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STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2011CP2305300

Jack R Harrell Jr vs. Keowee Falls Investment Group LLC

RECEIVED

MAR 12 2015

SC Court of Appeals

CHECK ONE:

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):
 - Rule 12(b), SCRPC;
 - Rule 41(a), SCRPC (Vol. Nonsuit);
 - Rule 43(k), SCRPC (Settled);
 - Other: _____
- ACTION STRICKEN (CHECK REASON):
 - Rule 40(j) SCRPC;
 - Bankruptcy;
 - Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 - Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
 - Affirmed;
 - Reversed;
 - Remanded;
 - Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; Statement of Judgment by the Court:

Dated at Greenville, South Carolina, this .

Court Reporter:

PRESIDING JUDGE -

This judgment was entered on the 16th day of February, 2015, and a copy mailed first class this 16th day of February, 2015, to attorneys of record or to parties (when appearing pro se) as follows:

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STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

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JACK R. HARRELL, JR. AND TINA W. HARRELL,

Plaintiffs,

vs.

KEOWEE FALLS INVESTMENT GROUP, LLC, THE CLIFFS COMMUNITIES, LLC, AND S&ME, INC.,

Defendants.

IN THE COURT OF COMMON PLEAS

Civil Action No. 2011-CP-23-5300

ORDER DENYING PLAINTIFFS' MOTION FOR A NEW TRIAL

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SC Court of Appeals

This matter is before the Honorable Clifton B. Newman pursuant to Plaintiffs' Motion for a New Trial. The Plaintiffs are represented by T. S. Stern, Esq. and Elizabeth Wright, Esq. Defendants Keowee Falls Investment Group, LLC ("KFIG") and The Cliffs Communities, Inc. ("The Cliffs") are represented by Elizabeth M. McMillan, Esq. Defendant S&ME, Inc. is represented by Stephanie Burton, Esq.

I. INTRODUCTION

A trial was held in this case on February 3, 2014 through February 14, 2014. The Plaintiffs proceeded to trial on the following causes of action against KFIG and The Cliffs:

1. Breach of Contract;
2. Breach of the Implied Covenant of Good Faith and Fair Dealing;
3. Negligence; and
4. Negligent misrepresentation.¹

¹ Plaintiffs voluntarily withdrew their cause of action for negligence per se.

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The Plaintiffs proceeded to trial on causes of action for professional negligence and negligent misrepresentation against S&ME, Inc. ("S&ME").

At the close of Plaintiffs' case, the Court granted directed verdicts to The Cliffs on all causes of action against it. After determining from the evidence presented during Plaintiffs' case that the essence of Plaintiffs' claims against KFIG was their negligent misrepresentation claim, the Court granted directed verdicts on all of Plaintiffs' other claims against KFIG. The Court also granted a directed verdict on Plaintiffs' negligent misrepresentation claim against S&ME. Therefore, the only causes of action that were submitted to the jury were the negligent misrepresentation claim against KFIG and the professional negligence claim against S&ME.

The jury returned a verdict in favor of both KFIG and S&ME. Plaintiffs thereafter filed a Motion for a New Trial on the basis that KFIG was not entitled to a directed verdict on Plaintiffs' causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing. In the alternative, Plaintiffs moved for a new trial absolute as to KFIG and S&ME on the grounds that the verdict was not justified by the evidence and Plaintiffs were entitled to a new trial under the Thirteenth Juror Doctrine.

II. FACTS PRESENTED AT TRIAL

This case involves Lot 31 in the Jasmine Cove section of Keowee Falls South on Lake Keowee, which Plaintiffs Jack and Tina Harrell purchased in 2008. Prior to the Harrells' purchase, the lot originally had been sold to Dick Rockwell. He hired Alpha Environmental Services, Inc. ("AES") to look at the lot to determine if there were buildability issues with it. AES issued a report dated June 2, 2005 which indicated that Roger Moore, the geologist with AES, thought that a slope failure had occurred in the past on Lot 31 when the lake had been

impounded, and that the failure may have extended beyond Lot 31 to the north and south. He took numerous photographs of the lot, many of which showed erosion issues near the shoreline of Lot 31. AES recommended that Lot 31 not be utilized for residential construction. The Rockwells sent their salesman, Tom Salisbury, a copy of the AES report. Tom Salisbury in turn sent it to the Development Office of The Cliffs. The Rockwells requested to exchange Lot 31 for another one, and KFIG agreed. Lot 31 was taken off the market for further investigation. Don Nickell, the senior director of planning, engineering, and development for The Cliffs, hired S&ME to review Lot 31 in light of the AES report. S&ME issued its findings regarding Lot 31 in a letter dated July 13, 2005, which stated the following:

The boring data indicates that the lot contains some unique surface and subsurface anomalies. Although the boring data indicates very low consistency soils extend well below the ground surface, it did not indicate that the exposed "scarp" areas are the result of lateral movements of surface sloughing. The surface features could be terraced alluvium deposited during past geologic events or possibly old road cuts created during construction of Lake Keowee. . . Based on the subsurface data and our experience, it is our opinion that residential structures can be supported on-site with some modification to improve the foundation soils.

Nickell trusted S&ME and believed their findings were more accurate than the findings of AES because of their reputation in the region and The Cliffs' history with the company. Therefore, Nickell did not believe slope failure was an issue with Lot 31.

Nickell and others in the Development Office of the Cliffs believed that shoreline erosion was occurring on Lot 31, as well as other lots, and that it should be addressed. They took Lot 31 off the market in November 2005 so that repair work could be done on the shoreline. In February 2006, KFIG sold Lot 31 to Randy Kimlin, another property owner in the Cliffs Communities, for the shoreline work to be performed since only individual property owners could obtain the permitting for shoreline work at that time. After the shoreline work had been performed, KFIG bought the property back from Kimlin.

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In May of 2008, the soil remediation work that S&ME had recommended in 2005 was performed on Lot 31 and S&ME issued another letter dated June 3, 2008 addressing the soil compaction testing it had done on the lot. KFIG put Lot 31 back on the market and within several weeks the Harrells signed a contract to buy the property.

On July 18, 2008, the Harrells contacted Ross Kester ("Kester") about looking at some property in the Cliffs communities. Kester was a real estate agent who worked as an independent contractor with The Cliffs Real Estate, Inc. After looking at Lot 31 for about an hour, the Harrells signed a contract to purchase the lot from KFIG that day for \$1,650,000.

Lot 31 had just come on the market at Keowee Falls South approximately seven to fifteen days prior to the Harrells looking at it. As noted above, this lot had been remediated with regard to soil compaction issues, and S&ME had field tested the soil compaction. The area on the lot where the work had been performed was obvious because there appeared to be a building pad with freshly placed soil on it. When asked about the clearing work, Kester explained to the Harrells that someone had previously looked at the lot and said it was not suitable for construction and that it had failed an engineer's test. Kester then explained that soil borings had been taken and the Cliffs had had the soils undercut at their expense. Before signing the Real Estate Sales and Purchase Agreement (the "Purchase Agreement"), Kester gave the Harrells a copy of the two S&ME letters which discussed Lot 31, and brought them to the Harrells' attention.

After seeing the recently repaired soil and the S&ME correspondence, the Harrells signed the Purchase Agreement without any attempt to bargain over the price of the lot. The Purchase Agreement provided in Section 9.3 that it was being sold in an "AS-IS" condition: "Except as

otherwise provided herein, Purchaser is purchasing and Seller is selling the Lot in an "AS IS" condition."

Additionally, KFIG agreed to an Addendum which gave the Harrells 14 days from the date they received a fully signed copy of the Purchase Agreement to decide if they wanted to rescind the agreement. The Harrells received a copy of the HUD statement prepared by KFIG, which discussed the plans and status of the development. Mr. Harrell admitted that he received this document along with the S&ME correspondence and findings, that he did not read the HUD statement or S&ME findings, and that he did not have any more questions for Kester or KFIG after receiving the Purchase Agreement and the extended right of rescission. The Harrells closed on the lot on September 22, 2008.

The Harrells hired Resort Custom Homes ("RCH") to build a home on their lot. RCH hired S&ME to advise it on geotechnical issues with regard to the construction of the Harrells' home. Ultimately, the Harrells did not build their house on the precise building pad area where the soil remediation work had been performed. While the house was under construction in December 2009, the Harrells alleged that their builder noticed that the under deck slab was separating from the rear wall. They learned that a water line separation had occurred in the cul-de-sac above their lot in November 2009 which released approximately 100,000 gallons of water. The Cliffs hired S&ME to investigate the cause of the water line break and agreed to hire Bunnell Lammons Engineering to install inclinometers and conduct testing to determine if movement was occurring on Lot 31 and adjacent lots. The Harrells hired an expert who opined that an active slope failure was occurring on their lot and that the lot would continue to move. They then filed suit against The Cliffs, KFIG, and S&ME.

III. DISCUSSION

Standard for Directed Verdict

When ruling on a motion for directed verdict, the Court must view the evidence in the light most favorable to the non-moving party. Wintersteen v. Food Lion, 344 S.C. 32, 542 S.E.2d 728 (2001). In this regard, the Court must determine whether a verdict for the party opposing the motion would have been reasonably possible under the facts. Hanahan v. McArver, 326 S.C. 140, 150, 485 S.E.2d 903, 908 (1997), overruled on other grounds. As explained by the court in Hanahan:

The issue must be submitted to a jury whenever there is material evidence tending to establish the issue in the mind of a reasonable juror. However, this rule does not authorize submission of speculative, theoretical and hypothetical views to the jury. We have repeatedly recognized that when only one reasonable inference can be deduced from the evidence, the question becomes one of law for the court. A corollary of this rule is that verdicts may not be permitted to rest upon surmise, conjecture or speculation.

Id. (citations omitted).

When a trial court's grant or denial of a motion for directed verdict is reviewed, it can only be reversed when there is no evidence to support the ruling or when the ruling is governed by an error of law. Creech v. South Carolina Wildlife & Marine Res. Dep't., 328 S.C. 24, 29, 491 S.E.2d 571, 573 (1997).

Directed Verdict on the Breach of Contract Claim

In order to recover under a claim for breach of contract, Plaintiffs must prove the terms of the contract, its breach, and the damages caused by such breach. Maro v. Lewis, 389 S.C. 222, 697 S.E.2d 684, 687 (Ct. App. 2010) (citing Fuller v. E. Fire & Cas. Ins. Co., 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962)). Plaintiffs contend that KFIG breached a contract, the Purchase Agreement, because a slope failure occurred on their lot which rendered their lot unbuildable.

Plaintiffs contend that the contract incorporated the terms of the HUD statement given by KFIG to Plaintiffs prior to the closing and the two letters from S&ME regarding their investigation and recommendations for Lot 31 in 2005 and their testing in 2008. Plaintiffs contend that the HUD statement and the S&ME findings established representations by KFIG that the lot was buildable, and that because a slope failure occurred, the lot was not buildable, and thus the contract was breached.

The evidence presented at trial, however, did not establish a breach of the terms of the Purchase Agreement. Under paragraph 3.1 of the Purchase Agreement, the HUD statement is incorporated into and is made a part of the Purchase Agreement. Even though it is part of the Purchase Agreement there was no evidence presented by Plaintiffs to show that any part of the HUD statement resulted in a breach of contract. The HUD statement did not make specific representations about the buildability of Lot 31. Most of the HUD statement is devoted to advising potential purchasers of the status of the completion of the development in which the lot is located and the infrastructure for the development. Nowhere in the HUD statement is any representation made that Lot 31 would not require any special construction techniques for the lot to be buildable.

The only section of the HUD statement which addressed the nature of the lots is the section entitled "SUBDIVISION CHARACTERISTICS AND CLIMATE", which is found on page 24. This section describes the general topography of the development and it specifically referenced lots in two identified sections of the subdivision that may contain steep slopes or other unusual features that could necessitate the use of special construction techniques to build. Lot 31 is not mentioned in this paragraph. However, immediately following this language in the HUD statement is a WARNING paragraph which stated as follows: "SOME LOTS IN THIS

MOUNTAINOUS SUBDIVISION HAVE A SLOPE OF 20% OR MORE. THIS MAY AFFECT THE TYPE AND COST OF CONSTRUCTION.”

Mr. Harrell was asked about the HUD statement and this particular section at trial. He testified that he did not read the HUD statement at all but when asked about the applicability of the warning to his lot, he testified that it could have applied to Lot 31. He also admitted that he was made aware that the lot had been worked on with regard to soil issues and that he could see that work had been done on the lot. Based on the language of the Purchase Agreement, the HUD report, and Mr. Harrell’s testimony, there was no evidence presented at trial to show that KFIG breached any terms of the Purchase Agreement or the HUD statement when it sold the lot to Plaintiffs.

The S&ME correspondence given to Plaintiffs also do not serve as the basis for a breach of contract claim against KFIG for the simple reason that the S&ME findings were never part of any contract between the Harrells and KFIG. The Purchase Agreement does not incorporate the terms of the S&ME correspondence as part of the agreement. Unlike the HUD statement, which was specifically incorporated by reference into the Purchase Agreement, the Purchase Agreement merely states that an engineering statement, not even the specific S&ME correspondence, was provided to Plaintiffs. Plaintiffs presented no evidence to show that the S&ME correspondence/reports were made a part of the contract between the parties. In order to show that additional material is incorporated into a host document, the following must be established:

“[T]he host document must identify with detailed particularity what specific material it incorporates and clearly indicate where that material is found in the various documents [identified].’ Cook Biotech, [Inc. v. Acell, Inc., 460 F.3d 1365, 1376-78 (Fed. Cir. 2006)]. In other words, the incorporating contract must use language that is *express* and *clear*, so as to leave no ambiguity about the identity of the document being referenced, nor any reasonable doubt about the

fact that the referenced document is being incorporated into the contract.”

Northrop Grumman Info. Tech., Inc., 535 F.3d 1339, 1344 (Fed. Cir. 2008).

The court in Northrop Grumman also reviewed the reasoning of courts in other jurisdictions which have determined when another document may be incorporated into a primary document:

[A] majority of states have concluded that the contract must clearly and specifically reference the document to be incorporated. Ingersoll-Rand Co. v. El Dorado Chem. Co., S.W.3d , 373 Ark. 226, 2008 Ark. LEXIS 262 at *12-13 (Ark. Apr. 17, 2008)(collecting cases); see also Kokjohn v. Harrington, 531 N.W.2d 99, 101 (Iowa 1995)(per curiam) (recognizing that ‘[t]he common thread throughout [incorporation by reference cases from other state jurisdictions] is a requirement that the reference be clear and specific’). A leading treatise also agrees. 11 Richard A. Lord, *Williston on Contracts* § 30.25 (4th ed. 1999) (‘So long as the contract makes clear reference to the document and describes it in such terms that its identity may be ascertained beyond doubt, the parties to a contract may incorporate contractual terms by reference to a separate, noncontemporaneous document . . .’).

Northrop Grumman, 535 F.3d at 1345.

Other courts have clarified that, in order to incorporate another document into an agreement, not only does the main document have to explicitly or precisely identify the written material being incorporated, the main document “must clearly communicate that the purpose of the reference is to incorporate the referenced material into the contract (rather than merely to acknowledge that the referenced material is relevant to the contract, e.g., as background law or negotiating history.)” Frost-Tsuji Architects v. Highway Inn, Inc., 2014 U.S. Dist. LEXIS 118757, *6 (Haw. 2014) (citing Safeway, Inc. v. Nordic PCL Cosntr., Inc., 130 Haw. 517, 527, 312 P.3d 1224, 1234 (Ct. App. 2013) (quoting Northrop Grumman Info. Tech. Inc. v. United States, 535 F.3d 1339, 1345 (Fed. Cir. 2008))).

Here, the Purchase Agreement does not include any specific language that indicates intent to incorporate the S&ME correspondence as part of the contract. Section 9.6 of the

Purchase Agreement, relied on by Plaintiffs, is entitled "Documents Received by Purchaser." It states that the Purchaser acknowledges having received and reviewed prior to the execution of the Purchase Agreement the following documents:

- (a) Copy of the Declaration, as supplemented and amended to the date hereof, together with the appended By-Laws of the Association.
- (b) Copy of Plat.
- (c) Design and Construction Guidelines.
- (d) The checked documents or instruments listed on the Purchaser's signature page below.

The signature page of the Purchase Agreement includes a paragraph titled "Additional Documents Received by Purchaser" which lists the following documents:

HUD, CCR's Plat Map
Golf membership addendum, membership finance addendum
Club Credit addendum
Engineering statement.

Nowhere in the Purchase Agreement does it specifically identify the S&ME documents. "Engineering statement" is the only language used to reference the other documents given to the Harrells, and no mention is made of the specific S&ME correspondence given to the Harrells.

Furthermore, the Purchase Agreement does not contain any specific language to incorporate the findings in the S&ME correspondence as part of the terms of the contract, whereas it does use clear and specific language to incorporate the terms of the HUD statement. In Section 3.1, Completion of Infrastructure, the Purchase Agreement states that the Seller will provide certain roads and services "as outlined in our Department of Housing and Urban Development ("HUD") Property Report, made effective March 29, 2007, which is incorporated herein and made a part hereof by this reference." Thus, the Purchase Agreement specifically incorporates the HUD statement, but not the other documents that simply were provided to Plaintiffs for their review.

Moreover, the Purchase Agreement also provides that the Lot was being sold in an "AS IS" condition: "Except as otherwise provided herein, Purchaser is purchasing and Seller is selling the Lot in an "AS IS" condition." Providing the Harrells with the S&ME correspondence did not affect the "AS IS" nature of the sale. Instead, the S&ME correspondence simply alerted Plaintiffs to the fact that the lot had been called into question and that work was required on the lot prior to building. There is no ambiguity in the contract about the "AS IS" nature of the sale because the S&ME correspondence did nothing more than advise Plaintiffs that work had to be done on the lot, just as Kester had advised them. The fact that KFIG made Plaintiffs aware of S&ME's recommendations and testing does not alter the fact that KFIG sold the property "AS IS."

Plaintiffs did not present any testimony at trial that would establish that they believed the S&ME findings were made a part of the Purchase Agreement or that they altered the "AS IS" nature of the sale and, in fact, they stated that they did not read the correspondence at all before signing the Purchase Agreement. The Harrells never testified that they were confused about whether the S&ME correspondence was made a part of the Purchase Agreement or that they had any concern about it whatsoever. Instead of simply relying on the S&ME correspondence given to them, the Harrells' builder subsequently hired S&ME to advise them further about building the residential structure on the lot, and the Harrells did not build their house on the specific area where the soils had been undercut by KFIG.

Based on this evidence submitted at trial, there was no evidence that any portion of the Purchase Agreement had been breached or that there was any ambiguity about its terms.

Directed Verdict on the Breach of the Implied Covenant of Good Faith and Fair Dealing

Plaintiffs also failed to establish a breach of the implied covenant of good faith and fair

dealing by KFIG. As has been established in South Carolina, there is no separate cause of action for such a claim but, instead, it is part of a claim for breach of contract. RoTec Services, Inc. v. Encompass Services, Inc., 359 S.C. 467, 597 S.E.2d 881 (Ct. App. 2004). Plaintiffs failed to present any evidence to show that an implied covenant of good faith and fair dealing in the Purchase Agreement was breached.

Mr. Harrell testified that he was very pleased with Kester, the salesman who showed him the property, and that he trusted Kester. He testified that Kester told him about the lot's failure of an engineer's test and that work had been done on the lot. Even after he brought this action, Mr. Harrell bought another lot in the Kewoee Falls South subdivision and went back to Kester to serve as the real estate agent to sell him the lot. Mr. Harrell presented no evidence to show that he believed anyone at KFIG acted outside the scope of good faith in dealing with him. Therefore, there is no evidence to support a breach of the implied covenant of good faith and fair dealing.

Plaintiffs' primary complaint against KFIG is that KFIG allegedly did not disclose the 2005 report that was given by AES to the Rockwells when they bought that lot. The cause of action for such a claim is negligent misrepresentation, not breach of contract or breach of the implied covenant of good faith and fair dealing. The negligent misrepresentation cause of action was properly submitted to the jury and the jury returned a verdict in favor of KFIG.

There is no basis to grant a new trial for Plaintiffs to proceed on a theory of breach of contract or a breach of the implied covenant of good faith and fair dealing.

New Trial Under the Thirteenth Juror Doctrine

There is no basis for disturbing the verdict of the jury under the thirteenth juror doctrine. Plaintiffs claim that, because the trial was delayed due to the unavailability of an expert witness

for one day and due to snow for two days, the jury did not properly consider the evidence that was presented and, thus, did not render a reasonable verdict. Therefore, they argue they are entitled to a new trial.

Based on the evidence presented to the jury and their consideration of the testimony, I find no grounds upon which to grant a new trial. "The thirteenth juror doctrine is a vehicle by which the trial court may grant a new trial absolute when he finds that the evidence does not justify the verdict." Folkens v. Hunt, 300 S.C. 251, 254, 387 S.E.2d 265, 267 (1990) (citing S.C. Highway Dept. v. Townsend, 265 S.C. 253, 217 S.E.2d 778 (1975)). "A trial judge's order granting or denying a new trial upon the facts will not be disturbed unless his decision is wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law." Folkens, 300 S.C. at 254-55.

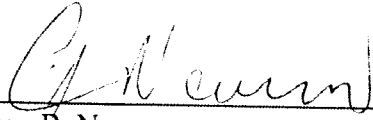
There was sufficient evidence to justify the jury's verdict, including the testimony from the Plaintiffs themselves, the testimony from the witnesses for KFIG who testified about how and why Lot 31 was investigated and remediated, what information was provided to potential purchasers about Lot 31 and why, and the extensive testimony provided by S&ME's experts as to whether a slope failure was occurring and about the impact the break in the water line had on the cul-de-sac and the issues with Plaintiffs' lot.

I find there is no basis to conclude that the jury's decision was impacted by the delay in trial or that the jury did not properly consider the evidence that was presented.

IV. CONCLUSION

Based on the foregoing, Plaintiffs' Motion for New Trial is DENIED.

AND IT IS SO ORDERED.



Clifton B. Newman
Presiding Judge

February 10, 2015
Columbia, South Carolina