THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE CIRCUIT COURT OF GREENVILLE COUNTY
Court of Common Pleas

The Honorable Robin B. Stillwell, Circuit Court Judge

Case No. 2014-002201

Señor Wraps, Inc., ...Respondent,

v.

E. Kwang Kim, as trustee of the E. Kwang Kim Revocable Trust dated January 5, 2007, and E. Kwang Kim, ...Appellants.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court correctly find November 30, 2012 as the valuation date?

STATEMENT OF THE CASE

Appellant-Respondent, Señor Wraps, Inc. ("SWI"), leases a ground floor space, in which it operates a restaurant ("the Restaurant"), from Respondents-Appellants, E. Kwang Kim, as trustee of the E. Kwang Kim Revocable Trust, dated January 5, 2007, and E. Kwang Kim (collectively "Landlord"), at 10 S. Main Street, Greenville, South Carolina ("10 South Main"). 10 South Main is two-story building with a stand-up crawl space. SWI began this action to determine whether a written option to purchase dated April 14, 2007 ("the Option") included the both the Restaurant Space as well as an upstairs space ("the Upstairs").

SWI filed suit against Landlord on January 11, 2013, in the Court of Common Pleas for Greenville County, South Carolina seeking a declaratory judgment whether the Option encompassed the Upstairs and for specific performance of the Option. (R. pp. 15-27). Landlord timely answered and also counterclaimed for declaratory judgment as to the extent of the Option, alleging the Option only encompassed the Restaurant Space. (R. pp. 28-63).

The Honorable Robin B. Stillwell, Circuit Judge, presided over a non-jury trial on June 12, 2014. At trial, counsel for Landlord asserted in questioning of SWI's owner, Ruben Montalvo, that SWI had exercised the Option on November 30, 2012, and had failed to consummate the Option according to its terms. (R. p. 212, line 15 – p. 215, line 4). Montalvo agreed that SWI had exercised the Option on November 30, 2012. *Id.*

Judge Stillwell issued an Order, executed July 29, 2014, and entered August 5, 2014. (R. pp. 3- 11) ("August 5 Order"). The August 5 Order interpreted the Option to only provide for purchase of the Restaurant Space. (R. p. 10).

SWI filed a Motion to Alter or Amend Judgment pursuant to Rule 59 on August 15, 2014. (R. pp. 367-371). Judge Stillwell held a hearing on the motion on September 3, 2014. In the hearing, counsel for SWI asked for clarification as to the exercise date of the Option by SWI. (R. p. 390, line 3 - 14). Judge Stillwell indicated he understood the need for clarification and stated, "that was my reason for coming on the record. Because I recognize that there may be need [sic] to be some clarification in the that regard." *Id.*

Critically, in a fact ignored by Landlord's brief, counsel for Landlord **again** argued that SWI had, in fact, exercised the Option on November 30, 2012, and that its exercise of the Option at that time had triggered certain timelines and deadlines, which had all passed. (R. p. 413, line 20-25).

In an order entered September 8, 2014, Judge Stillwell ruled in favor of SWI regarding the date of exercise of the Option and basing the date of valuation on the date of exercise. (R. pp. 12 - 14). Based upon his view of the evidence and relying on his findings as to credibility, Judge Stillwell found that SWI had exercised the Option on November 30, 2012, by a written letter according to the limited notice requirements of the Option, but that "[t]he original exercise of the Option was frustrated by and through the controversy which is the subject matter of this litigation[,]" and SWI was therefore entitled to a valuation date as of that time. (R. p. 12, ¶ 2).

SWI filed a Notice of Appeal on October 8, 2014, and Landlord filed a Notice of Cross-appeal on October 9, 2014. SWI subsequently withdrew its appeal on July 13,

2015. Landlord has continued with its cross-appeal challenging whether the trial court properly found that SWI exercised its option on November 30, 2012.

STATEMENT OF THE FACTS

Landlord's brief tellingly ignores the portion of the Option which actually governs how SWI was to exercise the Option. This is understandable, given the lack of any requirement other than written notice to exercise, rather than consummate, the Option.

The Option contains the following provision concerning its exercise by SWI:

> "2. Exercise or Expiration of Option and Agreement: [SWI] shall exercise the Option during the Option Term, if at all, by either (a) delivering in hand to [Landlord] written notice of such exercise, or (b) mailing such notice by registered or certified mail to [Landlord] at [Landlord's] notice address specified herein. The Option shall not be divisible, which is to say that the Option must be exercised as to all the Property, or not at all. In the event [SWI] does not give [Landlord] notice of exercise on or before 5:00 p.m. on the Option Expiration Date, this Option and Agreement shall automatically end, and thereafter [Landlord] and [SWI] shall have no further rights, duties or entitlements under this Option and Agreement."

(R. p. 333, ¶ 2)

On November 30, 2012, SWI sent a letter, through its counsel, indicating that it was exercising the Option. (R. pp. 353-354). At the June 12, 2014 trial, counsel for Landlord, Mr. Joseph Rohe, cross-examined Mr. Ruben Montalvo, the owner of SWI:

> Q Okay. In 2012, and again, you testified earlier this morning that you fully complied with the requirements of the purchase option for execution; is that correct?
>
> A Correct.
>
> Q Okay. Let's fast forward, November of 2012 –
>
> (WHEREUPON, Defendant's Exhibit No. 10 was marked for identification only.)

BY MR. ROHE:

Q Mr. Montalvo, I'm going to hand you Defendant's Exhibit No. 10, this is a letter from your attorney, Mr. Christophillis, indicating that you were hereby exercising the option, is that correct?

A Correct.

Q All right. And you understand from the terms of the option, you testified about this earlier or perhaps Mr. Goodyear did, that once you exercised there are certain time frames and deadlines that come into effect, correct?

A Correct.

(R. p. 212, line 15 – p. 213, line 8).

The Option also contains provisions setting forth how 10 South Main was to be divided upon the exercise of the Option pursuant to paragraph 2:

> "3. Necessity of Property Division: It is acknowledged and agreed that the Property is situated upon a larger tract of land (designated TMS Parcel No. 0001.00-03-012.01 and hereinafter referred to as the "Master Parcel"). Further, it is acknowledged that the Property exists as rental space within a larger building, with building has a footprint essentially coextensive with the Master Parcel. [Landlord] owns the entirety of the Master Parcel. In other that [SWI] may consummate its Option to purchase the Property, said Property will need to be severed from the Master Parcel – by subjecting the Master Parcel to the condominium form of ownership (or by some other form of subdivision acceptable to both [Landlord] and [SWI]). [SWI] covenants and agrees to bear the cost of such severance including, but not limited to all capital expenditures necessary to accomplish physical severance and building code compliance, legal fees and the costs of plot plans, floor plans, survey and architectural renderings necessary to subject the Master Parcel to the condominium form of ownership. The condominium master deed shall be prepared by an attorney approved by [Landlord], and the master deed itself shall be subject to complete review and approval of [Landlord]. In the event [SWI] fails to deliver a draft master deed (in recordable form with all exhibits attached) and all other documents or construction contracts reasonably necessary to accomplish severance within forty-five (45) days following Option exercise, the Option shall automatically be terminated and of no further force or effect."

Pl's Ex. 1, ¶ 3.

However, all the steps necessary to conclude the sale of the property were not required to be accomplished prior to the written notice being sent to Landlord. Indeed, some of the necessary steps were contingent upon Landlord's designation and approval. The Option, in paragraph 3 above, clearly requires Landlord to approve an attorney to prepare the condominium master deed. Landlord never conveyed to SWI her approved attorney. *Id.*

Further, the November 30, 2012 letter references attempts by SWI to determine, with Landlord, a mutually acceptable appraiser - attempts to which Landlord did not respond. (R. p. 333, ¶ 2).

Nor did SWI rest in its efforts to conclude its purchase of 10 South Main. Once it was clear there was dispute as to the Upstairs, SWI moved within weeks for a Declaratory Judgment, filing the instant action on January 11, 2013. (R. pp. 15 - 27.)

ARGUMENT

I. STANDARD OF REVIEW.

Landlord, in her initial brief, does not address the standard of review. However, the standard is fairly straightforward - the claims in this case sound in law, not in equity.

Declaratory judgment actions are neither legal nor equitable; thus, the standard of review depends on the nature of the underlying issues. *Campbell v. Marion County Hosp. Dist.,* 354 S.C. 274 (Ct.App.2003). Where the most substantial portion of an action involves the interpretation of a contract, it is an action at law. *Barnacle Broad., Inc., v. Baker Broad., Inc.,* 343 S.C. 140, 146 (Ct.App.2000). In an action at law tried without a jury, the "scope of review extends merely to the corrections of errors of law."

Id. Therefore, an appellate court will not disturb the trial court's findings unless they are found to be without evidence that reasonably supports those findings. *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86 (1976).

Accordingly, the Court must uphold Judge Stillwell's factual findings unless they are "without evidentiary support." *Kuznik v. Bees Ferry Assocs.*, 342 S.C. 579, 589, 538 S.E.2d 15, 20 (Ct. App. 2000). However, even if this were an equity case, the Court would not be free to simply disregard the trial court's factual findings. *Verenes v. Alvanos,* 387 S.C. 11, S.E.2d 771 (2010).

"Characterization of an action as equitable or legal depends on the appellant's main purpose in bringing the action." *Verenes*, 387 S.C. at 16, 690 S.E.2d at 773 (internal quotation marks omitted). "The main purpose of the action should generally be ascertained from the body of the complaint," but "resort may also be had to the prayer for relief and any other facts and circumstances which throw light upon the main purpose of the action." *Id.* (internal quotation marks omitted).

In this case, both the body of SWI's Complaint and the overwhelming majority of the argument at trial make clear that SWI's primary goal in bringing this action was to obtain legal relief in the form of a declaration of his rights under a contract, the Option. While the trial court rejected SWI's reasoning that the Option provided it an opportunity to purchase the upper floor of 10 South Main, the court's decision was clearly an interpretation of a contract, which the trial court stated was an at law determination.[1] (R. pp. 8 - 9.) Landlord does not argue in her initial brief that the trial court's determination

[1] Judge Stillwell stated at the Rule 59 hearing, "I understand that I can effect equity, but ultimately my job is to interpret the contract. And in doing so answer the specific questions that were posed to the Court." (R. p. 412, lines 22 -25).

was in error.

SWI's request for equitable relief, that of specific performance, was limited to his rights under the Option. In sum, the underlying action regarding the interpretation of the Option is clearly legal, not equitable. Accordingly, the Court should apply the standard of review for cases at law.

As discussed above, the standard of review for equitable claims does not apply to this appeal. However, even if it did, Judge Stillwell's factual determination is entitled to deference. While the appellate court in an equity case is authorized to make its own determination of the facts, "this broad scope [of review] does not relieve the appellant of his burden to show that the trial court erred in its findings." *Ballard v. Roberson*, 399 S.C. 588, 593, 733 S.E.2d 107, 109 (2012). Moreover, although the appellate court ***may*** substitute its findings for those of the trial court, it is never ***required*** to do so. To the contrary, the appellate court must give due respect to "the findings of the trial judge, who was in a better position to determine the credibility of the witnesses." *Id.*; *see also, Accord Crossland v. Crossland*, 408 S.C. 443, 452, 759 S.E.2d 419, 424 (2014) (reiterating the "sound principles underlying the proper review of an equity case," namely, "the superior position of the trial judge to determine credibility and the imposition of a burden on an appellant to satisfy the appellate court that the preponderance of the evidence is against the finding of the trial court").

II. THE TRIAL COURT CORRECTLY DETERMINED NOVEMBER 30, 2012 AS THE VALUATION DATE.

Judge Stillwell correctly determined a valuation date of November 30, 2012, because SWI properly exercised the Option with its letter of that date. The matter is not complicated.

The law in this state regarding the construction and interpretation of contracts is well settled. When it is perfectly plain and capable of legal construction, the language itself determines the full force and effect of the document. *Gilstrap v. Culpepper*, S.C., 320 S.E.2d 445 (1984); *Superior Auto Co. v. Maners*, 261 S.C. 257, 199 S.E.2d 719 (1973). Courts are without authority to alter a contract by construction or to make a new contract for the parties. *Id.* Their duty is limited to the interpretation of the contract made by the parties themselves. *Gilstrap*, *supra*, p. 447; *Blakely v. Rabon*, 266 S.C. 68, 73, 221 S.E.2d 767 (1976); *McPherson v. J.E. Sirrine & Co., et al*, 206 S.C. 183, 33 S.E.2d 501 (1945).

Where an option to purchase real property is exercised, the grantee is entitled to purchase the property at its appraised value as of the date of exercise. *Conner v. Alvarez*, 285 S.C. 97 (1985).

The language of the Option, Paragraph 2, entitled, "Exercise or Expiration of Option and Agreement" was very clear, "Grantee [SWI] shall exercise the Option, during the Option Term, if at all, by either (a) delivering in hand to Grantor [Landlord] written notice of such exercise, or (b) mailing such notice by registered mail or certified mail to Grantor at Grantor's notice address." (R. p. 333, ¶ 2). There was no condition precedent to SWI's exercise of the Option.[2] All that was required was for SWI to give written notice of its exercise of the Option to exercise the Option. *Id.* SWI did so. (R. pp. 353 - 354). Accordingly, SWI is entitled to a valuation date as of that time.

Importantly, Landlord used to agree with such an assertion. During trial and the Rule 59 motion hearing, counsel for Landlord consistently argued that SWI had exercised

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[2] "A condition precedent is an act which must occur before performance by the other party is due." *Wood v. Roy Lapidus, Inc.*, 413 N.E.2d 345, 348 n. 5 (1980).

its option with the November 30, 2012 written notice. [3] (R. p. 212, line 23 – p. 213, line 8; p. 413, lines 20 - 25). SWI's owner acknowledged the same. *Id.* Landlord cannot now complain of the exercise leading to a valuation date. *Morris v. Anderson County*, 349 S.C. 607, 564 S.E.2d 649 (2002) (It is well-settled that an appellant cannot change or add to the arguments he made at trial on appeal). Judge Stillwell, in observing the testimony and other evidence, clearly determined that the intent of SWI was to exercise the Option on November 30, 2012.

Conner v. Alvarez, *supra* is almost directly on point. In that case, as here, Conner was a tenant who had negotiated a purchase option with his landlord. There, as here, there were no conditions precedent to exercise the purchase option. There, as here, the purchase option also provided for a subsequent appraisal to determine the value of the property. Conner's attorney sent Alvarez, the landlord, a letter on February 2, 1979, stating that he intended to exercise his option to purchase the property. Subsequent litigation regarding a dispute between the parties over credit for previous rent payments against the purchase price delayed the consummation of the purchase option and final sale to Conner.

Nevertheless, the trial court held Conner had exercised his option as of the date of the February 2, 1979 letter and ordered that a retroactive appraisal be conducted to set the price of the property as of that date, and that Conner be allowed to purchase the property

[3] South Carolina officially recognized the doctrine of judicial estoppel in Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997). "Judicial estoppel precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation." Id. Landlord's initial brief is silent as to how she may argue the Option was exercised on November 30, 2012 at trial, sufficient to trigger deadlines "which have all passed" (R. p. 413, line 25), and yet now assert in its Initial Brief of Respondents-Appellants that the exercise of the Option was deficient.

at that retroactively determined price. The Supreme Court upheld the trial court's decision, affirming that Conner had validly exercised his purchase option on the date of his attorney's letter and was therefore entitled, even after all of the subsequent litigation, to purchase the property for its value as of that date.

Here, Judge Stillwell's order follows the same logic. Landlord has contended that SWI's exercise was somehow deficient because of the dispute regarding what portion of the property was involved in the Option. However, the November 30, 2012 letter, initially states unequivocally that, "Pursuant to the Option, particularly Section 2, Senor Wraps, Inc., hereby exercises its option to buy the subject property." (R. pp. 353 - 354). The letter is clearly relying on the Option's definition of subject property. Further, the letter clearly indicated SWI's ability and eagerness to move quickly to closing and to render the appropriate funds at that time. Subsequent litigation over the scope of the Option does not somehow negate SWI's exercise of the Option on that date. There has never been any dispute regarding SWI's right to purchase the Restaurant Space pursuant to the Option, only the Upstairs and crawl space.

III. LANDLORD'S ARGUMENTS ARE WITHOUT MERIT.

Landlord's arguments on appeal are without merit because they themselves seek to alter the terms of the Option, imposing responsibility for Landlord's refusal to comply with the Option's provisions upon SWI and distorting SWI's compliance with Judge Stillwell's August 5 Order.

"Contradicts" the Option

Landlord first seeks to equate the trial court's finding of a valuation date with some sort of "valuation process." (Initial Brief of Landlord, p. 3-4). Landlord admits

that SWI gave notice of its exercise of the Option on November 30, 2012, but then seeks to impose further conditions on SWI's exercise. *Id.* Such an effort ignores the plain language of Paragraph 2 of the Option, which only requires written notice to exercise the Option. (R. p. 333, ¶ 2). Landlord argues that the very plain language from other provisions governing the division of 10 South Main and providing for the completion of the purchase of the property **after the exercise** of the Option are somehow converted into requirements SWI must meet prior to obtaining a proper exercise. This argument is simply not supported by the language of the Option. That this is the case is perhaps best demonstrated by what is **not** included in Landlord's argument, the actual language of the Option governing exercise, Paragraph 2, which simply requires written notice. *Id.*

"Defective" attempts to exercise the Option

Landlord next outright distorts SWI's efforts to comply with Judge Stillwell's August 5 Order. Landlord misleadingly asserts that SWI continued to "contest the scope of realty to which the Option applies" by tendering a second, precautionary notice of exercise of the Option stating, "**Pursuant to the Option, and Judge Stillwell's Trial Order, Señor Wraps, Inc., hereby exercises its Option to buy all the Property.**" (R. p. 420)(emphasis in original). Landlord argues that SWI thought it could ignore Judge Stillwell's order and continue to try to purchase the Upstairs somehow. Setting aside the obvious absurdity of such an attempt, nothing could be further from the truth. And one need look no further than the language of the August 5 Order and the Option itself to see why SWI phrased its statement the way it did.

The August 5 Order very clearly states that the Option's definition of the "Property" includes "only the first floor/leasehold space at 10 S. Main Street." (R. p. 10).

This, in turn, must be read in conjunction with the language of Paragraph 2 of the Option which states, "[t]he Option shall not be divisible, which is to say that the Option must be exercised as to **all of the Property**, or not at all." (R. p. 333, ¶2).

Clearly, SWI was making a good faith effort to abide by the findings of Judge Stillwell as to the definition of the "Property" under the Option, while also abiding by the other requirements of the Option to purchase "all the Property." Landlord's attempt to twist SWI's good faith effort to her own benefit says more about the quality of her arguments than it does anything else.

"Failure" to timely deliver the condominium master deed

If possible, Landlord's next argument is even worse. Landlord asserts that SWI "failed to comply with the terms of the Option requiring it to provide condominium documents within forty-five (45) days following Option exercise." (Appl. Br. P. 5). This blatantly ignores Landlord's own responsibilities under the Option.

The Option requires that "[t]he condominium master deed shall be prepared by an attorney **approved by the Grantor**, and the master deed itself shall be subject to complete review and **approval of Grantor**." (R. p. 333, ¶ 3). The undisputed testimony from the trial was that Landlord never responded to SWI with her choice of approved attorney. (R. p. 182, lines 17-25; p. 217, line 2; p. 218, line 11; pp. 353-354). Mr. Montalvo, SWI's owner, was very clear that he was ready to move forward to complete the purchase, but that the reason he was unable to provide the condominium documents was because he could not obtain the cooperation of Landlord. *Id.*

There exists in every contract an implied covenant of good faith and fair dealing. *Williams v. Riedman*, 339 S.C. 251, 267 (Ct. App. 2000)(citing *Commercial Credit Corp.*

v. Nelson Motors, Inc., 247 S.C. 360, 366–67 (1966)). Clearly, Landlord, in her failure to designate her choice for the attorney to prepare the condominium master deed as required by the Option, failed to meet her obligation to operate in good faith to allow for the execution of the Option.

"Failure" to supply a mutually acceptable appraiser

Landlord next "doubles down" on her attempt to foist her responsibilities under the Option onto SWI. Landlord argues that the parties had to have agreed upon an appraiser before a valuation date would be triggered.

Setting aside the obvious problem that such a requirement for a valuation date is nowhere to be found in the Option, Landlord nevertheless again shows how she failed to live up to her duty to act in good faith. *Williams v. Riedman, supra.* Landlord states that, "[i]t would be impossible for the appraisal to proceed without first defining the condominium to be bought." (Ini. Brf. of Resp.-Appl., p. 6). Here again, Landlord refuses to acknowledge that it was her responsibility to designate an attorney to prepare the condominium master deed, or that she was required to mutually agree to an appraiser.[4]

"Contradicts" controlling equitable principles

Lastly, Landlord argues that all of the blame for the failure to conclude the Option should be placed upon SWI, and that equitable principles demand that she be allowed to

[4] To the extent that Landlord seeks to introduce new evidence into the Record on Appeal, such as Landlord's designation of an Appraisal [sic] Engagement Letter of May 13, 2015, SWI objects to the inclusion of any such new evidence or any arguments derived therefrom on the basis that such was not part of the record in the court below, and as such is not appropriate for inclusion in the Record on Appeal. *Morris v. Anderson County, supra.*

reap the benefits of "several years' worth of real property appreciation." (Ini. Brf. of Resp.-Appl., p. 6)

In foregoing a discussion of the proper standard of review, such a weak argument is perhaps inevitable. As discussed above, in that the substance of this action is the interpretation of a contract, the Option, this is an action in law. *Barnacle Broad., Inc., v. Baker Broad., Inc. supra.* Landlord complains that SWI failed to specifically perform in that it failed to supply the condominium documents and a mutually agreed upon appraiser. For the reasons discussed above, such facts do not constitute red in SWI's ledger, but rather the Landlord's, and are therefore not inequitable to the Landlord. Landlord also fails to point to any precedent or facts, aside from bare assertion, that SWI's reasonable efforts during the litigation constitute inequitable conduct.

CONCLUSION

For the reason set forth above, SWI asks this Court to affirm the judgment of the trial court that SWI properly exercised the Option on November 30, 2012, and is therefore entitled to a valuation as of that date.

Respectfully submitted,

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CEFTIFICATE OF COMPLIANCE

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

Respectfully submitted,

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PROOF OF SERVICE

The undersigned does hereby certify, this 6 day of November, 2015, that service of the FINAL BRIEF OF RESPONDENT was made on all counsel of record, specified below, by mailing a copy of the same by United States Mail, postage prepaid, to the following addresses:

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