

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Joseph M. Strickland, Master in Equity

Case No. 2016-000636

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SC Court of Appeals

Norwest Properties, LLC, Appellant,

v.

Michael T. Strebler, Lisa W. Strebler, and Paul J. Mitchell,.....Defendants,

Of Whom, Michael T. Strebler and Lisa W. Strebler are the Respondents.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. Whether the Master erred in awarding the Respondents special damages when they pled only general damages?
- II. Whether the Master erred in awarding the Respondents damages in excess of those recoverable in an action for breach of a real estate contract?
- III. Whether the Master erred in awarding special damages that were not within the parties' contemplation at the time they executed the contract and the Respondents failed to prove?

STATEMENT OF THE CASE

This is an appeal from an order granting Michael T. Strebler and Lisa W. Strebler's, Respondents, (collectively "the Streblers") motion to approve an amount of damages. The case arises out of an August 2005 real estate contract in which Appellant Norwest Properties, LLC, ("Norwest Properties") contracted to buy a vacant, residential lot from the Streblers. On November 18, 2005, after discovering encroachments from the neighboring property that the Streblers refused to remedy, Norwest Properties filed an action against the Streblers for specific performance and breach of contract. (Cmplt.). On February 13, 2009, Norwest Properties filed an Amended Complaint adding Paul J. Mitchell as a defendant to the specific performance action because Mitchell's driveway, fences, and pool area encroach on the property at issue. (Am. Cmplt.). The Honorable Joseph M. Strickland, Master in Equity, held a bench trial on November 9, 2009, at which the Streblers appeared *pro se*.

On May 20, 2010, the Master filed an order finding Norwest Properties did not prove its claims for specific performance and breach of contract, thereby permitting the Streblers to keep the property. (2010 Order p. 15). The Master further awarded the Streblers costs and damages, with the amount to be determined at a later date after the Streblers submitted an actual amount with supporting documentation. *Id.* at p. 15. On May 16, 2011, the Streblers filed a motion to approve amount of damages. (Mot.). The motion included only a one-page "Summary of

Damages” with no supporting documentation. *Id.* On July 29, 2011, the Master held a hearing on the motion. Norwest Properties submitted a memorandum in opposition to the motion. (Memo.). On March 1, 2016, the Master entered an order granting the Streblers’ motion for damages in the amount of \$40,388.00. Norwest Properties appeals from that order.

FACTS

The Streblers purchased the property in 1997 for \$57,000.00. (Pl.’s Exh. 14). The property was a vacant residential lot located in the Governors Hill neighborhood in downtown Columbia. (Nov. 2009 Tr. p. 12). Sometime in 2001, Mr. Strebler gave Mr. Mitchell permission to build a driveway, fences, and a pool deck that encroached onto his property. *Id.* at p. 110, 117; Pl.’s Exh. 4. The Streblers and Mr. Mitchell did not put the agreement in writing and did not record any document reflecting the encroachments. (Tr. p. 172 lns. 11-13, 176 lns. 5-8).

In 2005, the Streblers listed the property for sale. Keith Norville, the managing partner for Norwest Properties,¹ learned about the property when he saw it advertised for sale in the newspaper. (Nov. 2009 Tr. pp. 10, 12 lns. 1-6). Mr. Norville has been a licensed real estate agent for over twenty years. *Id.* at p. 10 lns. 8-24. Mr. Norville took his family to see the house and planned to build a retirement home that could also house his ailing mother. *Id.* at pp. 12-13. He sent Mr. Strebler multiple letters expressing interest in purchasing the lot, and Mr. Strebler asked Dana Wolfe, a real estate agent, to respond to Mr. Norville. *Id.* at p. 13 lns. 20-25.

On August 8, 2005, Norwest Properties offered the full asking price of \$175,000.00 in cash. *Id.* at p. 14 lns. 9-16; Pl.’s Exhs. 1 & 2. On August 10, 2005, the Streblers accepted Norwest Properties’ offer by signing a Contract of Sale. (Pl.’s Exhs. 1 & 2). The Contract specified that “[c]onveyance shall be made subject to all easements as well as covenants of record Seller

¹ Norwest Properties owns property and manages approximately thirty rental properties. (Nov. 2009 Tr. pp. 10-11).

agrees to convey by marketable title and to have prepared a proper statutory warranty deed free of encumbrances, except as herein stated.” *Id.* at ¶ 11. The Contract did not list any encumbrances and no easements of record existed. (Tr. p. 16 lns. 19-22, p. 17 lns. 7-10, pp. 25 ln. 25 – 26 ln. 3).

A survey of the property done prior to the August 31, 2005 closing date showed numerous encroachments from Mr. Mitchell’s property, including a brick fence, a wooden fence, a brick column, and portions of a pool deck and driveway. (Pl.’s Exh. 4). After receiving the survey, Mr. Norville notified Mr. Wolfe that the Streblers needed to remove the encroachments before the property sale could close. (Pl.’s Exh. 5). The August 31, 2005 closing date passed without a resolution of the encroachments.

Mr. Strebler refused to remove the encroachments. (Tr. pp. 18 ln. 25 – 19 ln. 1). A contractor examined the property and provided an estimate of \$1,500.00 to remove the encroachments and \$1,400.00 to rebuild the structures where they should be located. (Pl.’s Exh. 9, Tr. pp. 26-27).

On November 18, 2005, Norwest Properties filed an action against the Streblers for specific performance and breach of contract. (Cmplt.). The Master in Equity held a bench trial on November 9, 2009. At the trial, Mr. Strebler testified that he sought “costs of ownership beyond August 31, 2005,” the closing date. (Tr. p. 115 lns. 17-19). He requested “carrying costs, property taxes, homeowner’s association fees, maintenance costs, and costs of administration” in addition to costs in defending the action, but presented no evidence of these alleged damages. (Tr. p. 115 lns. 20-23). However, the Streblers’ answer only requests general “costs and damages” and does not include any allegation or enumeration of special damages. (Ans. p. 2).

On May 20, 2010, the Master entered an order finding that Norwest Properties did not prove its actions for specific performance and breach of contract. (2010 Order). The Master found

Norwest Properties breached the contract, the contract is invalid, and Mr. Mitchell has an easement on the property. *Id.* at pp. 6-15. The Master further ordered that “Strebler be awarded his costs and damages in this case in accordance with Paragraph 20 of the Contract. Strebler shall submit those actual amounts with supporting documentation to the Court for final determination of the amount of this award.” (Order p. 15). As to recoverable damages and costs, the Contract states only: “If Purchaser shall default under this Contract, Seller shall have the option of suing for damages or rescinding this Contract. . . . In any action to enforce the provisions of this Contract, the prevailing party and Broker(s) shall be entitled to the award of their costs, including reasonable attorney’s fees.” (Pl.’s Exh. 2 ¶ 20).

On May 16, 2011, the Streblers filed a motion to approve the amount of damages. (Mot.). Along with the motion, the Streblers submitted only a spreadsheet of figures with no supporting documentation. (Mot.). The damages sought total \$48,713.00, consisting of (1) \$6,842.00 in real estate taxes from 2005-2011, (2) \$2,560.00 in homeowners’ association fees from 2007-2010, (3) \$8,325.00 in Mr. Strebler’s alleged “professional time” defending the action *pro se*, (4) \$350.00 in litigation costs, and (5) \$30,637.00 in unexplained “carrying costs” or “cost of capital” for which the Streblers calculated a 3% interest rate. (Mot.). The Streblers never submitted a single page of documentation to support these figures.

On July 29, 2011, the Master held a hearing on the motion. (July 2011 Tr.). Norwest Properties argued numerous independent grounds for denying the Streblers’ motion, except as to the \$350.00 in litigation costs. (July 2011 Tr. pp. 5-9). It argued: (1) the Streblers may seek only general damages because they did not plead special damages in their answer; (2) the measure of general damages in an action for breach of contract to purchase real estate is the difference between the contract price and the fair market value at the time of the breach or subsequent sale price, and

the Streblers sold the property to Defendant Mitchell for the contract price of \$175,000.00 in May 2011; (3) the property taxes and homeowners' association fee payments are not recoverable and benefitted the Streblers, who continued to possess the property; (4) the "carrying costs" sought are speculative and not allowed by law; and (5) a *pro se* litigant is not legally entitled to compensation for his or her time defending or pursuing litigation. *Id.* The Master took the matter under advisement. *Id.* at p. 11.

On October 23, 2015, after receiving no ruling on the motion for over four years, the Streblers sent an *ex parte* communication to the court asking for "an order approving" their motion. (Oct. 2015 letter). On March 1, 2016, over four-and-a-half years after the hearing on the motion for damages, the Master in Equity issued an order granting the motion and awarding the Streblers \$40,388.00. (2016 Order). The Master granted all of the requested costs and damages except for the professional time costs because "Pro-se litigants are not entitled to attorney's fees."² (2016 Order p. 3). Norwest Properties appeals the Master in Equity's decision to award damages.³

STANDARD OF REVIEW

The Streblers alleged Norwest Properties breached the real estate contract and sought damages and costs pursuant to a contractual provision. (Ans. p. 1; Mot.). "An action for breach of contract seeking damages is an action at law." *Conway v. Charleston Lincoln Mercury Inc.*, 363 S.C. 301, 305, 609 S.E.2d 838, 841 (Ct. App. 2005). "In an action at law tried before a master, the appellate court will affirm the master's factual findings if there is any evidence in the record

² The Streblers did not file a cross-appeal as to this ruling. Therefore, it is the law of the case that they are not entitled to the requested \$8,325.00 in "professional time." See *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) ("An unappealed ruling is the law of the case and requires affirmance.").

³ Norwest Properties does not appeal the Master's decision to award \$350.00 in litigation costs pursuant to paragraph 20 of the Contract.

which reasonably supports them. However, an appellate court may determine questions of law with no particular deference to the trial court.” *Estate of Tenney v. S.C. Dep’t of Health & Env’tl. Control*, 393 S.C. 100, 105, 712 S.E.2d 395, 397 (2011) (internal quotation marks and citation omitted). The Master’s order granting the Streblers damages does not contain factual findings but, instead, states only: “In accord with evidence submitted by the Streblers, this Court awards damages to the Streblers in the amount of \$40,388.00.” (2016 Order p. 2). Therefore, this Court may determine the legal question of whether the Streblers are entitled to the requested damages with no particular deference to the Master.

ARGUMENT

The Court may reverse the Master’s order for any one of the independent reasons discussed below.

I. THE STREBLERS FAILED TO SPECIFICALLY PLEAD SPECIAL DAMAGES

The Streblers are not entitled to damages for property taxes, homeowners’ association fees, and carrying costs, all of which are special damages in an action for breach of a real estate contract, because they failed to plead special damages in their answer. “[S]pecial damages . . . may be recovered only when sufficiently stated and claimed.” *McNaughton v. Charleston Charter Sch. for Math & Sci., Inc.*, 411 S.C. 249, 261, 768 S.E.2d 389, 396 (2015).

“Special damages must . . . be specifically alleged in the complaint to avoid surprise to the other party.” *Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 117, 682 S.E.2d 871, 875 (Ct. App. 2009). “General damages are inferred by the law itself, as they are the immediate, direct, and proximate result of the act complained of.” *Id.* at 116-17, 682 S.E.2d at 875. “Special damages are those elements of damages that are the natural, but not the necessary or usual, consequence of the defendant’s conduct. . . . Special damages . . . are not implied at law because they do not

necessarily result from the wrong.” *Id.* “When items of special damages are claimed, they shall be specifically stated.” Rule 9(g), SCRPC.

The Master’s order awarding damages incorrectly states “The Streblers, in their Answer, requested costs and damages, including reimbursement of property taxes on the property at issue for the years 2006, 2007, 2008 and 2009, as well as the holding costs of the property.” (2016 Order p. 1). The Streblers’ answer alleges Norwest Properties breached the contract and states generally that “the defendants, having fully answered the complaint of the plaintiff, prays that the same be dismissed *with costs and damages* to the Defendants.” (Ans. pp. 1-2) (emphasis added). The answer does not include a request for special damages and does not mention property taxes, carrying costs, or homeowners’ association fees (none were imposed at the time, as explained below). Therefore, the Streblers may not recover special damages. For this reason alone, the Court may reverse the Master’s order as to these damages.

II. THE MASTER’S AWARD OF DAMAGES EXCEEDS THE SCOPE OF GENERAL DAMAGES RECOVERABLE IN AN ACTION FOR BREACH OF A REAL ESTATE CONTRACT

The Streblers alleged and the Master found that Norwest Properties breached the real estate contract. (Ans. p. 1; 2009 Tr. pp. 29-35, p. 122 lns. 13-20; 2010 Order pp. 6.9). “Generally, the measure of damages for breach of an executory contract to purchase land is the difference between the contract price and the market value of the property at the time of the breach.” *Benya v. Gamble*, 282 S.C. 624, 632, 321 S.E.2d 57, 62 (Ct. App. 1984). The Master erred in failing to apply this legal principal and, instead, awarding unpled and unproven special damages to the Streblers.

“In the case of a lost sale of a house, the proper measure of damages is the difference between the contract price and either (1) the fair market value of the house on the date of the breach or (2) the price at which the house is subsequently sold.” *Jackson v. Midlands Human Res. Ctr.*, 296 S.C. 526, 529, 374 S.E.2d 505, 507 (Ct. App. 1988) (reversing an award of damages for the

lost contract price where the plaintiffs “presented no evidence from which either differential could be calculated”). The Streblers presented no evidence to the Master of the fair market value of the property at the time of the alleged breach in October 2005 or of the price at which they subsequently sold the property. The only evidence in the record as to the property’s value is the contract price and the subsequent sales price, which Norwest Properties provided to the Master. (Exh. D to Pl.’s Memo. in Opp. to Def. Mot.). There is no evidence that the Streblers listed the property for sale between October 2005 and 2011, when they sold it to Mr. Mitchell. To the contrary, at the 2009 hearing, Mr. Strebler testified that he planned to keep the property and his wife did not want him to sell it. (2009 Tr. p. 143).

Applying the correct measure of damages, the Streblers damages are \$0. Because there is no evidence as to the fair market value of the property at the time of the alleged breach (aside from the contract price), the Court is unable to consider the amount of damages under the first method. As to the second method, the contract price between Norwest Properties and the Streblers was \$175,000.00. (Pl.’s Exh. 2 p. 1). The Streblers subsequently sold the lot to Mr. Mitchell in 2011 for \$175,000.00. (Exh. D to Pl.’s Memo. in Opp. to Def. Mot.); *see Benya*, 282 S.C. at 632, 321 S.E.2d at 62-63 (addressing whether the trial court erred in admitting evidence of a sale price that occurred eighteen months after the contract breach and finding the admission within the trial court’s discretion).⁴ Therefore, they did not suffer any recoverable damages. For this reason alone, the Court should reverse the Master’s decision to award damages.

⁴ *See also Hofer v. St. Clair*, 298 S.C. 503, 513, 381 S.E.2d 736, 742 (1989) (finding “lower court did not abuse its discretion in” considering appraisals “made approximately two years after the date on which damages should be determined”); *S.C. State Highway Dep’t v. Wilson*, 254 S.C. 360, 369, 175 S.E.2d 391, 396 (1970) (finding in eminent domain case that the trial court did not abuse its discretion and the plaintiff suffered no prejudice by the defendant’s introduction of the sales prices of the properties at issue nine years prior to condemnation).

III. THE STREBLERS FAILED TO PROVE THEY ARE LEGALLY ENTITLED TO SPECIAL DAMAGES

As noted above, the measure of general damages in a case for breach of a real estate contract is the difference between the contract price and the fair market value or subsequent sale price, including any contractual damages. In this case, the Master erred in awarding damages in excess of those permitted by law or provided for in the parties' contract.⁵ The Streblers failed to provide sufficient proof they are legally entitled to the damages at issue. Therefore, even if the Court permits the Streblers to belatedly seek special damages, the requested damages are not supported by the law or evidence.

"Where a [party] seeks special damages in addition to his general damages, he must plead and prove both the fact of damage and the amount of damage." *Jackson v. Midlands Human Res. Ctr.*, 296 S.C. 526, 528, 374 S.E.2d 505, 506 (Ct. App. 1988). When "proof is speculative, uncertain, or otherwise insufficient to permit calculation of his special damages, his claim should be denied." *Id.* at 528, 374 S.E.2d at 506. In this case, the Streblers provided only a damages summary with unsupported figures. (Mot.). It is unclear from the Streblers' motion what constitutes "carrying costs" sought in the amount of \$30,637.00. (Mot.). From Mr. Strebler's statements at the July 2011 hearing, it appears the carrying costs may be that Mr. Strebler "financed the property with a personal line of credit." (2011 Tr. p. 10 lns. 6-7, lns. 22-23). However, there is no documentation as to the amount of financing or proof of the amount of interest.⁶ Therefore, the claim is speculative and should be denied.

⁵ The contract provided for an award of only "costs, including reasonable attorney's fees" for the prevailing party in an action to enforce the contract. (Pl.'s Exh. 2 ¶ 20).

⁶ The Master's 2010 order specified that "Strebler shall submit those actual amount *with supporting documentation* to the Court." (2010 Order p. 15) (emphasis added).

Further, the alleged carrying costs of a line of credit did not exist at the time the parties entered into the contract and there is no evidence showing Norwest Properties was aware of the possible need for financing. To the contrary, the evidence shows the Streblers could afford to hold onto the property indefinitely. In an October 4, 2005 email to counsel for Norwest Properties, Mr. Strebler stated: “there is no financial urgency for us to sell the property. We don’t mind having Dana [the Streblers’ real estate agent] re-sell the property at a higher price with the known defect disclosed.” (Pl.’s Exh. 7). Therefore, the “carrying costs” are not recoverable as a special damage.

“The party claiming special damages must show that the [opposing party] was clearly warned of the probable existence of unusual circumstances or that because of the [opposing party]’s own education, training, or information, the [opposing party] had reason to foresee the probable existence of such circumstances.” *Stern & Stern Assocs. v. Timmons*, 310 S.C. 250, 251, 423 S.E.2d 124, 125 (1992) (internal quotation marks omitted).⁷ “[T]he defendant must know or have reason to know the special circumstances so as to be able to judge the degree of probability that damage will result from delayed performance.” *Id.* at 251, 423 S.E.2d at 125. “The special circumstances **must exist when the contract was made.**” *Id.* (emphasis added). “When the above elements are met, special damages are considered within the contemplation of the parties at the time the contract was signed.” *Id.* at 251-52, 423 S.E.2d at 125.

The homeowners’ association fees are also not recoverable because they were not within the contemplation of the parties at the time they signed the contract because the Streblers represented to Norwest Properties that there were no such fees. The contract states “Seller

⁷ See also 22 Am. Jur. 2d *Damages* § 654 (“If special damages are sought to be recovered in actions for breach of contract, the complaint must allege not only the special circumstances relied on but also that the special circumstances were known to the defendant to be the probable consequences of a breach at the time the contract was entered.”).

represents that the property is [] or is *not [X]*⁸ *subject to* a mandatory association fee (i.e., homeowner's association/regime or otherwise.)" (Pl.'s Exh. 2 ¶ 9.B.-C.) (emphasis added). That Norwest Properties had no notice of a homeowner's association fee is further supported by the fact that the Streblers claim damages for the fee starting in 2007, two years after the parties entered into the contract of sale. (Mot. p. 3). The Streblers also did not present any documentation to support the amount claim for the fees. Therefore, the homeowners' association fees are not recoverable.

Finally, the Streblers are not entitled to damages for property taxes. The Streblers continued to possess the property and receive benefit from their ownership. They were obligated to pay property taxes prior to the parties entering into the contract. Further, as noted above, Mr. Strebler testified in 2009 that he planned to keep the property and his wife did not want him to sell it. (2009 Tr. p. 143). The Streblers argued at the 2011 hearing that Norwest Properties filing of a lis pendens prevented them from selling the property but failed to acknowledge they also filed a lis pendens on the property in March 2009. (Pl.'s Exh. 13). Therefore, the Streblers' independent decision to keep the property necessitated the payment of property taxes.

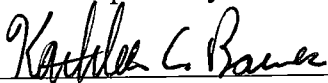
The Master erred in awarding the unpled and unproven special damages.

CONCLUSION

Appellant Norwest Properties requests this Court reverse the Master in Equity's decision to award the Streblers damages. Norwest Properties seeks an opinion remanding this case for entry of judgment in the amount of \$350.00 for the Streblers' litigation costs.

⁸ The Contract contains a check mark rather than an "X".

Respectfully submitted,



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