THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

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SC Court of Appeals

Case No. 2012-CP-29-01187
Appellate Case No. 2015-000904

Kenneth R. Gainey..... Appellant,

v.

Timothy M. Gainey..... Respondent.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This is an action for equitable indemnification for financial loss by Appellant resulting from breach of contract by Respondent. Appellant and Respondent are brothers. In 2004, they purchased a building as co-tenants for investment purposes for $295,000. Appellant paid his half of the purchase price in cash. Respondent borrowed $134,000 to pay his half of the purchase price. Respondent's lender, First Citizens Bank (Lender), required that the entire property be mortgaged for Respondent to obtain his loan. Appellant and Respondent agreed that Appellant would allow Lender to hold a mortgage on Appellant's half interest if Respondent would agree to be responsible for and make all payments on the note and mortgage. Based on this agreement, Respondent received the loan from Lender.

In 2009, the initial five-year balloon note of Respondent matured. Respondent refinanced with Lender but borrowed $187,000 against a loan payoff of only $114,523.01. Respondent took $69,890.99 out in cash at the closing. Appellant was not aware of the financial detail of the second loan. Appellant was never indebted to Lender on either mortgage. The parties did not have a tenant in the property until 2011. In 2011, a tenant signed a lease for one year at $3,500 per month. Respondent refused to share in the cost of complying with his obligation as landlord required by the lease. Appellant bore all the expenses related to the lease. The tenant paid Respondent one-half of the monthly rent but paid Appellant various amounts, always less than one-half of the rent after deducting expenses paid by the tenant. Respondent had a poor relationship with the tenant and eventually unilaterally evicted the tenant. Respondent stopped making mortgage payments to Lender.

Lender foreclosed the 2009 mortgage and the entire property was lost at a foreclosure sale in 2014. Appellant originally brought this suit for dissolution of an LLC holding title for the property and for an accounting. After the foreclosure, Appellant amended his Complaint to recover Appellant's loss due to the failure of Respondent to make the mortgage payments, thus breaching his agreement with Appellant. Both parties testified at trial regarding their estimated value of the building at the time of the foreclosure.

After asking a question, the jury returned a verdict for Respondent.

The Trial Judge denied Appellant's Rule 50 Motion for Judgment Notwithstanding the Verdict. In denying the Motion, the Trial Judge agreed that Appellant had established liability on the part of Respondent and was entitled to equitable indemnification. However, the Trial Judge denied the Motion on the grounds that there was not sufficient evidence in the record for the jury to establish the amount of damages.

The jury verdict was returned on March 18, 2015. This appeal was filed April 17, 2015.

ARGUMENTS

1. DID THE TRIAL JUDGE ERR IN REFUSING TO GRANT APPELLANT'S RULE 50 MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AT THE CLOSE OF TRIAL?

After the verdict was rendered, Appellant's counsel moved for Judgment Notwithstanding the Verdict. In his ruling made from the bench at the close of trial, the Trial Judge said, "I am going to deny the motion. It is up to the Plaintiff to prove the amount of damages and while I think that there is an equitable indemnity claim even though the only thing in the record was the Plaintiff's testimony as to the value of the property, that does not necessarily mean that the jury was persuaded that that was the value of the property. And so I think they could have very well said that the Plaintiff failed to prove the amount of damages he sustained as an element so I will deny the Motion." (R. p. 183, lines 15-24)

Rule 50, SCRCP, allows the Motion for Judgment Notwithstanding the Verdict to be made promptly after dismissal of jury. That was the procedure followed in this case.

If the Trial Judge denies the motion on appeal under Rule 50(d), the Appellant Court may grant a new trial. That is the remedy Appellant seeks in this appeal.

"When we review a trial judge's grant or denial of a motion for directive verdict or JNOV, we reverse only when there is no evidence to support the ruling or when the ruling is governed by an error of law." Austin v. Stokes-Craven Holding

Corp., Op. No. 26784 (S.C. Sup. Ct. filed March 8, 2010 citing Creech v. South Carolina Wildlife & Marine Res. Dep't, 328 S.C. 24, 491 S.E.2d 571 (1997).

Appellant contends that when the evidence is viewed in its entirety the Trial Judge erred in denying the Motion. There was no evidence to support the ruling of the Trial Judge because there was ample evidence in the record to allow the jury to determine damages, the issue on which the Trial Judge denied the Motion.

Appellant seeks a review of the record by the Appellate Court and a determination Appellant should be entitled to a new trial on the issue of damages.

2. DID THE TRIAL JUDGE FIND IN HIS RULING FROM THE BENCH THAT APPELLANT HAD ESTABLISHED HIS RIGHT TO EQUITABLE INDEMNIFICATION?

The Trial Judge in his ruling acknowledged that Appellant had established liability. Appellant understands the Trial Judge to say by implication in his ruling that Appellant had proven that an agreement existed between the parties, that Respondent breached the agreement and that as a result of the breach, the building was lost to foreclosure and Appellant suffered damages. The Trial Judge did not err in finding that Appellant had established the necessary elements to entitle Appellant to an indemnification award.

There is no question that as a result of Respondent's failure to pay Lender, the building owned by Appellant and Respondent was foreclosed and sold for a price of $150,000. Respondent admitted that he was solely responsible for the mortgage payments and that he did not make them. (R. p. 48, line 2 - p. 49, line 1) Respondent admitted that he agreed in order to induce his brother to sign the mortgage that Respondent would pay all the mortgage payments. (R. p. 37, line 15 - p. 40, line 16) Respondent's failure to pay the mortgage payments was the proximate cause of the foreclosure. (R. p. 67, lines 1-19) Respondent had access to a $35,000 credit line but made no effort to use those funds to stop the foreclosure. (R. p. 90, lines 5-25)

All the necessary elements of an agreement were proven. There was a valid verbal agreement for Respondent to borrow $134,000 from Lender and make all payments in exchange for Appellant's agreement to allow Lender to hold the entire property as collateral for Respondent's loan. There was an agreement that Respondent

would make all payments to Lender, but he breached that agreement and the Lender foreclosed. The building was lost due to the breach of the agreement by Respondent. Appellant is entitled to indemnity for his loss from Respondent.

The Trial Judge in his ruling expressed no concern that Appellant had not established all the elements of Appellant's case for indemnification. The only remaining issue was how much Appellant lost.

3. **DID THE TRIAL JUDGE ERR IN RULING THAT INSUFFICIENT EVIDENCE WAS INTRODUCED TO ALLOW THE JURY TO MAKE A FINDING ON THE AMOUNT OF APPELLANT'S ACTUAL DAMAGES?**

The error alleged by Appellant is that the Trial Judge failed to take into consideration all the evidence on damages submitted by Appellant. In his ruling, the Trial Judge said "the only thing in the record was the Plaintiff's testimony as to the value of the property." (R. p. 183, lines 18-19) That is factually and legally incorrect.

Respondent was called as Appellant's first witness and testified that Respondent's opinion of value was "two or 300,000, 200,000, 250. I don't know." (R. p. 78, line 7) Respondent is an owner of the property and is competent to testify to its value. Whisenant v. James Island Corp., 277 S.C. 10, 281 S.E.2d 794 (1981). The fact that Respondent did not know an exact value is not the deciding factor. He stated a value that was consistent with Appellant's direct testimony on value of the building.

The testimony of Respondent was competent evidence of the value of the property from the owner of the property even though he said he was not sure about the value. He gave a range of value from $200,000 to $300,000. Had he not testified about any range of value, the Trial Judge might be correct. The fact that Respondent did not know to a mathematical certainty or to an appraised value makes no difference.

In addition, Appellant testified that the value of the building was "probably right at $300,000." (R. p. 122, line 6) Defense counsel objected at that point on the grounds that the figure given by Appellant was testimony from a lay witness. The Trial Judge properly overruled the objection. (R. p. 122, lines 8-10)

Appellant continued to testify that he had paid $295,000 for the building, had made improvements over the years, "several improvements" (R. p. 122, line 14) and that the restaurant left a large bar that they constructed inside the building. (R. p. 122, lines 15-21)

In addition, Appellant offered as evidence the Special Referee's deed that conveyed the property showing a consideration of $150,000 paid by Lender at the foreclosure sale. (R. p. 67, lines 5-17) (Appellant's Exhibit 10)

"Generally, in order for damages to be recoverable, the evidence should be such as to enable the court or jury to determine the amount thereof with reasonable certainty or accuracy." Whisenant, supra, at p. 13. "While neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation, proof with mathematical certainty of the amount of loss or damage is not required." Id.

"Ordinarily a property owner, who is familiar with his property and its value, may give his estimate of its value or the damage inflicted upon it even though he is not an expert." Barton v. Superior Motors, Inc., 309 S.C. 491, 494, 424 S.E.2d 524, 526 (Ct. App. 1992); Whisenant, supra, at p. 13 (noting that ordinarily a property owner, who is familiar with his property and its value, may give his estimate of its value or the damage inflicted upon it even though he is not an expert); Abercrombie v. Abercrombie, 372 S.C. 643, 647, 643 S.E.2d 691, 699 (Ct. App. 2007) (recognizing general rule in South Carolina that a property owner is competent to offer testimony as to the value of his property); Hawkins v. Greenwood Dev. Corp., 328 S.C. 585, 598, 493 S.E.2d 875, 881 (Ct. App. 1997) ("The rule that a property owner is competent to

present an opinion as to the property's value is well recognized.") "Unless the property owner's lack of knowledge of the value of his property is so complete so as to render it worthless, it is for a jury to assess the probative value of his testimony." Barton, supra, at p. 494.

Appellant introduced evidence from three different sources of the value of the property. The two owners of the property, Appellant and Respondent, agreed that the building was purchased for $295,000 and had a value at the time of the foreclosure of a range between $200,000 and $300,000. Any expert witness that might have been called by Appellant would have rendered his opinion of value. That opinion is no more probative than the value testified to by the owners themselves. If the testimony of the owners was disputed, the clear evidence was that Lender bought the property for $150,000 thus setting an actual sale value which should be a base value below which a jury or judge should not tread.

Appellant contends that the Trial Judge clearly agreed that Appellant should prevail if Appellant proved his damages. Appellant contends that Appellant presented sufficient evidence from which the jury conformed a reasonable conclusion that the building was worth at least $150,000 and at the most $300,000. The jury should have returned a verdict between those two numbers. The fact that the jury returned no verdict for Appellant but instead ruled for Respondent in reality means that the jury did not understand the case at all. The jury was swayed by some other element whether it be a misunderstanding of the facts or misunderstanding of the law or some combination of the two. The question that was asked by the jury is evidence of the jury's confusion.

When the jury came back with the question "Can we consider cash back from the second refi or is that separate from the indemnification?" (R. p. 178, lines 8-9), the following colloquy took place among counsel for the parties and the Trial Judge.

"MR. WRIGHT: I don't understand.

THE COURT: I don't know whether to bring them in here for clarification or whether to say the cash back from the second refi is not damages sustained by the plaintiff but it can be considered for whatever extent you think is appropriate in determining the value of the property or the value -- amount of damages -- I'm trying to think of a way.

MR. WRIGHT: That's just a weird question --

MR. GRISSOM: I guess we need to understand what they mean by.

MR. WRIGHT: Could they make the question --

THE COURT: What I'll do is just bring them in and ask them what did they mean, what is it that they wanted to know, I don't really understand your question. But I think we all agree that any cash that the defendant got in the second refinance is not necessarily damages -- or is not damages sustained by the plaintiff.

MR. WRIGHT: If the question is can we identify and put that [$69,800] sic, on top of it, no. But I don't know what --

THE COURT: If they're asking can we consider the amount he got back, can we consider that when we come up with a value of what this property was worth.

MR. WRIGHT: And I don't know if that has any relevance on the issue of damages, maybe it does, but --

THE COURT: Well, you've got to believe that, you know, if he borrowed more in the second refinance then the property had appreciated to some extent, but how that plays on the value at the time of foreclosure I'm not really sure. What's your position?

MR. GRISSOM: I think Mr. Wright is probably right, it's either one or the other, can we indemnify plus that or can we say no indemnity and give him the 69. I don't know what -- which way --

THE COURT: Do you want me to bring them in and just say that the cash back from the second refinance is separate from indemnification?

MR. WRIGHT: Could we just ask what they mean by the question? I think we need to understand.

THE COURT: All right. Anything from the plaintiff before we bring the jury in?

MR. WRIGHT: No, Your Honor.

THE COURT: Anything from the defense?

MR. GRISSOM: No, Your Honor.

(The jury returned to the courtroom.)

THE COURT: All right, ladies and gentlemen, welcome back. I understand that you do have a question, Mr. Tores. I understand the jury's question is, "Can we consider cash back from the second refinance or is that separate from indemnification?" My question is what do you mean by considered as cash back? What do you mean can we consider it?

THE JUROR: Can we consider --

THE COURT: Let's see if this answers your question. The fact that the defendant got cash back from the second refinance, whatever he got, would not necessarily be damages or would not be damages sustained by the plaintiff. However, the fact that he got cash back at the second refinance might assist you in your determination of what the value of the property was. The plaintiff -- if you find that the plaintiff is entitled to damages, his damages would be what he lost as a result of the defendant's actions, not necessarily what the defendant got from the second refinance. So when you say can we consider the cash back, you can consider it if it helps you determine the amount of damages that the plaintiff lost. But the fact that the defendant may have gotten X amount of dollars when he refinanced it does not necessarily mean that the plaintiff is entitled to that X amount because the defendant got it and the plaintiff didn't. Does that answer your question?

THE JUROR: Yes.

THE COURT: All right. I will send you out and let you continue your deliberations. Thank you very much."

(R. p. 178, line 10 - p. 181, line 7)

It was obvious that the jury was confused. Why they were confused or what they were confused about was unclear to both attorneys and the Trial Judge.

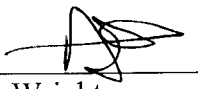
When the jury announced a verdict for Respondent and the Trial Judge was convinced that Appellant had proven liability, knowing that the jury was confused and knowing that there were several sources of evidence introduced regarding value of the property, the proper remedy would be to grant Appellant's Motion and if not setting an amount of damages based on the testimony, then granting Appellant a new trial.

The verdict in this case and the ruling of the Trial Judge are a complete miscarriage of justice. The evidence is clear that Respondent breached his duty to pay the mortgage and that as a result the property was lost. Appellant suffered loss because his half interest was lost. The only issue the jury had to decide was how much that was worth, and it was worth somewhere between half of $150,000 to $300,000. That is the only equitable ruling and decision in the case. For Appellant to recover nothing is contrary to the law and the evidence, and the Trial Judge should have recognized that.

CONCLUSION

There was evidence in the record of the amount of the foreclosure sale deed of $150,000, evidence of Respondent who was a half owner of $200,000 to $300,000 and evidence of Appellant's testimony of a value of $300,000. There was no testimony that the building was worthless. There was no testimony that the building had a negative value and should be torn down. It was a structure that had been used as a restaurant until Respondent evicted the tenant. It was commercially used and generated rent. The jury could have determined a value from the evidence in the record, not to a mathematical certainty but to a reasonable degree of accuracy. The jury was confused, but the source of that confusion is unclear from the verdict. As a result, the Trial Judge should have acknowledged that the verdict was the result of confusion as shown by the jury's question and should have granted the Motion of Appellant for Judgment Notwithstanding the Verdict. If the Trial Judge's concern was valuation of damages, a new trial on that issue alone is necessary. It is completely inappropriate both legally and equitably for Appellant to walk away from this case with nothing.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

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

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CERTIFICATE OF SERVICE

I certify that I have served the Final Brief of Appellant and Certificate of Compliance on the Respondent by depositing it in the United States Mail, postage prepaid, on September 11, 2015, addressed to the attorney of record, Lucy L. McDow, Esq., Post Office Box 767, Rock Hill, SC 29731-6767.

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