THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Marvin H. Dukes, III, Master in Equity,
Beaufort County Special Court Judge

Case No. 2013-CP-07-2262
Court of Appeals Number:
2015 - 00592

Spanish Wells Investments, LLC,

Respondent,

v.

Greg Luckenbill and Evelyn Luckenbill,

Appellants.

FINAL BRIEF OF RESPONDENT

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I. Did the Trial Court properly find that in order for the Purchasers to terminate the Contract, they must first send a notice of default and provide ten (10) business days to cure any breach?

II. Did the Trial Court properly find that the Purchasers did not comply with the notice of default provisions of the Contract?

III. Did the Trial Court properly find the Purchasers breached the terms of the Contract by failing to close?

STATEMENT OF THE CASE

This is a dispute over the sale of a vacant lot on Hilton Head Island that was initiated by the Respondent, Spanish Wells Investments, LLC ("Seller"), against the Appellants, Greg Luckenbill and Evelyn Luckenbill ("Purchasers"), on September 4, 2013. Pursuant to a November 13, 2013 Consent Order allowing the amendment of the Complaint, the Seller filed an Amended Complaint on November 18, 2013 asserting Purchasers breached the terms and provisions of the written Contract for the purchase of the property and seeking damages allowed under South Carolina law. The Purchasers timely filed an Answer and Counterclaim, dated September 23, 2013, generally denying the allegations of the Seller's Complaint, and asserting Seller breached the terms of the Contract and requesting a refund of their earnest money deposit.

The case was referred with finality to Marvin H. Dukes, III, the Beaufort County Master in Equity. The matter was heard before Judge Dukes on Tuesday, November 25, 2014. The Trial Court issued an Order, dated February 16, 2015, ruling in favor of the Seller and awarding a judgment for breach of the Contract against the Purchasers for failing to close the transaction in the amount of $29,947.74. The Court also ordered that the real estate agent holding the $1,000 earnest money deposit to pay same to the Seller.

The Purchasers thereafter filed a Notice of Appeal on March 9, 2015.

STANDARD OF REVIEW

This matter was heard by the Beaufort County Master-in-Equity pursuant to an Order of Reference with finality. An action for breach of contract is an action at law. *Consignment Sales, LLC v. Tucker Oil Company*, 391 S.C. 266, 705 S.E.2d 73 (2010). This Court cannot disturb the trial court's findings of fact unless no evidence reasonably supports its findings. *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). The appellate court can correct errors of law. *Okatie River, L.L.C. v. Southeastern Site Prep, L.L.C.*, 353 S.C. 327, 334, 577 S.E.2d 468, 472 (Ct.App. 2003).

STATEMENT OF FACTS

The parties entered into a written Contract of Sale ("Contract") for Lot 10, Otter Road, a vacant lot in Sea Pines, Hilton Head Island, at a price of $100,000. (R. pp. 55 – 60, P. Ex. 3) Purchasers were to pay the escrow agent $1,000 as an earnest money deposit upon the execution of the Contract and an additional $4,000 twenty-one (21) days after the Contract was accepted on April 18, 2013[1]. It is undisputed that this was a "short sale" transaction, in which the lender of the Seller had to approve the sale of the property for $100,000, which was less than the total mortgage debt. (R. p. 293, lines 14 – 21; R. pp. 55 – 60, Ex. 3, § 6; R. p. 75, P. Ex. 7) Under Section 7 of the Contract, the closing date was June 17, 2013. There was no provision in the Contract that provided time was of the essence.

[1] Only $1,000 was paid as earnest money by the Purchasers. The remaining $4,000 was never paid. (R. p. 293, line 25 to p. 295, line 5)

Section 9 of the Contract contained specific language dealing with a breach and the available remedies of the parties. Upon either party failing to comply with the Contract in a timely manner, the non-defaulting party was required to send a notice of default and provide ten (10) business days (i.e., two weeks) to cure said default. Thereafter, if the breach was not cured, the non-defaulting party could proceed with any and all right and remedies allowed in law or equity against the defaulting party. Said language reads as follows from Section 9:

> Upon the failure of either party to comply with the terms hereof within the stipulated time, and after notice of said default is provided per the provisions of Paragraph 15 below, with a ten (10) business day right to cure, it is understood and agreed by and between the parties hereto that either party may proceed with all rights and remedies at law or in equity against the defaulting party. In the case of a Purchaser default, the Seller may elect, in lieu of all other remedies, the forfeiture of the Deposit as liquidated and agreed upon damages.

The Seller was not able to obtain short sale approval from Wells Fargo, as set forth under Section 6 of the Contract, prior to the closing date of June 17, 2013. On the following day, the Purchasers submitted a written offer to purchase a home on Lot 20, Otter Road, a completed residence in the same neighborhood as the subject property, at a price of $287,000 (R. p. 310, line 25 to line 31, P. Ex. 26 (R. p. 108); P. Ex. 27 (R. p. 109); P. Ex. 32 (R. pp. 115 – 116); P. Ex. 34 (R. pp. 118 – 131)). This offer was accepted by the owners of said property on June 20, 2013 at a final agreed price of $305,000 (R. p. 312, lines 24 – 4; P. Ex. 39 (R. pp. 138 – 144)).

On June 19, 2013, representatives of the Purchasers e-mailed the Seller's attorney and advised their clients had decided to go in another direction, and wanted to know if the parties could mutually agree on a termination (Tr. p. 132, P. Ex. 35). Said e-mail, in its entirety, reads as follows:

Hello –

> I've spoken with my clients and their realtor this morning, and since we've passed the contract closing date on this property, my clients would like to terminate their purchase of this property. They've indicated they have decided to go in another direction, **so I wanted to inquire if we could mutually agree on this termination**.
>
> After you've had a chance to discuss with Russell, please let me know. (emphasis added)

On the same day, Seller's counsel responded and notified the Purchasers that the Seller did not agree to terminate the Contract and that his clients fully intended to close under the terms of the Contract (R. p. 266 lines 2 – 18; Tr. p. 133, P. Ex. 36).

Thereafter, on July 12, 2013, Wells Fargo issued its short sale approval letter. (R. p. 269 lines 20 to line 4; R. pp. 154 - 161, P. Ex. 47). When the Purchasers indicated they did not intend to close, the Seller on July 15, 2013 sent the required notice of default with ten (10) business day right to cure to Purchasers' legal representative (R. p. 269, lines 8 – 11; R. p. 162, P. Ex. 48). On July 25, 2013, the Purchasers closed on the Lot 20 Otter Road residence (R. p. 314, line 3 to p. 315, line 5; Tr. pp. 173 – 177, P. Ex. 53). On July 30, 2013, the Seller notified the Purchasers that since they had not cured the default by closing on Lot 10, Otter Road, the Seller had elected to terminate the Contract and pursue its legal remedies (R. p. 193, P. Ex. 55).

The Seller thereafter timely re-listed Lot 10, Otter Road and was able to sell same to a third party on May 30, 2014 for a price of $92,000 (R. p. 274, lines 8 to 17; R. p. 275, lines 5 – 14; R. pp. 211 - 216, P. Ex. 63; R. pp. 221 – 226, P. Ex. 65).

LEGAL ARGUMENT

I. The Trial Court properly found that in order for the Purchasers to terminate the Contract, they must first send a notice of default and provide ten (10) business days to cure any breach.

The Contract between the parties expressly provided for the remedies available as to any breach. Section 9 of the Contract clearly required that if either party failed to comply with the terms of the Contract within the allotted time, notice of default and a ten (10) business day right to cure written notice was required to be given. Thereafter, if the breach was not cured, then and only then could a party proceed with any and all rights available in law or in equity against the defaulting party. Clearly the remedy sought by the Purchasers of termination or rescission of the Contract and a refund of the earnest money deposit is an equitable remedy.

Both parties stipulated at trial the above language was unambiguous. (R. p 284, line 24 to p. 285, line 14). "When a contract is unambiguous, clear and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary and popular sense." *C.A.N. Enterprises, Inc. v. South Carolina Health and Human Services Finance Com'n*, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988). The Trial Court correctly held that this clear, unambiguous language required the Purchasers to send a notice of default with a ten (10) business day right to cure period prior to having available the equitable remedy of termination or rescission of the Contract based on the Seller failing to close on the Contract closing date of June 17, 2013.

Our courts have consistently recognized that where the parties set forth specific requirements for the termination of a contract, they will be enforced by the Court. In *Biber v. Dillingham*, 111 S.C. 502, 98 S.E. 798 (1919), the court enforced the remedy language in the

parties' lease as to thirty (30) day notification prior to termination. "As the parties in this case have entered into a contract as to the time and mode of terminating the tenancy, their rights are to be determined by the fair construction of that contract, and not by the technical rules which apply to the termination of a tenancy at will where there is no contract on the subject." *Id.*, at p. 799. The same result was reached in *Litchfield Company of South Carolina, Inc. v. Kiriakides*, 290 S.C. 220, 349 S.E.2d 344 (1986), in which there was a landlord-tenant dispute as to the payment of taxes on an adjoining parking lot. The Court found that the landlord could not terminate the lease because it could not prove it had properly given the mandatory notice of default and ten (10) day right to cure letter expressly agreed to by the parties in the lease, citing *Biber*. The same principles were applied by the Court in *McNair v. United Energy Distributors*, 390 S.C. 44, 699 S.E.2d 723 (2010).

In the subject case, the parties clearly required a notice of default and ten (10) business day right to cure period before either party could exercise any legal or equity remedies, which obviously include termination or rescission of the Contract, as sought by the Purchasers.

The Purchasers cite no legal authority for the proposition that such language can be simply ignored and that it has the right to terminate the Contract on the day after the closing date, or even some reasonable time thereafter. That is simply not the law in our State and the Trial Court correctly held the Purchasers must comply with the Contract in order to terminate same.

II. The Trial Court properly found that the Purchasers did not comply with the required notice of default provisions of the Contract.

The Trial Court properly found that the Purchasers did not comply with Section 9 of the Contact requiring a notice of default and ten (10) business days to cure prior to being able to terminate the Contract. The only evidence put forth by the Purchasers as to the compliance with

said provision is a June 19, 2013 e-mail (R. p. 132, P. Ex. 35). Said email clearly does not comply with the requirements of Section 9 of the Contract. It reads as follows:

> Hello –
>
> I've spoken with my clients and their realtor this morning, and since we've passed the contract closing date on this property, my clients would like to terminate their purchase of this property. They've indicated they have decided to go in another direction, **so I wanted to inquire if we could mutually agree on this termination**.
>
> After you've had a chance to discuss with Russell, please let me know. (emphasis added)

The Purchasers candidly admitted at trial and in their Brief that said notice does not contain or provide the required ten (10) business day right to cure period. (R. p. 257, lines 1 – 10; Appellant's Brief, p. 17 – "The email did not include the specific right to cure language but met the spirit of the requirement in the Contract"). No case law is cited by Purchasers in support of their position that this Court can simply ignore the requirements of a written agreement. Further, the e-mail does not even terminate the Contract, as it asks if the parties want to mutually agree on termination. The Trial Court properly found that the Purchasers did not comply with Section 9 of the Contract and did not, nor could they lawfully, terminate the Contract.

It also cannot be ignored the Purchasers had no intention in complying with the Contract's notice of default and right to cure provision as they knew the Seller would timely cure any breach upon receipt of said notice. Two e-mails of June 20, 2013 between the Purchasers, their realtor, David Bragg, and William Clark, their closing attorney, make this abundantly clear.

On June 20, 2013 at 12:36 p.m., three (3) days after the Contract closing date, Darcie Whitney, the Purchasers' real estate closing paralegal, wrote David Bragg and William Clark the following e-mail (R. p. 145, P. Ex. 40) as to the notice of default:

> Now, if we serve him with default today, that means we're saying, 'we're ready to close', but we're not; and we don't want to anymore. And that will give him 10 days to get his approval letter, which I'm sure he'll have it by then. Then he'll be in a position to hold us in default. And our construction loan is not happening now, so the Luckenbill's couldn't close at that point – unless they paid cash. At the point the earnest money – all $5k – goes to them, and then.....they could sue for non-performance.

Later that day, at 4:06 p.m., David Bragg, the Purchasers' realtor, in an email (R. p. 148, P. Ex. 42) responds to William Clark, the Purchasers' closing attorney, directing his office not to send the notice of default and right to cure notice.

> Hi Bill, thanks for getting back to us. We are on hold until you can advise us (Greg & Evelyn Luckenbill). Evelyn has left you a voicemail also, fyi. I asked Darcie yesterday not to send a right to cure because we believe the seller (Russell) can come up with the deficiency note from Wells Fargo in that 10 day time but the purchaser is no longer interested.

Thus, this is not a situation where the Purchasers or their closing counsel simply overlooked or misconstrued the requirement to send the notice of default in the Contract – the Purchasers deliberately elected not to do so. Having elected to proceed down the road of deliberately not complying with the Contract, they cannot now be heard to complain as to their final destination of being found in breach of the Contract.

III. The Trial Court properly found the Purchasers breached the terms of the Contract by failing to close.

It appears Purchasers are asserting on appeal that the Trial Court should have found they did not breach the Contract since they were not given reasonable time to close or that it was impossible for them to close. Each position is discussed below.

a. Purchasers were given reasonable time to close.

Since the Contract did not provide time was of the essence, the law implies that a contract is to be performed within a reasonable period of time under the facts and circumstances. *Faulkner v. Millar*, 319 S.C. 216, 460 S.E.2d 378 (1995). The stated closing date under the Contract was June 17, 2013 (R. pp. 55 - 60, P. Ex. 3, § 7). The short sale approval letter was obtained by Seller on July 12, 2013 (R. pp. 154 - 161, P. Ex. 47). When it became apparent the Purchasers did not intend to close, Seller sent the required notice of default letter with the ten (10) business day right to cure period. Purchaser thus had two (2) weeks, or until July 29, 2015, to close. Purchasers never attempted to close, having signed a contract of sale on a home on Lot 20 Otter Road on June 20, 2013 (R. pp. 138 – 144, P. Ex. 39). In fact, Purchasers advised the Seller on July 16, 2013 they were not going to close (R. p. 170, P. Ex. 51). There was no request for additional time to get appraisals, title work, etc. The parties agreed in the Contract as to the right to cure period, and said the period should be enforced. Any argument by Purchasers it needed more time to close is disingenuous at best.

b. The Defense of impossibility is not available nor proven by Purchasers.

The Purchasers assert in their Brief (pp. 13 – 14) that because of the delay in obtaining the short sale approval letter it was impossible for them to close within the ten (10) business days after the Seller sent its notice of default and right to cure on July 15, 2013 (R. p. 162, P. Ex. 48). In essence, Purchasers are asserting impossibility as a defense. Impossibility was not raised as an affirmative defense and is not available to Purchasers on appeal since it was not raised in their pleadings. *Strickland v. Strickland*, 375 S.C. 76, 375 S.E.2d 486 (Ct.App. 2006); 17A *Am.Jur.* 2d Contracts § 667. In addition, such an argument is not supported by the facts in this case. "A party to a contract must perform its obligations under the contract unless its performance is

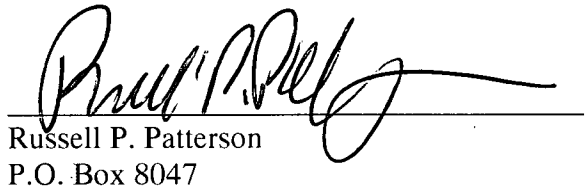
rendered impossible by an act of God, the law, or by a third party." *Hawkins v. Greenwood Development Corporation*, 328 S.C. 585, 593, 493 S.E.2d 875, 880 (1998). Impossibility must be real and not a mere inconvenience. 17A Am.Jur.2d *Contracts* § 673, at 681 (1991). "A party to a contract cannot be excused from performance on the theory of impossibility of performance unless it is made to appear that the thing to be done cannot by any means be accomplished, for if it is only improbable or out of the power of the obligor, it is not deemed in law impossible." Id.

It is clear that the Purchasers did not close because they elected to purchase another property in the same neighborhood. On June 18, 2013, the day after the contract closing date, they submitted a written offer on 20 Otter Road (R. p. 308, line 18 to p. 309, line 4; R. pp. 118 - 131, P. Ex. 34). A binding contract on said home was reached on June 20, 2013 for $305,000 (R. p. 312, lines 24 – 4; R. pp. 138 – 144, P. Ex. 39). They closed on this property on July 25, 2013, a mere ten (10) calendar days after the Seller sent its notice of default (R. p. 314, line 3 to p. 315, line 5; R. pp. 173 - 177, P. Ex. 53). The failure of the Purchasers to close had absolutely nothing to do with any timing issues as to appraisals, construction contracts, title searches, all of which were within the sole control of Purchasers, but had everything to do with their decision to buy a different piece of property. While they certainly were free to exercise their discretion to buy another piece of property, it is not a defense to their legal obligations to close under the Contract for the subject property. In addition, the Purchasers admitted at trial they could have closed on the property as a straight lot purchase, with no construction loan, (R. p. 315 line 1 to p. 316, line 15), or even just paid cash. (R. p. 306, line 10 to p. 307, line 18). There is simply no evidence of impossibility, even if such a defense were available.

CONCLUSION

This is a simple, straightforward breach of contract case. The Contract clearly set forth a requirement for a non-defaulting party to send a notice of default and provide a ten (10) business day right to cure period prior to invoking any legal or equitable remedies. The Purchasers intentionally ignored the Contract requirements and thus the remedy of termination is not available. The Seller did follow the terms of the Contract and provide the required notice of default and ten (10) day right to cure and terminate the Contract. The Purchasers simply made a business decision to buy a completed home. The Trial Court properly enforced the Contract terms under South Carolina law.

RUSSELL P. PATTERSON, P.A.



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January 16, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Master-in-Equity and
Beaufort County Special Court Judge

Case No. 2013-CP-07-2262
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RULE 211(b) CERTIFICATE

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Counsel for the Respondent, Spanish Wells Investments, LLC, hereby certifies that the Final Brief of Respondent complies with Rule 211(b), SCACR.

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January 21, 2016

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
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PROOF OF SERVICE

I certify that I have served three (3) copies of the Final Brief of Respondent, on the Appellants, Greg Luckenbill and Evelyn Luckenbill, by depositing said copies of it in the United States Mail, postage prepaid, on January 22, 2016, addressed to their attorney of record, as follows:

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