STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)
SPANISH WELLS INVESTMENTS, LLC,)
Plaintiff,)
vs.)
GREG LUCKENBILL,)
EVELYN LUCKENBILL,)
Defendants.)

IN THE COURT OF COMMON PLEAS
THE FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2013-CP-07-2262

FINAL ORDER ENDING CASE

This matter came before me for a final evidentiary hearing on Tuesday, November 25, 2014 at 9:30 a.m. Appearing on behalf of the Plaintiff was Russell P. Patterson. Appearing on behalf of the Defendants was Steven L. Alexander. The case proceeded to trial pursuant to the Amended Summons and Complaint dated November 26, 2013 and the Defendants' Answer and Counterclaim dated September 23, 2013. The Plaintiff timely filed a Reply to said Counterclaim on October 1, 2013. After carefully considering the testimony and evidence provided by all parties, and the Pre-Trial Brief of the Plaintiff, the Court rules in favor of the Plaintiff for the reasons discussed below.

FACTS

This is a real estate closing dispute. The facts are largely not in dispute. The primary issues to be decided by the Court is whether the Defendants breached the terms and conditions of a written contract to purchase a vacant lot in Sea Pines Plantation, and if so, what damages the Plaintiff is entitled to recover.

1. The Plaintiff owned a vacant lot in Sea Pines Plantation which it had been trying to sell for a number of years. On April 18, 2013 the Plaintiff and Defendants reached an agreement for the purchase and sale of the property as evidenced by a written Contract of Sale – Offer and Acceptance ("Contract").

2. The purchase price under the Contract was $100,000, with $1,000 earnest money deposit ("EMD") paid at the time of execution, and a second EMD of $4,000 due twenty-one (21) days after April 18, 2013, or by May 9, 2013.

3. The date of closing was June 17, 2013. The Contract did not provide that time was of the essence as to the date of closing. The parties do not dispute that under Paragraph 6 of the Contract this was a short sale, subject to the approval by Wells Fargo, which held the first mortgage. Under Paragraph 9 of the Contract, prior to any party being held in default, the Contract required that the non-defaulting party provide a notice of default and provide ten (10) business days to cure any default to the defaulting party prior to proceeding with any remedies in law or equity.

4. The Plaintiff did not obtain short sale approval by the closing date, June 17, 2013. Short sale approval was obtained on July 12, 2013 (Ex. 47). The Defendants thereafter refused to close and the Plaintiff sent on July 15, 2013 a Notice of Default and 10-Day Business Right to Cure (Ex. 48), which this Court finds met the requirements of Paragraph 9 of the Contract. The Defendants thereafter refused to close, and the Plaintiff terminated the Contract by written notice on July 30, 2013 (Ex. 55). Plaintiff then commenced this action for damages on September 4, 2013.

5. The Defendants assert at trial that the Contract terminated on its own since the Plaintiff did not close on the closing date, or in the alternative that a June 19, 2013 e-mail from their closing attorney's office to the Plaintiff (Ex. 35) effectively gave notice of termination of the Contract. This Court rejects both arguments and finds that the Defendants never provided the notice of default and 10-day right to cure pursuant to Paragraph 9 of the Contract, which this Court finds was required by the Contract.

6. Neither party asserts that the Contract is ambiguous. As stated above, the Contract does not provide that time is of the essence as it relates to the closing date. Under South Carolina law, without such a provision, the law implies that a contract is to be performed within a reasonable

period of time. Faulkner v. Millar, 319 S.C. 216, 460 S.E.2d 378 (1995); Hobgood v. Pennington, 300 S.C. 309, 387 S.E.2d 690 (Ct.App. 1999). Thus, this Court finds that the Plaintiff was not in default when the closing did not occur on June 17, 2013.

7. As to the Defendants' argument that it was not required to send a notice of default and right to cure simply to terminate the Contract, the Court rejects this argument. After the Contract was signed, there were only three (3) ways that the contractual relationship could end, as follows: (1) the transaction could close; (2) the parties could mutually agree to terminate the Contract; (3) a party is deemed in default after notice of default and ten (10) business day right to cure under Paragraph 9 and the Contract is properly terminated. Section 9 of the Contract is clear and unambiguous and sets forth very precise steps that must be taken prior to a party being held in default. This Court finds that under the terms of the Contract, a party is not in default until the notice of default and 10 business day right to cure has been sent. The Court finds this is a mandatory requirement. No such notice was ever sent by the Defendants. Defendants' Exhibit 35, the June 19, 2013 e-mail, clearly does not meet this requirement, as there is no 10-day right to cure language in said e-mail. On the other hand, the Plaintiff did properly comply with said provisions by its July 15, 2013 letter (Ex. 48). The Defendants did not cure said default during the 10 business days provided, and the Plaintiff thereafter on July 30, 2013 properly terminated the Contract (Ex. 55).

PLAINTIFF DAMAGES

8. Having found that the Defendants are in default under the Contract and that the Plaintiff properly terminated same, this Court must determine the appropriate amount of damages recoverable by the Plaintiff.

9. "Generally, the measure of damages for breach of an executory contract to purchase land is the difference between the contract price and the market value of the property at the time of

breach." Benya v. Gamble, 282 S.C. 624, 632, 321 S.E.2d 57, 62; Bannon v. Knauss, 320 S.E.2d 470 (SC.App. 1984) "If the property is resold within a reasonable time after the breach, the amount received is *prima* facie evidence of its market value at the time of breach." Benya; Barre v. MacGlothin, 176 V.A. 474, 11 S.E.2d 617 (1940); 92 C.J.S. Vendor & Purchaser § 537(c) (3) at 530 (1955).

10. The court in Benya held that a sale of the subject property eighteen (18) months after the breach was admissible evidence of the fair market value of the property at the time of breach. Benya also cited two (2) other decisions where similar evidence was admitted under the discretionary powers of the trial court nine (9) years later (South Carolina State Highway Dept. v. Wilson, 254 S.C. 360, 175 S E.2d 391 (1970); and eight (8) months later (Fulton County v. Power, 109 G.A.App. 783, 137 S.E.2d 474 (1964)).

11. In this case, after the Defendants breached the Contract and did not cure same, the Plaintiff immediately re-listed the property for sale and closed on the transaction at a price of $92,000 on May 30, 2014, some eleven (11) months after the Defendants defaulted under the Contract. Said sale was for $8,000 ($100,000 - $92,000) less than the Contract.

12. I find that the Plaintiff properly mitigated its damages and is entitled to the $8,000 price differential set forth above. In addition, the Plaintiff, as set forth in Exhibit 66, and the testimony of Robert Tillison, also incurred other expenses related to its continued ownership after the Plaintiff was in position to close on July 12, 2013, until it re-sold the property on May 30, 2014, a total of 321 days. Plaintiff incurred property owner assessments of $516.17 and real estate taxes of $1,739.82, which this Court finds are damages recoverable under the Contract.

In addition, the Plaintiff also had to pay interest on the mortgage amount that would have been paid on July 12, 2013 at the closing if the Defendants had not breached the Contract by refusing to close. Under basic South Carolina contract law, the purpose of a damages award for a

breach of contract is to put the Plaintiff in as good a position he would have been if the contract had been performed. Maro v. Lewis, 389 S.C. 216, 697 S.E.2d 684 (S.C.App. 2010); Mellen v. Lane, 377 S.C. 261, 659 S.E.2d 236 (S.C.App. 2008). Had the Defendants complied with the Contract by closing on July 12, 2013, $92,[illegible]50 would have been paid down on Plaintiff's existing Wells Fargo mortgage, as testified to by Robert Tillison and is confirmed by a review of line 506 of the Settlement Statement dated May 30, 2014 (Ex. 65) when the Plaintiff was able to sell the property almost a year later. As the real estate commission of 7% was lower on the May 30, 2014 closing (Ex. 65, line 700) than under the original Contract (10%, Ex. 1), this explains the slight increase in the mortgage deduction at the final closing (ie. $92,860 vs. $94,729). Since the Defendants breached the Contract and failed to close, Plaintiff was required to continue to pay interest on this $92,860 for another 321 days, until May 30, 2014, when it was finally able to sell the property to a third party. Thus, the interest carry on said amount is clearly a recoverable portion of damages to make the Plaintiff whole. The interest rate on said loan was 7.125%[1]. The additional interest the Plaintiff had to pay on its note to Wells Fargo for the 321 days it took for it to re-sell the property is $5,818.69 ($92,860 X 7.125% X (321 ÷ 365)).

13. Finally, under Section 9 of the Contract, the parties agree that the prevailing party in any litigation would be entitled to recover attorney's fees and costs. The Plaintiff at trial attached an Affidavit of Attorneys Fees and Costs seeking a total of $13,873.06. The Affidavit includes very detailed billings reflecting the activities of Plaintiff's counsel in this contested litigation. This Court has reviewed the factors in Dede v. Strickland, 307 S.C. 155, 414 S.E.2d 134 (S.C. 1992) and finds said request fair and reasonable. This was an action to enforce the terms of a Contract which involved extensive discovery and was vigorously opposed by the Defendants. (Over 3,400 pages of

[1] At trial, the testimony provided by Mr. Tillison was the interest rate was 9.5%. After the trial, the Plaintiff's counsel advised the Court that said interest rate was in error, and that the actual amount was 7.125%. The Court is thus using the corrected amount in this Order.

documents were produced by various parties). This Court has carefully reviewed the time and labor devoted to the case, pursuant to the detailed billings provided by Plaintiff's counsel and finds that they are all proper and necessary to prepare to try the case. The Court is also familiar with the professional standing of Plaintiff's counsel, who has appeared before this Court many times. The hourly rate charged by counsel of $225 is fair and reasonable. The Court would note that said rate is comparable to the rate charged by defense counsel. Finally, the Court has taken into consideration the beneficial results obtained by Plaintiff's counsel in prevailing in this action. The amount awarded in attorney's fees is also comparable to the attorney fees sought by defense counsel of $11,822 under its Counterclaim. It should be noted that defense counsel was substituted in as attorney for the Defendants some three (3) months after the action was filed, thus his billings of $11,822 do not include work on the entire litigation.

14. Based upon the above, the total judgment awarded in favor of the Plaintiff against the Defendants is **$29,947.74**, calculated as follows:

1.	Price Differential on Re-Sale		$ 8,000.00
2.	Plaintiff's Carrying Costs for 321 days		
	(a) POA Fees	$ 516.17	
	(b) Property Taxes	1,739.82	
	(c) Mortgage Interest	5,818.69	
	Subtotal		$ 8,074.68
	(d) Attorney Fees and Costs		$13,873.06
	Total		$29,947.74

15. Although the Contract provided there was to be $5,000 of Earnest Money, through the testimony at trial, only $1,000 was paid by the Defendants. After the trial, counsel for the parties confirmed with realtors from both real estate agencies involved (The Alliance Group Realty,

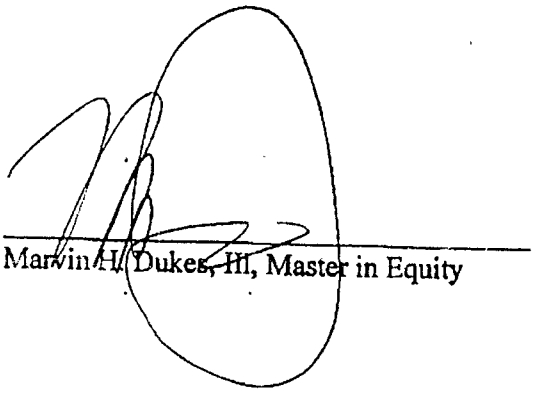
agent for the Defendants, and Remax, agent for the Plaintiff, that neither agency seeks any portion of the EMD). Thus, this Court orders that the $1,000 held by The Alliance Group Realty be paid to the Plaintiff, Spanish Wells Investments, LLC, and said amount will reduce the monetary judgment rendered above.

Wherefore it is Ordered, Adjudged and Decreed

1. That the Plaintiff, Spanish Wells Investments, LLC, shall have judgment against the Defendants, Greg Luckenbill and Evelyn Luckenbill, in the amount of $29,947.74.

2. That the Alliance Group Realty within ten (10) days from the date of this Order shall pay to the Plaintiff, Spanish Wells Investments, and the $1,000 Earnest Money Deposit it is holding. Upon receipt of payment of said funds, the judgment rendered in favor of the Plaintiff against the Defendants will be reduced in said amount accordingly.

AND IT IS SO ORDERED.



Marvin H. Dukes, III, Master in Equity

January 16, 2015
Beaufort, South Carolina

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	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	2013-CP-39-2262
SPANISH WELLS INVESTMENTS, LLC	
PLAINTIFF,	CERTIFICATE OF MAILING
V.	
GREG LUCKENBILL AND EVELYN LUCKENBILL,	
DEFENDANTS,	

This is to certify that the undersigned did cause the Defendant's Notice of Appeal to be served upon the Attorney for the Defendant by mailing a copy of the same in an envelope addressed as shown below and depositing same in the United States Post Office, with proper postage affixed thereto, on the 9th day of March, 2015.

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