCOPE OF REVIEW

ARP-I seeks damages against Lunar and Lussier for abuse of process and seeks legal damages which is an action at law. “ In an action at law, the trial judge’s factual findings “ will not be disturbed unless a review of the record discloses there is no evidence which reasonably supports the [judge’s] findings.” (*Culler v. Blue Ridge Elec. Co-op., Inc.* 309 S.C. 243, 246; 422, S.E.2d 91, 93 (1992).

ARP-I concedes that the trial Court’s Order properly states the law on abuse of process. The trial court properly set forth the elements of abuse of process in the Order:

“Abuse of Process is the use of the legal system for a purpose other than that which was intended by the law. Whitfield Constr. Co. v. Bank of Tokyo Trust Co., 338 S.C. 207, 223, 525 S.E.2d 888, 897 (Cp.App. 1999). The elements of such claim consist of “an ulterior purpose and

a wilful act in the use of the process not proper in the regular course of the proceeding.

“Futhermore, “[t]he improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself.” Id. (quoting Hainer v. Am. Med. Int’l, 328 S.C. 128, 136-37, 492 S.E.2d 103, 107 (1997)). A “Defendant who has done nothing more than carry out process to its authorized conclusion, even though with bad intentions, cannot be liable for abuse of process.” Hainer v. Am. Med. Int’l, 328 S.C. 128, 492 S.E.2d 103 (199). See also Food Lion, Inc. v. United Food & Commercial Workers Int’l Union, 351 S.C. 65, 567 S.E.d2 251 (Cp.App.2002) (noting “bad motive” alone insufficient to support claim).”

ARP-I contends that Lunar’s filing of a Amended Lis Pendens satisfies the elements of an abuse process claim. Lunar’s contract for the purchase of the condominium provides, however, that “Purchaser agrees to allow the Company to apply said funds to the actual purchase and closing of the underlying real estate of the condominium project (set forth in Schedule A attached hereto the “Condominium Property”. In such event, as collateral for repayment of the funds, the Purchase will receive a *pari pasu*, dollar for dollar, interest in the purchase of the Condominium Property. (R.p. 0275, Early Purchase Addendum, paragraph B)

The trial judge’s finding that, “Lunar’s contract provided that ARP-I’s property was collateral for the repayment of Lunar’s deposit. Therefore, Lunar was within its rights to file the lis pendens initially.” was reasonably support by the evidence. (R.p. 0012, Order, paragraph 15).

After Lunar assigned its rights to the claims asserted in the Plaintiff’s Complaint on December 20, 2007, Lunar had no further control of the claims or Amended Lis Pendens that was filed with the suit.

II. The trial court did not err in finding that ARP-I did not prove any damages on its abuse process claim.

The trial judge's finding that the testimony offered by ARP-I as to damages was at best speculative as to any alleged losses is reasonably supported by the evidence presented.

“ When the tortious conduct of a defendant causes a plaintiff to lose prospective profits, the plaintiff may recover such profits after proving (1) it is reasonably certain that such profits would have been realized except for the tort, and (2) such lost profits can be ascertained and measured from the evidence produced with reasonable certainty.” Vortex Sports & Entm't, Inc. v. Ware, 378 S.C. 197, 208, 662 S.E.2d 444, 450 (2008). Such certainty “means the damages may not be left to mere speculation or conjecture.” id.

ARP-I offered the testimony of, Stuart Longman, who was the operating manager of Emerald Investments, which owns 100% of ARP-I as to damages. (R.p.0017, L.21-24) Mr. Longman attempted to testify that ARP-I was offered \$5.5 million dollars for its property by Centex, but the offer was contingent upon the acceptance of another offer on ARP-II's property which ARP-II refused to accept. An objection to Mr. Longman's testimony was sustained on the basis that it was a contingent deal and was speculative. (R.p. 0218, L.2-22). There was no testimony offered by ARP-I from which the trial court could ascertain and measure any losses with reasonable certainty.

CONCLUSION

The Respondents, Lunar and Lussier, respectfully request that the Court affirm the decision of the trial court.

CISA & DODDS, LLP



Frank M. Cisa

858 Lowcountry Blvd., Suite 101

Mt. Pleasant, SC 29464

Phone: (843) 881-6530

Fax: (843) 881-5433

E-mail: frank@cisadodds.com

Attorneys for the Respondents, Lunar Systems, LTD
and Thomas J. Lussier

This 5th day of May, 2014

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief of the Respondents complies with
Rule 211(b), SCACR.

May 5, 2014



Frank M. Cisa
Attorney for the Respondents, Lunar System,
LTD and Thomas J. Lussier

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PROOF OF SERVICE

I certify that I have served the Final Brief of the Respondents, Lunar Systems, LTD and Thomas J. Lussier by depositing a copy of them in the United States Mail, postage prepaid, on May 6, 2014, addressed to the Appellants attorney of record Clayton B. McCullough, Esquire, McCullough Khan, LLC located at 68 ½ Queen Street, Charleston, SC 29401 and to William C. Cleveland, Esquire, Wombyl Carlyle Sandridge & Rice, PLLC, P.O. Box 999, Charleston, SC 29402 the attorney of record for the Respondents', Ashley River Properties, II, LLC, as assignee of Lunar Systems, LTD and Ashley River Properties II, LLC.

May 6, 2014

CISA & DODDS, LLP



Frank M. Cisa

858 Lowcountry Blvd., Suite 101

Mt. Pleasant, SC 29464

Phone: (843) 881-6530

Fax: (843) 881-5433

E-mail: frank@cisadodds.com

Attorneys for the Respondents, Lunar Systems, LTD
and Thomas J. Lussier