THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM YORK COUNTY

Court of Common Pleas

Daniel D. Hall, Circuit Court Judge

S. Jackson Kimball, Special Circuit Court Judge

Case No. 2015-CP-46-002460

Morningstar Fellowship Church, Appellant/Respondent

v.

York County, South Carolina, Respondent/Appellant

APPELLANT/RESPONDENT'S INITIAL REPLY BRIEF

April 25, 2016

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Appellant/Respondent Morningstar Fellowship Church ("Morningstar") respectfully submits this brief in reply to the Initial Respondent's Brief of Respondent/Appellant York County ("York County"), and in support of Morningstar's appeal from the Order for Partial Summary Judgment of the Honorable S. Jackson Kimball, entered on July 17, 2014 (the "Summary Judgment Order"); the February 3, 2015 Order on Defendant York County's Motion to Exclude Damages and Motion *in Limine* (the "Motion *in Limine* Order"); and the November 10, 2015 Order Granting Defendant's Renewed Motion for Entry of Judgment of the Honorable Daniel D. Hall (the "Final Order").

ARGUMENT

I. MORNINGSTAR PROPERLY PRESERVED ITS APPEAL FROM THE TRIAL COURT'S ERRONEOUS LIMITATION OF THE PRESENTATION OF MORNINGSTAR'S BREACH OF CONTRACT CLAIM AT TRIAL.

York County incorrectly argues in its Initial Respondent's Brief that because Morningstar did not move for reconsideration of the Summary Judgment Order, it has failed to preserve its appeal of that Order. York County's Resp. Br., p. 10. Motions for Reconsideration are to be filed in a limited number of circumstances. See Poch v. Bayshore Concrete Products/South Carolina, Inc., 382 S.C.13; 686 S.E.2d (Ct. App. 2009); Johnson v. Cunoco Products Company, 381 S.C. 172, 672 S.E.2d 567 (2009). Morningstar did not contend that Judge Kimball misunderstood the facts presented to him, failed to consider the applicable law, or needed to review additional evidence. Morningstar contended, simply, that the ruling of the trial court was wrong. That decision was interlocutory until Judge Hall's order was entered, but is now properly

before this Court. As each of the issues Morningstar raises on appeal were argued before and ruled upon by Judge Kimball, Morningstar has properly preserved its appeal.

York County erroneously asserts that the holdings in I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (S.C. 2000), and Wilder Corp. v. Wilke, 330 S.C. 71, 297 S.E.2d 731 (S.C. 1998), require an unsuccessful litigant to file a motion for reconsideration of a ruling before exercising their right to appeal. According to York County, Judge Kimball should have been given "an opportunity to address" the issues Morningstar raises on appeal. York County's Resp. Br., p. 10. But Wilder and I'On merely stand for the proposition that an *issue* must have been "raised to and ruled upon by the trial judge to be preserved for appellate review." Wilder, 330 S.C. at 76, 297 S.E.2d at 733; I'On, 338 S.C. at 421-422, 526 S.E.2d at 724 (discussing "the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments."). Neither case requires a motion for reconsideration be filed to preserve an issue for appeal. Instead, both cases cited by York County reiterate that an issue or argument must have been made to the lower court and addressed by the lower court, and that a litigant cannot invent new legal theories and arguments for the first time on appeal. Wilder, 330 S.C. at 76, 297 S.E.2d at 733 (determining that issues concerning competing theories of the proper accounting method were ruled upon by the trial court judge).

Morningstar's appeal from the Summary Judgment Order raises the following issues: (1) that York County failed to provide timely notice of the purported approval of the site plan for the project, (2) York County failed to deliver the notice in the fashion

dictated by the Development Agreement, (3) York County failed to provide a required utilities extension agreement, (4) York County demanded financial assurances without providing Morningstar the necessary time and information necessary to obtain those assurances, and (5) York County publicly declared Morningstar in default prior to the one hundred and eighty (180) days required by the Development Agreement. Each of these issues was presented to the lower court. June 19, 2014 Hrg. Tr. 22:9-23:3, 23:23-24:13, 25:16-29:2, 30:5-31:33:12, 33:19-35:17, 36:23-38:17, 43:14-43:20; June 19, 2014 Yarnes Aff. ¶¶ 15, 17, 18, 22, 23, 28; June 19, 2014 Selvey Aff. ¶¶ 6-9, 12-13; Morningstar's Summary Judgment Response Br., p. 1-8; June 18, 2014 Bowyer Aff. ¶¶ 3-4. They were ruled upon by Judge Kimball, who (incorrectly) concluded that the only fact issues remaining for trial were those "pertaining to the reasonableness of the notice of approval of the site plan." Summary Judgment Order, p. 6. Morningstar has properly preserved its appeal from the Summary Judgment Order, and that Order should reversed because the trial court erred by limiting the presentation of Morningstar's breach of contract claim at trial to that narrow set of facts.

II. THE TRIAL COURT ERRED IN CONCLUDING THAT NOTICE HAD BEEN GIVEN TO MORNINGSTAR.

As it did before the lower court, York County continues to argue that by purportedly giving informal notice of site plan approval to Gerald Lee, of Power Engineering, Morningstar effectively received all the notification it was entitled to under the Development Agreement. Given the crucial significance of site plan approval to the development of the Tower, however, clear notice to Morningstar that the 180-day clock had started was required.

A. The Development Agreement Requires Formal Notice to Morningstar.

York County argues that the Development Agreement does not require formal notice of site plan approval, and that Morningstar failed to negotiate this term. York County's Resp. Br., p. 13. Yet in Section XI.H of the Development Agreement, Morningstar provided a specific address and a person to whom any notices should be directed, in order to ensure that Morningstar would be aware of all important dates and milestones in the development of the Tower. The parties do not dispute that notice of site plan approval was necessary. In light of the covenant of good faith and fair dealing implied by South Carolina law, the only notice of this watershed event that both makes sense and comports with the parties' intentions is notice of approval sent pursuant to the agreed-upon notice provision in Section XI.H. However, as the trial court observed, "[i]t is undisputed that . . . no formal 'notice' of the approval was sent to Joyner per the provision in the Agreement quoted above." Summary Judgment Order, p. 3.

The trial court nonetheless determined that no formal notice of site plan approval was required, and that some informal notice was given, the Summary Judgment Order erroneously concluded that the only issue remaining for trial was the adequacy of that notice. Because Morningstar was entitled to formal notice pursuant to the notice provision of the Development Agreement, the Summary Judgment Order improperly narrowed the issues for trial, and should be reversed.

B. Power Engineering Did Not Receive Adequate Notice.

The County asserts, and the lower court relied heavily upon the notion that Power Engineering was Morningstar's agent, such that any notice to Power Engineering's knowledge was binding upon Morningstar. The trial court found that since Power Engineering was designated as project engineer, it "would necessarily be the first to have

knowledge of site plan approval." Summary Judgment Order, p. 6. According to the County, Power Engineering was hired by Morningstar "as its agent with actual authority to obtain" site plan approval, and that authority was never limited by Morningstar. York County's Resp. Br., pp. 26-27. York County hangs its hat on the testimony of Pat Selvey that "he had communicated with Power about approval," and that notice to an agent is necessarily imputed to the principal. York County's Resp. Br., pp. 14, 26-27.

Even setting aside that notice should have been made pursuant to the notice provision in Section IX.H, both the County and the lower court incorrectly assume that adequate notice was actually given to Power Engineering. The County and the trial court ignore the fact that Morningstar's primary contact with Power Engineering, Gerald Lee, left Power Engineering prior to August 18, 2009 and did not recall ever receiving the written notification he thought the County would send that site plan approval had been granted. June 19, 2014 Hrg. Tr. 12: 9-12:10; Lee Dep. Tr. 60:1-64:1, 65:24-66:2; 88:9-88:16. The testimony of Mr. Lee and another Power Engineer employee – Morningstar's supposed agents – indicates that Power Engineering believed they had done all that was required, but expected formal confirmation of that fact from the County. Lee Dep Tr. 57:25-59:2; Derrick Boyte Dep. Tr. p. 28:11-28:25. Morningstar also presented evidence that it was expecting to negotiate a utility extension agreement for the project that was critical to pricing. June 19, 2014 Yarnes Aff. ¶ 16. The County presented evidence that Morningstar should not have been worried about it. June 18, 2014 Bowyer Aff. ¶¶ 3-4. It should have been left to the jury to determine which position was correct, given the plans that had been submitted.

At best, the facts before the trial court indicate a dispute as to whether the County breached the Development Agreement and failed to properly notify Morningstar of site plan approval.[1] There is simply no evidence that would show, as a matter of law, that Morningstar knew that the 180 day period had started until January 13, 2010, when the County first raised its claim to Pat Selvey. By limiting Morningstar's case at trial to "the facts pertaining to the reasonableness of the notice of approval of the site plan," Summary Judgment Order, p. 6, the trial court presupposed that the County did provide notice of some kind, and prevented Morningstar from challenging that assumption. The Summary Judgment Order should therefore be reversed, and Morningstar should be permitted to present all of the facts relevant to its breach of contract claim at trial.

III. THE TRIAL COURT ERRED IN CONCLUDING THAT NOTICE HAD BEEN GIVEN TO MORNINGSTAR.

Following the Summary Judgment Order, the trial court entered the Motion *in Limine* Order that effectively, though not procedurally, entered judgment against Morningstar on its breach of contract claim. The Final Order simply carried the Motion *in Limine* Order to its logical next step by granting judgment to the County on Morningstar's breach of contract claim. York County now contends that its motion to exclude damages was not a motion *in limine* but rather a summary judgment motion, despite the fact that the trial court, Morningstar, and the County itself all referred to the motion as "a motion to exclude damages." York County's Resp. Br., p. 16, 16n. Yet the purpose of the Motion *in Limine* Order was to exclude evidence on any of Morningstar's

[1] In light of these genuine issues of material fact, judgment in York County's favor would not be proper.

three categories of damages on its brief of contract claim, though its sweeping effect was much broader.

Even assuming *arguendo* that the appropriate standard for the motion to exclude damages is that applicable under Rule 56, SCRCP, which Morningstar denies, the trial court's exclusion of Morningstar's evidence as to the loss of the value of the Tower, the development costs it had incurred, and lost profits was erroneous. The County argues, and the trial court determined, that all of Morningstar's damages were speculative. Motion *in Limine* Order, pp. 3, 4, 6-7. Contrary to York County's assertions, however, Morningstar presented the trial court with a rational basis for its damages claims, all of which "either flow as a natural consequence of the breach or [were] reasonably within the parties' contemplation at the time of the contract," Hawkins v. Greenwood Dev. Corp., 328 S.C. 585, 595, 493 S.E.2d 875, 880 (Ct. App. 1997). The fact that York County disagrees with the evidence presented does not mean it should not have been presented to a finder of fact. Morningstar in fact provided testimony and forecasted evidence that it would lose the value of the Tower in the event the County forces Morningstar to demolish the Tower, would have to incur various development costs again, and that lost profits were foreseeable when the Development Agreement was executed and were caused by the County's notice of default.

In its counterclaims, York County contends that it has the right to demolish the Tower. Answer and Counterclaims, ¶ 53(d). As Morningstar argued to the lower court, South Carolina law allows a jury to determine the just compensation for a piece of property even if the government's exercise of its condemnation power is optional. Morningstar's Motion to Exclude Damages Response Br., p. 3 (citing Haig v. Wateree

Power Co., 119 S.C. 319, 330-333 (S.C. 1992)). Morningstar presented evidence that the value of the Tower and the work in place was assessed at $11,887,719 in 2007, permitting a jury award (albeit conditional) of that amount. Id. at p. 2; Joyner Dep. Tr. 498:21-499:14, 503:1-504:8; Joyner Dep. Exhibits 36, 37. In the event York County is permitted to demolish the Tower, the just compensation owed to Morningstar has been well-demonstrated. Both the County's and the lower court's assessments that this number is speculative are wrong.

Morningstar is also entitled to recover the direct expenses it incurred in trying to develop the Tower. By wrongfully declaring Morningstar to be in default of the Development Agreement, York County prevented Morningstar from obtaining the benefit of those development expenses and completing the renovation of the Tower. As a result, all of the expenses incurred by Morningstar for engineering, marketing, architectural, legal and development work constitute compensable damages. Morningstar provided evidence and testimony that it had expended approximately $819,460.09 on such development costs related to the Tower – a substantial, rather than speculative, injury. Yarnes Dep. Tr. 579:17-579:23, 581:16-590:13; Yarnes Dep. Exhibit 54.

In addition, Morningstar is entitled to recover its lost profits as a result of York County's breach of the agreement. See, e.g., Sterling Dev. Co. v. Collins, 309 S.C. 237, 242 (S.C. 1992) (holding that lost profits can be established by facts "from which a reasonably accurate conclusion regarding the cause . . . can be logically and rationally drawn"). Morningstar forecasted evidence that, as a result of York County's wrongful declaration of default, it has lost a number of reservations for the Tower, which logically would have been converted into deposits but for the default. Over a period of five years,

Morningstar calculates its lost profits from the sale of reservations and deposits for units in the Tower to be $7,187,421, based on the amount of anticipate fees and associated revenue. Yarnes Dep. Tr. 370:2-372:1, 594:25-601:8; Yarnes Dep. Exhibit 56; Joyner Dep. Tr. 565:7-566:16. Contrary to the arguments of York County and the Motion *in Limine* Order, Morningstar's lost profits are not speculative.

The sweeping breadth of the Motion *in Limine* Order went beyond narrowing the evidentiary issues for trial and effectively rendered judgment on Morningstar's breach of contract claim, leading the lower court to subsequently indicate that it had reconsidered the Motion *in Limine* Order and would permit Morningstar to put on its evidence. October 27, 2015 Hrg. Tr. 13:14-14:16. Morningstar respectfully submits that this would have been the correct procedure to follow. However, the Court ultimately entered the Final Order upholding its earlier rulings and precluding Morningstar from putting on evidence of damages. Because Morningstar's damages are not speculative but are supported by evidence and testimony, this Court should reverse the Motion *in Limine* Order and Final Order, and send the case back for trial.

IV. MORNINGSTAR PROPERLY ASSERTED ITS APPEAL FROM THE TRIAL COURT'S ERRONEOUS EXCLUSION OF EVIDENCE OF DISCUSSIONS AT MEDIATION AND BIASED STATEMENTS OF COUNTY COUNCIL MEMBERS.

York County inexplicably contends that Morningstar abandoned its appeal of the Motion *in Limine* Order's exclusion of evidence of statements made during mediation and by County Council members because Morningstar made "no argument or further mention of the issue in support of its assertion of error" in its initial brief. York County's Resp. Br., p. 31. In actuality, Morningstar clearly addressed these issues on pages 16-18 of its Initial Appellant's Brief.

Specifically, Morningstar noted that the trial court had excluded statements made during the course of a mediation, which Morningstar proposed to admit to demonstrate the County's breach of the Development Agreement's alternative dispute resolution provision. Morningstar's Br., pp. 16-17. As Morningstar noted, South Carolina law restricts the admissibility of mediation and settlement discussions only when such evidence is used to establish liability or damages, and which otherwise permits such evidence to be admitted for the purpose of demonstrating, among other things, bias. See, e.g., Meehan v. Commercial Casualty Ins. Co., 166 S.C. 496, 504, 165 S.E. 194, 197 (1932) (holding that offers of compromise admissible if offered to establish agency relationship "and not for the purpose of showing that an offer of compromise has been made"); Wyatt v. Security Inn Food & Beverage, Inc., 819 F.2d 69, 71 (4th Cir. 1987) (observing that the nearly identical Fed. R. Evid. 408 "need not prevent a litigant from offering such evidence when he does not seek to show the validity or invalidity of the compromised claim"). The Motion *in Limine* Order erroneously ignored this precedent.

In addition, Morningstar argued that the trial court incorrectly excluded the email correspondence of York County Councilman Buddy Motz that Morningstar sought to admit to demonstrate the County's bias against Morningstar. Morningstar's Br., p. 18. As Morningstar observed, the Motion *in Limine* Order failed to properly consider South Carolina case law finding that evidence of a city councilman's views are admissible if the plaintiff is "not attempting to go behind the actions of county council" or challenge a legislative or quasi-legislative decision. Baird v. Charleston County, 333 S.C. 519, 535, 511 S.E.2d 69, 78 (1999).

Morningstar substantively addressed its contentions that the trial court's exclusion of mediation statements and communications from County Council members was erroneous, and any argument that it abandoned those issues is unfounded.

V. SECTION III OF YORK COUNTY'S BRIEF SHOULD BE DISREGARDED.

York County correctly cites to the principal that a respondent may raise additional grounds to affirm a lower court's ruling for its decision. However, Morningstar is not aware of any case allowing a party to support a Court's ruling on one issue by arguing that the Court mistakenly ruled on another. The lower court's decision that the case should proceed to trial was correct. It should proceed to trial, though, after the rulings raised in Morningstar's brief are reversed.

CONCLUSION

For the foregoing reasons, the Summary Judgment Order, Motion *in Limine* Order, and Final Order should be reversed.

Dated: April 25, 2016
Charlotte, North Carolina

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