THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Kristi L. Harrington, Circuit Court Judge

Case No.: 2011-CP-18-1684

WALTERS CONSTRUCTION, INC., ...Respondent,

vs.

STANLEY J. SLEDZIONA and SHARON SLEDZIONA,. . . . . .Appellants,

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FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Plaintiff Walters Construction, Inc. (hereinafter "Walters") filed suit against Defendants Stanley J. Sledziona and Sharon Sledziona (hereinafter "Sledziona") on August 31, 2011 for breach of contract. (R. pp. 6-8.) On or about November 15, 2011, Sledzionas answered Walters' Complaint, and filed a Counterclaim against Walters and a Third Party Complaint against Third Party Defendants Stephen D. Walters and Walters Realty alleging breach of contract and breach of fiduciary duty. (R. pp. 9-27.) Walters and Third Party Defendants filed their Reply and Answer to the Sledzionas' Counterclaim and Third Party Complaint on or about December 3, 2011. (R. pp. 28-29.) The case was tried before the Honorable Kristi Harrington on March 21, 2013. Judge Harrington ruled for the Plaintiff, Walters Construction, Inc., and awarded the Plaintiff damages in the amount of One Hundred Twenty-One Thousand Nine Hundred and No/100 ($121,900.00) Dollars by way of an Order dated March 21, 2013 which was not received until March 26, 2013. (R. pp. 1-3.) The Sledzionas timely filed a Motion for Reconsideration on April 5, 2013, which Judge Harrington denied on May 6, 2013. (R. pp. 4-5; pp. 203-205.) The Sledzionas then filed their Notice of Appeal.

FACTS

The Sledzionas contracted with Walters on October 25, 2008, to buy a home already under construction at lot 35, 5489 Clearview Drive, North Charleston, South Carolina. (R. pp. 115-126.) Walters owned the home and started it on or about April 2, 2007. (R. p. 31; p. 79.) Walters was building the house as a "spec house" speculating on selling it in the future. (R. p. 32.) Walters owed over Five Hundred and No/100 ($500,000.00) Dollars on the loan to Regions Bank to finance the construction. (R. p. 88.) At the time the Sledzionas contracted with Walters, work had stopped on the house. (R. p. 34.)

Walters offered the Sledzionas a Construction Sales Contract which provided that the Sledzionas pay a purchase price of Five Hundred Ninety-nine Thousand Nine Hundred and No/100 ($599,900.00) Dollars. (R. pp. 34-35; pp. 66-67; pp. 115-126.) The Sledzionas were to pay a down payment of Five (5%) Percent with Five Thousand and No/100 ($5,000.00) Dollars paid at signing and the balance of the down payment within Two (2) weeks. Id. The remaining balance of the purchase price, per the terms of the contract, was due at "Final Settlement and upon receipt of a Certificate of Occupancy." (R. pp. 115-126.) The Sledzionas only paid Fifteen Thousand and No/100 ($15,000) Dollars of the down payment. Id. Construction was to be complete and the parties were to close on the house by December 23, 2008. Walters had the right to extend the closing by up to Thirty (30) days. (R. p. 36; pp. 115-126.)

Walters failed to complete the house by December 23, 2008 or by January 23, 2009. (R. p. 76.) Walters failed to complete the house at all while it still owned the house. (R. p. 44.) On or about July 7, 2009, Walters' mortgage lender foreclosed on the house and it was subsequently sold to a third party buyer. (R. p. 45.) In August 2011, Walters filed suit against the Sledzionas alleging that the Sledzionas breached the Construction Sales Contract by failing and refusing to close on the purchase of the property despite the fact that Walters never finished the house, never had or demanded a Final Settlement, nor obtained a Certificate of Occupancy, all of which were required before the Sledzionas were obligated to close. (R. pp. 6-8; pp. 67-68; pp. 115-126.)

At trial, Walters contended that the Sledzionas refused to close on the house, but admitted that the Sledzionas continued to try to purchase the house even after Walters stopped working on the house. (R. p. 50; p. 75; p. 77.) It admitted that it never demanded that the Sledzionas close. (R. p. 75.) Walters claimed that because of the alleged failure to close on the purchase of the property it could not resell the house and, therefore, lost it in foreclosure. Id. It further claimed

that it lost profits expected from the sale and incurred expenses in making changes to the house pursuant to the contract all because the Sledzionas would not close. Id. (R. pp. 63-64.) At trial, Walters admitted that the Sledzionas paid Fifteen Thousand and No/100 ($15,000.00) Dollars towards the down payment and that some of the materials and costs Walters attributed to this property were actually incurred for a nearby property Walters was also constructing. (R. p. 65; p. 68.)

ARGUMENTS

I. THE TRIAL COURT ERRED IN AWARDING A MONETARY JUDGMENT TO WALTERS CONSTRUCTION FOR BREACH OF CONTRACT FOR WORK DONE ON THE PROPERTY WHEN THE AGREEMENT BETWEEN THE PARTIES SPECIFIED THAT THE BUYERS WERE ONLY REQUIRED TO PAY THE REMAINING BALANCE OF THE PURCHASE PRICE AT FINAL SETTLEMENT AND UPON RECEIPT OF A CERTIFICATE OF OCCUPANCY WHICH NEVER OCCURRED.

This case was tried before the Trial Court without a jury. "In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed on appeal unless found to be without evidence which reasonably supports the judge's findings." Townes Assocs. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). The Appeals Court looks to see "if the evidence reasonably supports the findings ...." GHMSW Partnership v. Logan, 310 S.C. 555, 557, 426 S.E.2d 332, 334 (Ct.App.1992). "However, '[a] reviewing court is free to decide questions of law with no particular deference to the trial court.'" Silver v. Abstract Pools & Spas, Inc., 376 S.C. 585, 590, 658 S.E.2d 539, ___ (Ct. App. 2008) quoting Hunt v. S.C. Forestry Commission, 358 S.C. 564, 569, 595 S.E.2d 846, 848-49 (Ct. App. 2004).

In this case, the plain language of the Construction Sales Contract precludes Walters from recovering for damages under the facts. (R. pp. 115-126.) There is no ambiguity in the Contract by which the Trial Court could find that the Sledzionas were somehow obligated to pay for

Walter's costs and lost profits without Walters first meeting its obligations. "[T]he court must consider the contract as a whole, rather than deciding whether phrases in isolation could be interpreted in various ways. " Silver, 376 S.C. at 591, 658 S.E.2d at ___ (Ct. App. 2008).

Looking at this Construction Sales Contract as a whole, it is apparent from Paragraph 2, which sets forth the conditions under which the Sledzionas must pay, and Paragraph 14, which addresses damages, that the right to recover damages is conditional. Additional confirmation of this conditional liability is found in Paragraph 14 of the Agreement which, in setting forth the parties' rights, begins with "[i]f BUILDER fully performs all of BUILDER'S covenants and agreements contained herein and BUYER fails to perform their obligation hereunder, then BUILDER shall retain the Earnest Money Deposit described above ...." (R. p. 117., Paragraph 14.) (emphasis added). Walter's right to damages is expressly conditioned on it "fully performing all of its covenants and agreements". It failed to fully perform all of its covenants and agreements. Paragraph 14 also uses the phrase "thereafter be enforceable in law ..." further emphasizing that the enforceability of the Contract comes "thereafter" Walters fully performed his obligations and not before.

Further, an Addendum to the Contract, attached to the Original Contract, specifically states that "[t]he following Changes and Additions shall be made at no cost to Buyers[.]" (R. pp. 115-126.) It was these alleged changes and additions for which Walters sought and recovered a judgment despite the express language of the Agreement stating that they would be of no cost to the buyers. (R. pp. 66-67.) The costs of the changes and additions were to be included in the overall purchase price due at Final Settlement and upon presentation of a Certificate of Occupancy. Further, Walters specified that any changes to the contract had to be in writing. (R. p. 78; p. 115, Paragraph 2(B).)

The parties' relationship is governed by the terms of the Contract. The Contract Walters provided to the Sledzionas is not ambiguous. Walters admitted the only Contract was the Construction Sales Contract. (R. p. 69.) There was no oral agreement altering the terms of the original contract. (R. p. 69.) Nothing in the Contract required the Sledzionas to pay for changes or additions to the property or be responsible for Walters' costs in making the changes prior to Walters providing a Final Settlement a Certificate of Occupancy. Id. The Sledzionas' obligations were to pay a down payment and then pay the final amount owed when at Final Settlement and presentation of a Certificate of Occupancy. (R. pp. 67-68.) While the Sledzionas did not pay the full amount of the down payment, Walters did not sue for damages or raise any claims for said failure. (R. pp. 6-8; pp. 68-69.) His claim was for damages allegedly caused by the Sledzionas' alleged failure to close on the property. However, that obligation was conditional on having a Final Settlement and Walters providing a Certificate of Occupancy, which he never did. It never demanded that the Sledzionas close on the property. (R. p. 75.)

"Where the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect." Jordan v. Security Group, Inc., 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993); Blakeley v. Rabon, 266 S.C. 68, 221 S.E.2d 767 (1976). "The Court's duty is to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." Jordan, 311 S.C. at 230, 428 S.E.2d at 707 (1993); McPherson v. J.E. Sirrine & Co., 206 S.C. 183, 206, 33 S.E.2d 501, 510 (1945). While in hindsight it might have been prudent for Walters to address possible damages that might occur even if it failed to provide a Final Settlement and Certificate of Occupancy, Jordan prevents the Court from reading in additional protections not enumerated in the Agreement.

"In construing and determining the effect of a written contract, the intention of the parties and the meaning are gathered primarily from the contents of the writing itself, or, as otherwise stated, the four corners of the instrument." Silver v. Abstract Pools & Spas, Inc., 376 S.C. 585, 591, 658 S.E.2d 539, 542 (Ct. App. 2008). "[W]hen such contract is clear and unequivocal, its meaning must be determined by its contents alone; and a meaning cannot be given it other than that expressed. Hence words cannot be read into a contract which import an intent wholly unexpressed when the contract was executed." Id. at 591, 658 S.E.2d 539, 542 (Ct. App. 2008). In this case there was no intent that the Sledzionas pay or be responsible for any payment other than the down payment and any money prior to the Final Settlement and presentation of the Certificate of Occupancy.

By failing to have a Final Settlement and provide a Certificate of Occupancy, Walters failed to fully perform all of his covenants and agreements. While, the Sledzionas concede that had Walters had a Final Settlement and provided a Certificate of Occupancy, and they failed and refused to close, they would be responsible for Walter's damages, without meeting the conditions required for closing Walters cannot prevail against the Sledzionas for failing to close. There is no provision in the Contract to address what liability the Sledzionas will or would have if Walters had out of pocket costs due to changes and additions to the house but did not have a Final Settlement and Certificate of Occupancy.

The Sledziona's had no duties under the Contract until the Certificate of Occupancy was obtained and they were "at Final Settlement." Id. The Sledzionas' liability was contingent or conditional on Walters' completion of the house. Restatement (2^{nd}) of Contracts §§ 224, 225(1). Accordingly, Walters Construction was the first to breach the Contract when he discontinued

work on the home and failed to obtain a Certificate of Occupancy. Walters Construction breached first, and carries the liability of that breach.

The Contract speaks for itself and did not obligate the Sledzionas to pay any money until the house was completed and Walters provided a Certificate of Occupancy, which it never did. The Trial Court, by finding that Walters was entitled to damages, even though Walters never finished the construction, had a Final Settlement, or obtained a Certificate of Occupancy, totally rejected the express contingent or conditional nature of the Sledzionas obligation to pay anything beyond the down payment until the final settlement and the receipt of a Certificate of Occupancy. By holding the Sledzionas liable for Walters costs incurred prior to it completing the house and prior to it being in a position to sell the house, the Trial Court erred in awarding Walters any monetary damages and the judgment should be vacated as a matter of law.

II. THE TRIAL COURT ERRED IN FAILING TO TAKE INTO CONSIDERATION THE PARTIAL DOWNPAYMENT MADE BY THE SLEDZIONAS AND THE COSTS THAT WALTERS ADMITTED WERE ERRONEOUSLY APPLIED TO THE AMOUNT IT CLAIMED WAS OWED.

At trial, Walters testified under direct examination that it spent approximately Seventy-three Thousand and No/100 ($73,000.00) Dollars on the construction of the house and lost approximately Forty-eight Thousand and No/100 ($48,800.00) Dollars in profits. (R. pp. 63-64.) The Trial Court awarded Walters the sum of One Hundred Twenty-One Thousand Nine Hundred and No/100 ($121,900.00) Dollars. Assuming, solely for the sake of argument, that the Sledzionas were obligated to pay for making changes and responsible for Walters' lost profit prior to a closing and tender of a Certificate of Occupancy, the Court should have reduced the amount allegedly owed by the amount the Sledzionas already paid and which Walters admitted it should not have charged the Sledzionas.

Paragraph 14 of the Contract specifically states that "[i]f the BUILDER does elect to enforce this Contract the BUYERS shall be credited with the sum of the earnest money deposit against any award of damages to builder...." (R. p. 117, Paragraph 14.) By the express terms of the Agreement, the Trial Court's judgment should have been reduced by the Fifteen Thousand and No/100 ($15,000.00) Dollars the Sledzionas already paid. (R. p. 82.)

Further, Walters admitted that at least Five Hundred and No/100 ($500.00) Dollars in changes to the project were erroneous. (R. p. 65.) Despite this admitted error and the Fifteen Thousand and No/100 ($15,000.00) Dollars paid as a down payment, the Trial Court actually increased the amount Walters claimed as damages. Walters claimed Forty-eight Thousand Eight Hundred and No/100 ($48,800.00) Dollars in lost profit and Seventy Three Thousand and No/100 ($73,000.00) Dollars in out-of-pocket costs for a total of One Hundred Twenty-one Thousand Eight Hundred and No/100 ($121,800.00) Dollars. The Trial Court awarded One Hundred Twenty-one Thousand Nine Hundred and No/100 ($121,900.00) and did not reduce the amount by the Fifteen Thousand and No/100 ($15,000.00) Dollar down payment or the Five Hundred and No/100 ($500.00) Dollar charge erroneously applied to the project and as a result committed an error of law.

CONCLUSION

Because the Construction Sales Contract conditioned the Sledzionas' obligation to pay the balance of the purchase price upon Walters having a Final Settlement and providing a Certificate of Occupancy and because Walters failed to finish the house, have a Final Settlement or obtain a Certificate of Occupancy, the Trial Court erred as a matter of law in awarding Walters damages for its out of pocket expenses and its lost profits. Further, because the Contract specifically states that any down payment would be a set off to any actual damages and because

Walters admitted that it erroneously included some expenses in calculating it's out of pocket costs, the Trial Court erred as a matter of law in not reducing the amount of the judgment.

Respectfully Submitted,

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May 12, 2014

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PROOF OF DELIVERY

I certify that I have served a copy of the Appellant's Final Brief, Final Reply Brief and Record on Appeal on Walters Construction, Inc. by depositing a copy of it in the United States Mail, postage prepaid, on May 14, 2014 addressed to their attorney of record, Frank M. Cisa, 858 Lowcountry Blvd., Suite 101, Mt. Pleasant, SC 29464.

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