THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT
APPEAL FROM HORRY COUNTY
Court of Common Pleas

Steven H. John, Circuit Court Judge
Appellate Case No.: 2011-182306

Opinion No. 5006 - Filed September 5, 2012

James D. Broach and Mark J. Loomis,

~~Respondents,~~ Petitioners

v.

Eugene E. Carter, Advantage Real Estate, Inc., SilverDeer, LLC, Paradise Grande, LLC d/b/a The Horizon at 77th, Howard Jacobson

Defendants.

Of whom

Howard Jacobson is,

~~Appellant.~~ Respondent.

Of whom

~~James D. Broach and Mark J. Loomis are~~

~~Petitioners~~

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for the Petitioner certifies that the Petition for Rehearing was made and finally ruled upon by the Court of Appeals on September 5, 2012.

QUESTIONS PRESENTED

I DID THE COURT OF APPEALS ERR IN REVERSING THE JURY VERDICT BY HOLDING THAT THE APPELLANT WAS JUSTIFIED IN PROCURING THE BREACH OF RESPONDENTS' CONTRACTS?

II. DID THE COURT OF APPEALS ERR IN REVERSING THE JURY'S AWARD OF PUNITIVE DAMAGES?

STATEMENT OF THE CASE

A. Introduction:

In this case, two real estate agents worked for over two years to get pre-sales and close contracts for the developer at a condominium project in Myrtle Beach. Unknown to the agents, the developer entered an agreement with the construction lender and the broker to defer the agent's commissions until after full repayment of the construction loan of some 38 million dollars. Even though many units closed, the agents were never paid. The agents brought this action for their unpaid commissions.

B. Procedural History:

On November 19, 2008, Respondents Broach and Loomis filed their original Complaint. On February 23, 2009, Paradise Grande filed its Answer. On April 1, 2009, Mr. Carter and Advantage Real Estate filed their Answers. On September 14, 2009, Respondents Broach and Loomis filed their Amended Summons and Complaint. On September 16, 2009, Mr. Carter and Advantage Real Estate filed their Answers to Amended Complaint. Appellant Paradise Grande filed its Answer to Plaintiffs' Amended

Complaint on October 12, 2009. On October 23, 2009, Howard Jacobson, hereinafter "Appellant Jacobson," filed his Answer to the Amended Complaint.

A jury trial in this matter took place from November 29, 2010 through December 2, 2010. The jury's verdict was rendered and a "Form 4 Judgment in a Civil Case" was filed on December 2, 2010. The jury found that Advantage Real Estate and Mr. Carter breached the Independent Contractor Agreements with Respondents. The jury determined Paradise Grand was not liable for tortious interference. The jury did find that Appellant Jacobson was liable for tortious interference and awarded actual damages in the amount of $50,000.00 and punitive damages in the amount of $50,000.00. Appellant Jacobson's Notice of Appeal was timely filed on January 7, 2011. This matter was argued before the Court of Appeals and the Court reversed the jury verdict, holding that Jacobson was justified in procuring the breach of the agents' contracts. The Respondents timely filed a Petition for Rehearing. The Petition was granted. The Court of Appeals revised its earlier opinion, with the same results.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN REVERSING THE JURY VERDICT BY HOLDING THAT THE APPELLANT WAS JUSTIFIED IN PROCURING THE BREACH OF RESPONDENTS' CONTRACTS.

1. Standard of Review:

In an action at law tried by a jury, the jurisdiction of the Appeals Court extends merely to correction of errors of law and the factual finding of the jury will not be disturbed unless a review of the record discloses that there is no evidence that reasonably supports the jury's findings. Townes Associates, Ltd. v. City of Greenville, 266 S.C.81, 221 S.E.2d 773 (1976).

2. Elements of Cause of Action:

The elements of a cause of action for tortious interference with contract are as follows:

a. The existence of a contract;

b. Defendants' knowledge of the contract;

c. Defendants' intent in procuring its breach;

d. Absence of justification;

e. Resulting damages.

Eldeco, Inc. v. Charleston County School District, 372 S.C. 470, 642 S.E.2d 726 (S.C. 2007). The Court of Appeals agreed that the Respondents had proved all the elements, except "d. absence of justification."

The Court of Appeals agreed that there was sufficient evidence of a contract. The Court also agreed that Jacobson knew about the contracts and that he intentionally procured the breach. The Court of Appeals disagreed with the Jury's finding that the procurement of the breach was not justified, holding that "the evidence in the record establishes only that Jacobson was justified" in procuring the breach.

There is no dispute that a contract existed between Respondents Broach and Loomis and the broker. This contract was entered into evidence as Plaintiffs' Exhibit No. 1 without objection. (R.pp. 14, 321-23) Broach testified that he understood he would be paid at closing and that there was nothing in his Independent Contractor and Broker Agreement which indicated to him that he might not get paid at closing. (R.p. 149, lines 8-24; p. 197, lines 18-24) Broach testified that he had a good faith belief that he would be paid at closing. (R.p. 150, lines 2-8)

The broker and developer had entered into an initial Sales and Marketing

Agreement which stated that his agents would get paid at closing. (R.p. 79, lines 1-7, p. 324-29) Mr. Carter confirms that this first Agreement provided for his agents to be paid at closing. (R.p. 79, lines 9-19) This first Marketing Agreement remained in effect from September 28, 2005 until the second Marketing Agreement was executed on October 24, 2006. (R.p. 93, line 13). The Court of Appeals states that the First Agreement was terminated. The facts and circumstances, however, suggest that there was always a continuous and seemless relationship between the broker and the developer. There is no letter or notice of termination. The Second Agreement is simply a modification of the First.

The second Marketing Agreement was entered into evidence as Plaintiff's Exhibit 4. (R.p. 93, lines 2-14) The second Marketing Agreement between the broker and developer purported to change the terms so that the agents of the broker would not be paid until the bank's construction loan of about 38 million dollars had been paid in full. (R.p. 93, lines 15-25; p. 128, lines 7-15; See paragraph 3.b)2) at R.p. 332) Neither Broach nor Loomis were a party to the first or second Marketing Agreement. (R.p. 80, lines 8-14) They were not made aware of these material changes until shortly before the first closings in 2008. (R.p. 90, lines 18-24)

The Court of Appeals agreed with the jury that there is ample evidence in the record that the Appellant Jacobson had knowledge of the contractual relationship between the broker and Respondents. Jacobson knew that the broker had a number of agents working for him and that these agents fully expected to be paid under the first Marketing Agreement.

Plaintiffs' Exhibit 3 is an email from Howard Jacobson to Gene Carter of October 19, 2006 explaining why the first Marketing Agreement should be replaced with the

second Marketing Agreement. (R.pp. 87-89, p. 330) The email shows that Jacobson knew about the agents and their expectations. The Agreement states, in part, as follows:

> I must say that this Agreement does not address my biggest remaining concern – that your team stops pushing Paradise Grande. They have worked hard, no doubt. They have been vital to what we have achieved so far, but my investors and I are still significantly at risk in this project. We need to sell at least another $7M of units to get my investors out. If we fail in this, I will have serious problems. I need to know that your team (I don't really worry about you) will ensure [sic] that not just they are compensated, but that I and my investors too get some profit out of this deal. Ideally, I would structure some holdback of commission if we don't achieve certain sales levels. Help me figure out how to make sure that I don't get left holding the hardest to sell units with no one helping me sell them.

This email from Howard Jacobson shows that Jacobson understood that the broker had employed agents to work hard to market and sell units at The Horizon (Paradise Grande). The Agreement refers to these agents as "your team." The email indicates Jacobson's concern that the "team" might stop pushing the units at Paradise Grande. The implication of these words is simple: if the agents are informed about the change in the timing of their commission, then there is a risk that they might switch their efforts to selling units at other resorts. Why would they wait to receive their commissions at Paradise Grande when they could sell condominium units at some other resort and get paid at closing? Jacobson is keenly aware of this problem and the jury could conclude that a fair reading of the email would be the underlying statement of Jacobson to this effect, "Don't tell your agents that I have interfered with their contract because then they will lose interest in Paradise Grande." Carter admits that he did not tell the agents about the email or the material change in the timing of the payment of their earned commissions. (R.p. 90, lines 18-21; p. 93, lines 17-25; p. 94, lines 1-5; p. 159, lines 2-12, 25; p. 160, lines 1-18)

This e-mail underscores the lack of justification for interfering with the Appellant's right to receive a commission at closing. The only way for the developer to get construction financing was to sacrifice the agent's commissions and the only way to close the sales was to keep the agents in the dark. Getting pre-sales was only part of the agent's job. At the time of the second Marketing Agreement, the construction had not even begun. There was a lot of work left to do in order to bring these pre-sales to closing. Most of the agents' work lay ahead of them. But now, unknown to them, they would not be paid at closing. They would be paid only after the bank's loan had been repaid in full, which has not and will not ever happen. The economy has proven what the developer should have anticipated, that the developer was undercapitalized and had no right to capitalize the project on the agent's commissions. Such actions were completely unjustified.

Jacobson argues that his actions were justified because if he had not capitalized the project on the agent's commissions then the project would have never been built and no one would get paid. Wrong. He fails to acknowledge that the agents continued to work on the project, getting more pre-sales, replacing pre-sales and obtaining firm contracts for another 18 months during construction. The best option for the agents was for the building not to be built. Then the agents would have lost only the minimal effort put into pre-sales. They could have devoted their time to other projects or other real estate sales. Instead, they lost 18 months of hard work. While Jacobson may think this is justified, the agents certainly do not and the jury agreed.

The Court of Appeals agreed that Jacobson intended to procure the breach of the contractual relationship between the broker and its agents by subordinating the agents' commissions to the construction loan agreement. That intent is clear from the second

Marketing Agreement (Plaintiffs' Exhibit 4) and from Jacobson's email of October 19, 2006 (Plaintiffs' Exhibit 3). Jacobson is adamant throughout his testimony that the only way for the project to proceed forward was to agree to the lender's term to subordinate and defer the agent's commissions. (See e.g. R.pp. 134-35) The only way to accomplish that was to interfere with the previously existing contractual relationship that called for the agent's commissions to be paid at closing.

In the case of Keels v. Powell, 34 S.E.2d 482 (S.C. 1945), the Supreme Court of South Carolina touched upon the issue of what is justified and not justified. In that case, the Plaintiff (an attorney) had entered into an attorney/client relationship with a person who was injured at a railway crossing. The attorney had entered into a contract to receive a contingent fee of 1/3 on any settlement reached with the Defendant railroad company. With knowledge of this contract, the railroad company settled the injured person's claim directly with the injured person and bypassed the attorney. The attorney then sued the railroad for intentional interference with contractual relations claiming that the railroad company owed him 1/3 of the settlement amount. The Supreme Court affirmed the Order of the Trial Court overruling the Defendant's demurrer, essentially holding that the railroad company's action was not justified. The court stated as follows, "The general tenor of the authorities on the point is to the effect that to give rise to a cause of action of this character the interference must have been willful and unjustified. A fair construction of the allegations of the Complaint, in the light of this generally accepted doctrine, constrains me to say that the Complaint states such a cause of action." 34 S.E. 2d at 484.

In Keels, the attorney was entitled to be compensated on a commission basis upon the settlement of the lawsuit. Similar to the present case, the Defendant in Keels intentionally interfered with that contract and bypassed the commission due to the

attorneys. Arguably, such an interference would be for the benefit of the railroad as well as for the benefit of the third party who was injured because the third party would not have to pay an attorney's fee. Similarly, in our case, the bank entered into a direct agreement with the developer whereby the bank could avoid commissions owed to the agents who assisted in procuring the sales and closings of the properties. In Keels, the railroad could certainly have argued that such an action was justified because it saved money for the railroad and saved money for the injured party. The railroad also could have argued that a settlement might not have been reached at all if the injured party had been faced with the prospect of paying 1/3 of the recovery to his attorney. The present case is even more compelling than the Keels case in that arguably the attorney in the Keels case did little or no work to consummate the settlement, while in the present case, the agents worked diligently toward closing and in fact accomplished many closings for the benefit of the bank and the developer. Therefore, in the present case, the actions of the Defendant are even more unjustified than the actions of the railroad company in the Keels case.

It is not justification simply to say that it was advantageous to the person procuring the breach. The jury could certainly conclude from the evidence that the Respondent's actions were not justified in the eyes of the agents. One could imagine the scenario where the developer and the broker approached the agents directly and informed them of the demands of the bank. If the agents then agreed to a change in the relationship, then the change could possibly be said to have been justified.

Under the facts of this case, however, the change was made in secret and without any notification to the agents. The fair implication of Jacobson's email of October 19, 2006 is that, if the agents learn about this change they will no longer be motivated to sell

units at this project. Therefore, not only was there no justification, there is a sense of covertness and secrecy to the change. The Appellant very much needed for the agents to continue to work hard and to achieve closings for which they might not ever get paid. Respondent Jacobson insists that he did not instruct the Broker to keep the agents from knowing about this material change. (R.p. 139, lines 11-14) Whether he did or not does not change the fact that he interfered with the agents' contract. Their contract calls for them to be paid at closing, when the commission is "earned." The Appellant intentionally interfered with this material provision in the agents' contract by insisting on a modification in the Marketing Agreement.

The Appellant argues that the change in commissions was justified because the bank was demanding it and the construction loan would not have been approved without it and the project would not have been built. The jury apparently rejected this argument and with good reason. It is as if the developer were saying, "We are about to materially change the timing of your commission payments, but this is for your own good, even though we are not going to tell you about it, because you might not think it is for your own good." The jury rightly rejected the absurdity of this argument.

It should also be noted that absence of justification does not equate to "malicious intent." The court in Eldeco, Inc., supra,n.5, noted as follows:

> The concept of "intent to harm" is analogous to the concept of "malicious intent," which courts have previously interjected into the analysis of claims for intentional interference with contractual relations and intentional interference with prospective contractual relations. However, consideration of these concepts in this context is often an error, due in large part to the historical use of the term "malicious" to describe the idea that the intent must generally be improper in some way. Therefore, as modern courts have addressed these causes of action, the distorted notion of "malicious intent" has been removed, and the elements of these torts have been clarified as specifically requiring the intent to interfere for an improper purpose rather than a motive generally grounded in some sort of

spite or ill will towards the Plaintiff.

Therefore, the absence of justification is more properly equated to improper purpose rather than some level of malice. There is evidence of improper purpose on the part of the Appellant. The Appellants' purpose was to attempt to obtain the construction financing loan by sacrificing the agent's commissions. The evidence also shows the improper purpose of continuing to have the agents believe that they would be paid at closing so that they would continue to work hard on these units. The improper purpose of the interference with this contract is to bargain for the construction loan by using the value of the agent's commissions as an incentive for the bank to give the loan. In essence, the developer was attempting to capitalize the project using the earned commissions of the agents who were working hard to make the project work. The value of the agent's commissions is simply not something that belongs to the developer and not something that he can bargain away. The jury could certainly conclude from these facts in the record that the Appellant had no justification in using the agent's commissions as a bargaining chip with the bank.

Additional insight can be gained to the issue of justified conduct by examining the Restatement (Second) of Torts. §767, which states as follows:

> In determining whether an actor's conduct in intentionally interfering with a contract or a prospective contractual relation of another is improper or not, consideration is given to the following factors:
>
> (a) the nature of the actor's conduct,
> (b) the actor's motive,
> (c) the interests of the other with which the actor's conduct interferes,
> (d) the interests sought to be advance by the actor,
> (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,

(f) the proximity or remoteness of the actor's conduct to the interference and
(g) the relations between the parties.

A brief analysis of these seven (7) factors supports the jury's finding that Jacobson's actions were unjustified or improper, as the term is used in the Restatement.

(a) The nature of the actor's conduct.

Jacobson's actions were secretive and selfish. The implication of his email to the broker is that the agents should be kept in the dark so that they will continue to work on the project thinking they will be paid their commissions at closing. The Court of Appeals' decision finds this conduct justified because there were not quite enough presales and not quite sufficient capital for the bank to approve the construction loan. The only way the project could move forward would be to capitalize the project by sacrificing the agents' commissions. This conduct shows clearly that the developer was undercapitalized and probably should not have been involved in this venture from the start. Jacob's conduct furthers his own interest at the expense of the agents.

(b) The actor's motive.

Jacobson's motive is clearly seen in the email when he continually references himself and his investors. His only motive is to make money, even at the risk of the agent's hard earned commissions. It is this very motive that has become the hallmark of the real estate collapse throughout the entire nation.

(c) The interests of the other with which the actor's conduct interferes.

The interests of the agents Broach and Loomis was not greed, but rather to be paid a fair wage and their rightfully earned commission. The standard of the real estate industry is for real estate agents to be paid at closing. If the real estate agent is not paid at closing, the process simply will not work. The real estate agents also had an interest in

their time. If they had known that their real estate commissions would be at risk, they could have made an informed decision whether to continue to work for sales at this development or to use their time in some other endeavor in which they would actually get paid for their work.

(d) The interests sought to be advanced by the actor.

Once again, Jacobson's interest was to protect himself and his investors. He had no thought of protecting interests of the agents. As Jacobson stated in his email, "My investors and I are still significantly at risk... If we fail in this, I will have serious problems." Furthermore, he wanted to make sure that "I and my investors too get some profit out of this deal." Jacobson went so far as to state his desire to punish the agents for not achieving certain sales levels, evidenced by this comment: "Ideally, I would structure some holdback of commission if we don't achieve certain sales levels."

(e) The social interests in protecting the freedom of action of the actor and the contractual interests of the other.

Presumably, this section deals with the freedom to contract in general as it relates to our society. The judicial system should not condone the interference of an agent's contract which causes the agent not to be paid his or her commission at closing. The social interests in the facts of this case weigh heavily in favor of the agents. Furthermore, the developers understood that they were taking a risk in building a high rise condominium on the oceanfront in Myrtle Beach. The developers stood to make millions of dollars and they also stood to lose millions of dollars. The agents did not take this risk. They did not stand to make millions of dollars or to lose millions of dollars. They also did not voluntarily or knowingly take the risk of not being paid a commission at closing. The social interests of protecting a real estate agent's livelihood and income for himself

and family far outweighs any social interest in protecting developers who knowingly and voluntarily take tremendous financial risks.

(f) The proximity or remoteness of the actor's conduct to the interference.

In this case, the conduct of Jacobson is the direct and proximate cause of the subordination and deferral of the agents' commissions.

(g) The relations between the parties.

The relations between the parties underscore the need to protect the agents' commissions. The agents were working very hard to close loans on behalf of the developer. Amazingly, even while the agents were working hard for the developer, the developer literally pulled the rug out from under them to deny them earned commissions at closing. The relation between the parties turned out to be one of loyal employee and self-centered developer. The State of South Carolina has long protected the hard earned wages of employees through numerous employment and consumer laws. See, for example, the Payment of Wages Act at S.C. Code Ann. §41-10-10 et seq. and the Payment of Post-Termination Claims to Sales Representatives at S.C. Code Ann. §39-65-10, et seq. To overturn a jury verdict and hold that a developer's intentional procurement of the breach of an agent contract resulting in earned commissions not being paid, would be a serious departure from this State's longstanding protection of the men and women who count on wages and commissions for a living.

II. THE COURT OF APPEALS ERRED IN REVERSING THE JURY'S AWARD OF PUNITIVE DAMAGES

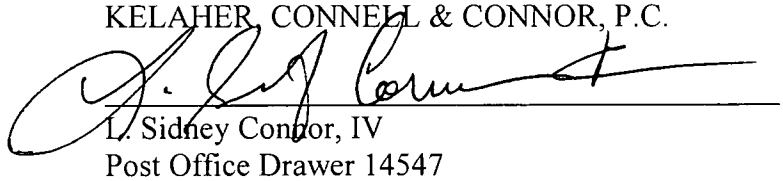
The jury was certainly justified in awarding punitive damages against Howard Jacobson. Once again, the email of October 19, 2006 shows Jacobson's sinister motives in bargaining away the commissions of the agents and then strongly suggesting to the

broker that he not tell the agents about this change in the commission structure for fear that the agents would stop pushing the Paradise Grande units. The Appellant's actions were intentional, carried out for improper purposes, and with reckless disregard or concern for the payment of rightfully earned commissions to the agents. Mr. Jacobson was using somebody else's money to bargain for a deal which neither he nor his investors could afford.

CONCLUSION

There was sufficient evidence in the record for a jury to return a verdict against Jacobson for tortious interference with a contract and to award punitive damages. For the foregoing reasons, the Respondents ask this court to reverse the ruling of the Court of Appeals and affirm the jury verdict.

KELAHER, CONNELL & CONNOR, P.C.



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September 24, 2012

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Of whom

Howard Jacobson is,

Appellant.

Of whom

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Petitioners

PROOF OF SERVICE

PERSONALLY appeared before me, Lynn C. Benton, who being duly sworn, deposes and says that she is an employee of KELAHER, CONNELL & CONNOR, P.C., Attorneys at Law, and that she has served the **Petition for Writ of Certiorari** on the Respondent, through its attorney of record, by depositing a copy of same in the United States Mail, postage prepaid, to:

Mark D. Neill, Esquire
The Neill Law Firm
Post Office Box 2810
Murrells Inlet, SC 29576

DATE OF MAILING: September 24, 2012

Lynn C. Benton

SWORN AND SUBSCRIBED before me,
this 24th day of September, 2012

Donna M. Budner
Notary Public for South Carolina
My Commission Expires: 2/14/17

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September 24, 2012

The Honorable Daniel E. Shearouse
Clerk of the South Carolina Supreme Court
Post Office Box 11330
Columbia, SC 29211

Re: ***James D. Broach, et al v. Eugene E. Carter, et al***
Case No.: 08-CP-26-9454
Case Tracking No.: 2011182306

Dear Mr. Shearouse

Enclosed please find the following for filing in the above-captioned matter:

Enclosed please find the following in the above-captioned matter:

(1) Original and seven (7) copies of our Petition for Writ of Certiorari and Proof of Service;

(2) Two (2) copies of the Appendix (one of which is unbound).

(3) Our check for $100.00 for the filing fee;

(4) A self-addressed, stamped envelope for return of one filed copy of the Petition for Writ of Certiorari to this office.

I am further, by copy of this letter, filing the Petition for Writ of Certiorari with the South Carolina Court of Appeals.

I am also, by copy of this letter, serving attorneys for Respondents with the Petition for Writ of Certiorari.

Very truly yours,

L. Sidney Connor, IV

LSCIV:lb
Enclosures
cc/w encl.: Tanya A. Gee, Clerk
South Carolina Court of Appeals
Mark D. Neill, Esquire
James D. Broach
Mark J. Loomis

The Supreme Court of South Carolina

KELAHER, CONNELL & CONNER 09/26/2012

RECEIPT #65673

Fee Type:	Case Initiation Fee
Amount:	$100.00
Payment Type:	Check
Reference No:	36157
Check/Money Order Date:	09/18/2012
Comments:	BROACH V. CARTER

2012-213009