

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

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SC Court of Appeals

Morningstar Fellowship Church,

Appellant/Respondent

v.

York County, South Carolina,

Respondent/Appellant

APPELLANT/RESPONDENT'S INITIAL RESPONDENT'S BRIEF

May 16, 2016



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## STATEMENT OF THE ISSUES ON APPEAL

Appellant/Respondent Morningstar Fellowship Church (“Morningstar”) respectfully submits this brief in response to the Initial Appellant’s Brief of Respondent/Appellant York County (“York County”), and in further support of Morningstar’s appeal from the Order for Partial Summary Judgment of the Honorable S. Jackson Kimball, entered on July 17, 2014. The following issues have been raised by York County in its cross-appeal:

- I. Did the trial court properly deny York County’s motion for summary judgment because the sufficiency of any notice given to Morningstar is an issue of fact?
- II. Did the trial properly deny York County’s motion for summary judgment because Morningstar did not have actual notice of site plan approval?

## STATEMENT OF THE CASE

Morningstar filed this action on January 24, 2013, asserting claims for breach of contract, declaratory judgment, and breach of the duty of good faith, and seeking damages in an amount exceeding \$12 million. The case centers around a development agreement entered into between Morningstar and York County (the “Development Agreement”). Yarnes Aff., Exhibit A. The Development Agreement concerns the intended completion, rehabilitation and remodeling of what was previously known as Heritage Tower (the “Tower”), a 21-story condominium planned to have been part of PTL Ministries’ development in the Regent Park area of Fort Mill, South Carolina. Morningstar purchased the property in 2004. The Complaint asserts that York County breached the Development Agreement and engaged in conduct which made it impossible for Morningstar to complete the Tower, and that Morningstar is entitled to damages as a result.

York County answered the Complaint on March 23, 2013, denying all liability. It asserted counterclaims for breach of contract, declaratory judgment, and nuisance. It seeks an order holding that it is entitled to demolish the Tower, with all costs borne by Morningstar.

York County filed a “Motion for Summary Judgment or Partial Summary Judgment” on April 29, 2014. Judge S. Jackson Kimball entered an “Order for Partial Summary Judgment” on July 16, 2014 (the “Summary Judgment Order”). The Summary Judgment Order dismissed Morningstar’s claim for breach of duty of good faith and limited Morningstar’s claim to the single issue of whether Morningstar received adequate notice of site plan approval. York County moved for reconsideration of that order, and its motion was denied by order dated September 29, 2014. York County has cross-appealed the trial court’s Summary Judgment Order.<sup>1</sup>

### **STATEMENT OF FACTS**

Morningstar purchased the old PTL property in 2004. That property had multiple improvements and structures located on it, including a twenty-one (21) story building (the Tower). Morningstar’s original intention was to tear the Tower down. The Tower was incomplete and had stood dormant for many years. Morningstar changed course after an investigation revealed the Tower to be structurally sound. Morningstar began exploring the market for multifamily, retirement-style housing. The market seemed very

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<sup>1</sup> In addition to bringing its own appeal of the Summary Judgment Order, Morningstar has also appealed from the February 3, 2015 order granting York County’s Motion to Exclude Damages (the “Motion *in Limine* Order”), as well as the November 10, 2015 order granting York County’s Motion for Entry of Judgment (the “Final Order”). The Motion *in Limine* Order and the Final Order are not the subject of York County’s cross-appeal, however, and accordingly are addressed in detail in Morningstar’s Initial Appellant’s Brief and Initial Reply Brief.

strong and the idea fit a niche in the overall concept for the Morningstar property. It began to take the steps necessary to complete and redevelop the Tower into such a facility. Yarnes Affidavit, ¶¶ 4-5.

A detailed Development Agreement relating to the Tower was negotiated with the County over many months and executed in January, 2008. The Development Agreement envisioned a five (5) year time horizon, but also contained the following language:

The Parties acknowledge that the market conditions may, and will likely, affect the pace and character of the Property. Therefore, the Parties agree that they shall take into account...any change in market conditions, demographics or similar matters when deliberating disputes or negotiating for future modifications to this Agreement made pursuant to this paragraph. Section X.C.

Both sides, then, anticipated delays and built their understanding into the Development Agreement. The project was complicated because of the length of time during which the Tower had simply stood there without any construction activity. Moving it forward was a mutually beneficial goal. Yarnes Affidavit, ¶¶ 7-10. The parties attempted to deal with the mechanics of communicating with each other in the Development Agreement. Section XI.H of the Development Agreement provides that: "All notices, certificates, or other communications hereunder shall be sufficiently given and shall be deemed given when mailed by certified or registered mail, postage prepaid, addressed as follows," specifying that notice to Morningstar should be addressed to Rick Joyner, with a copy to its attorney, James Sheedy.

Morningstar made progress on the project, and delivered a preliminary site plan for the County's consideration in December, 2008. Since the execution of the Development Agreement, the economy had begun to teeter, and development nationwide

came to a halt. Morningstar continued to try to get this site plan into final form throughout 2009. There appeared to be no problems between the parties. Morningstar continued to wait for formal notification that the site plan was approved, but simply assumed that the County was in no rush to begin actual construction. Yarnes Affidavit, ¶¶ 15-16. Morningstar continued to expend significant funds trying to move the project forward. Yarnes Aff. ¶ 17.

Things changed in early 2010. Pat Selvey from Morningstar sent a progress update to the County on January 12, 2010. Selvey Aff. ¶ 9. The County began contending that week, for the first time, that site plan approval had been granted in August, 2009. Yarnes Affidavit, ¶ 19. This was critically important, because the Development Agreement contains the following language:

Within 180 days of County approval of the commercial site plan for the Property, should Developer or its contract be unable to obtain bid, performance and payment bonds from an A+ Best rated insurer, or letters of credit from a national bank or a substantial equivalent acceptable to County, then this Development Agreement shall be deemed null and void. At such time, the Tower shall be demolished, with all costs for its demolition borne by the Developer.

The County demanded the bonds or alternative financial assurances be presented by the end of February 2010. The parties to the email exchange knew their position was going to result in litigation, and appear to have recognized that what they were asking for could not be delivered on such short notice. *See e.g.* Britt email, January 22, 2010, County production pp. 660-661. A commercial site plan is a set of drawings that discloses information relating to infrastructure, landscaping, traffic flow, parking, and the location of the anticipated improvements. Yarnes Affidavit, ¶ 14. It is a necessary first

step in getting accurate pricing for any development. Selvey Affidavit, ¶¶ 5-8. Morningstar had not received any communication from the County about the site plan for many months. Yarnes Affidavit, ¶¶ 16-18. The Development Agreement contemplates the negotiation and execution of a “Non-Reimbursable Extension Agreement” connected to utilities on the site prior to site plan approval. This had never even been discussed. Yarnes Affidavit, ¶¶ 16-18. Morningstar was not in a position, then, to get definitive bid information. Without accurate pricing, it is impossible to supply the necessary information to purchase performance bonds. Selvey Affidavit, ¶¶ 8-10. There was simply no way to scramble and comply with the County’s demands. Yarnes Affidavit, ¶ 22.

Morningstar’s representatives met with County representatives on February 4, 2010. They attempted to explain the predicament Morningstar was being placed in, but were met with a response consistent with the Motz email. They were accused of not having the ability to complete the project, and of taking people’s money improperly. Selvey Affidavit, ¶ 11. Yarnes Affidavit, ¶¶ 23-24. David Yarnes sent a letter on February 17, 2010, setting out the problems with the notice issue, but there was no changing the County’s position. Yarnes Affidavit, ¶¶ 25-26.

A formal notice of default was sent on March 5, 2010 (“Default Notice”). The news was picked up in the media. The results were dramatic, and devastating. Reservations to purchase units in the Tower were cancelled, and the project came to a stop. Morningstar continued, and still continues, to try to move the Tower project forward, but has not been able to do so. It has attempted to provide all information the

County has requested, but it has been apparent that demolition is the only acceptable option. This litigation is the result of that reality. Yarnes Affidavit, ¶ 28.

## ARGUMENT

### I. STANDARD OF REVIEW.

In considering an order on a motion for summary judgment, appellate courts apply the same standard governing the trial court under Rule 56(c), SCRPC: “summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” Miller v. Blumenthal Mills, Inc., 365 S.C. 204, 219, 616 S.E.2d 722, 729 (Ct. App. 2005). Appellate courts must take “all ambiguities, conclusions, and inferences . . . in a light most favorable to the nonmoving party below.” Id. The nonmoving party is only required to “submit a mere scintilla of evidence to withstand a summary judgment motion . . . .” Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). Because Morningstar presented evidence raising genuine issues of material fact as to whether it ever received proper notice of site plan approval, the trial court properly denied York County’s motion for summary judgment.

### II. THE TRIAL COURT PROPERLY DENIED YORK COUNTY’S MOTION FOR SUMMARY JUDGMENT BECAUSE THE SUFFICIENCY OF ANY NOTICE GIVEN TO MORNINGSTAR IS A FACTUAL ISSUE.

York County incorrectly contends that the sufficiency of the notice provided to Morningstar is a question of law, and that it was thus appropriate for the trial court to grant summary judgment in its favor. York County Br., p. 8. Under South Carolina law, however, the sufficiency of notice is a question of fact. See, e.g., Southern Cotton Oil

Co. v. Schafer Co., 140 S.C. 445, 452, 138 S.E. 882, 884 (S.C. 1927) (holding that “[t]he sufficiency of a notice to produce a written instrument is a preliminary [sic] question of fact for the trial Court”); Brown v. Goodman Mfg. Co., L.P., 2015 U.S. Dist. LEXIS 26939, \*24 (D.S.C. Mar. 5, 2015) (“[A]ny question about the reasonableness of the notice is a question of fact for the jury”). The cases cited by York County in its brief are simply inapposite.

York County also argues that the trial court improperly refused to grant it summary judgment as to the sufficiency of any notice given to Morningstar “without finding any material facts in dispute.” York County Br., p. 8. In so arguing, however, York County ignores the issues raised by Morningstar and the evidence it presented that notice was not properly given or received. The trial court found that Morningstar’s agents had been told that all of the work had been done and the site plan had been approved. Given the importance of this benchmark, questions of fact regarding the parties’ relationship and the negotiations surrounding the agreement had to be resolved in order to determine whether the notice relied upon by the County was sufficient. Summary Judgment Order, p. 5. Accordingly, the trial court concluded that the “sufficiency [of notice] is a question of fact based on the record presented.” Id. In denying summary judgment to York County, the trial court correctly recognized that Morningstar had presented sufficient evidence that it in fact never received notice of any kind prior to January 2010 so as to create a genuine issue of material fact.

II. THE TRIAL COURT PROPERLY DENIED YORK COUNTY'S MOTION FOR SUMMARY JUDGMENT BECAUSE MORNINGSTAR DID NOT HAVE ACTUAL NOTICE OF SITE PLAN APPROVAL.

Beyond simply creating a genuine issue of material fact sufficient to defeat summary judgment, Morningstar presented sufficient evidence to the trial court to establish that it did not have actual notice of site plan approval.

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. Instead, 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. 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 Br., pp. 9-10. 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 Br., pp. 9-12.

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. 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. The fact that Morningstar could not produce the requested financial information in an abbreviated time period does not evidence York County’s entitlement to summary judgment. York County’s Br., p. 9. It simply reinforces the need to give clear, unequivocal notice that the time period had begun, and that the trial court properly denied summary judgment to York County.<sup>2</sup>

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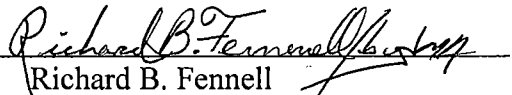
<sup>2</sup> Given the substantial evidence presented by Morningstar, Morningstar contends that the Summary Judgment Order in fact improperly narrowed the issues for trial, as set forth more fully in its Initial Appellant’s Brief and Reply Brief in its appeal.

**CONCLUSION**

For the foregoing reasons, the Summary Judgment Order should be affirmed to the extent it denied summary judgment to York County.

Dated: May 16, 2016  
Charlotte, North Carolina

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