The State of South Carolina
In The Court of Appeals

Appeal from Charleston County
Court of Common Pleas

Maité Murphy, Circuit Court Judge

Appellate Case No.: 2015-001748

Wells Fargo Bank N.A., as trustee for the Certificate holders of Banc of America Mortgage Securities, Inc., Mortgage Pass-Through Certificates, Series 2005-E,

v.

Daniel O. Myers, Bethany A. Theis and Bank of America N.A., Defendants, Daniel O. Myers and Bethany A.

Respondents

v.

Aubie Melot, John Melot and Carolina One, LLC, Third-Party Defendant of whom John Melot is the Appellant.

Appellant

Brief of Appellant

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Statement of the Issue on Appeal

The Melots' appeal presents three main issues:

- **Right to Terminate Agreement Upon Inspection.** The language of Addendum 1 of the Agreement provides that if the buyers are satisfied with the inspections, they are not obligated to close. Upon inspection of the Property, the Melots discovered numerous issues with the Property and its condition. Should Respondents be allowed to enforce the Agreement against the Melots when an express contingency allows them to walk away?

- **Right to Terminate Agreement Prior to Bank Approval of Short Sale.** The language in the short sale addendum states that the Agreement was contingent on bank approval of the short sale and the purchaser had the right to terminate the contract prior to lender approval. Therefore, any revocation of an offer prior to the approval of the short sale would not constitute a breach. Should Respondents be allowed to enforce the Agreement against the Melots when the lenders had not approved the short sale?

- **Respondents Suffered No Damages.** The proper measure of compensation in a breach of contract claim is the loss actually suffered by the plaintiff as a result of the breach. In this case, the second mortgage holder neither appeared in this action nor made any efforts to collect, and its balance sheet for the loan reflected a balance of $0.00. Did the trial judge properly award damages to Respondents given that they suffered no loss?

Statement of the Case

On February 16, 2011, Wells Fargo Bank initiated foreclosure proceedings against Daniel Myers, Bethany Thies, and Bank of America (as the holder of a second mortgage). In response, on March 23, 2011, Myers and Thies ("Respondents") filed a third-party complaint against John Melot ("Appellant"), Aubie Melot, and Carolina One Real Estate alleging breach of contract, fraud, and negligent misrepresentation. During the course of this litigation, sadly Mrs. Melot passed away from cancer, and as such she is not part of this appeal. Bank of America never appeared.

On August 10, 2012, Carolina One filed and served its Answer. On August 20, 2012, the Melots filed and served their Answer asserting cross-claims against Carolina One Real Estate for breach of fiduciary duty, promissory estoppel, negligence, and negligent misrepresentation.

Wells Fargo resolved the foreclosure through a short sale, and as such, Wells Fargo was dismissed by stipulation on March 14, 2012.

On November 19, 2014, a non-jury trial took place before the Honorable Maité D. Murphy. At the commencement of the trial, the court directed (in accordance with the agreement of counsel) that the claims between Appellants and Carolina One would be held in abeyance and that those claims would be addressed following the disposition of the case between Appellants and Respondents.

In the order filed by the court on December 23, 2014, the court ruled in favor of Respondents on their breach of contract claims, but the court ruled against Respondents on their claims of fraud and negligent misrepresentation. The court entered judgment in favor of Respondents on their breach of contract claim, including pre-judgment interest, in the amount of $162,486.30.

On December 29, 2014, Appellant filed and served his Motion to Alter or Amend the Court's Judgment. On July 2, 2015, Appellant received written notice of the court's denial of Appellant's Motion to Alter or Amend, and on July 29, 2015, Appellant served his Notice of Appeal.

Brief Statement of Facts

1. The Contract

In the summer of 2011, Appellant John Melot and Aubie Melot (the "Melots") traveled to Utah for Mrs. Melot's cancer treatment. (R. p. 164, ¶ 4.) While in Utah, the Melots started their search for a new home in the summer of 2011 as a result of a house fire, which completely destroyed their home. (R. p. 164, ¶ 3.) The Melots contacted real estate agent Nancy Hoy ("Hoy") of Carolina One Real Estate about a new short sale listing for the property at 94 North Shelmore Boulevard in Mount Pleasant, South Carolina (the "Property"). (R. p. 164, ¶ 5.) Discussions began between the Melots and Hoy as the Melots gathered more information about the Property. (R. p. 164, ¶ 5.)

On August 10, 2011, while the Melots were still in Utah for cancer treatment, Hoy sent an "Agreement to Buy and Sell Real Estate" (the "Agreement"). (R. p. 164, ¶ 6.) Hoy and the Melots discussed the advantages and disadvantages of a short sale and of moving forward with an offer without being able to see the house in person. (R. p. 164, ¶ 7.) Among other avenues, Hoy assured the Melots that prior to bank approval of the transaction, the Melots were able to withdraw their offer for any reason. (R. p. 164, ¶ 8.) The Melots executed the Agreement. (R. p. 164, ¶ 9.)

2. Condition of the Property

On August 17, 2011, the Melots flew back to South Carolina from Utah. (R. p. 164, ¶ 10.) On August 18, 2011, the Melots visited the Property for the first time, and upon a cursory review, the Melots noticed a number of issues, including—but not limited to—the following: water damage and rot to the siding of the house; the HVAC for the first floor was not working; the HVAC for the second floor was not draining; the floors needed to be refinished; and the entire house required repainting. (R. p. 165, ¶ 11.)

Throughout mid-to-late September, the Melots investigated the poor condition of the Property and gathered estimates for remediation of the damage. (*See* R. p. 75.) On September 11, 2011, the Melots received an estimate for the flooring for $3,993.90. (*See* R. p. 89.) On September 22, 2011, the Melots received an estimate for painting and treating the exterior of the Property. (*See* R. pp. 85-

88.) On September 23, 2011, the Melots received an estimate for painting for $6,437.50. (*See* R. pp. 83-84.)

Following Mr. Melot's examination of the Property and the receipt of the estimates, the Melots concluded that the costs associated with restoring the Property to a satisfactory condition greatly outweighed the house's initial appeal. On October 4, 2011, prior to the bank's approval of the short sale, the Melots conveyed their desire to withdraw their offer on the Property to Hoy. (*See* R. pp. 76-77.)

In addition to that and the preliminary estimates provided to the Melots referenced above, real estate agents voiced several concerns to Hoy regarding the condition of the Property. On November 5, 2011, Hoy received a Feedback Response on the Property, which provided, "Home was in terrible condition, trip hazards on the front walk are of a concern. House was dirty as well." (R. p. 79.) On March 27, 2012, Myers and Thies received an email from Hoy, which provided, "The home is continuing to be shown, but there is common fear about the condition of the house." (R. p. 81.) On March 27, 2012, Hoy received a Feedback Response on the Property, which provided, "[C]ondition was a problem, price certainly accounts for some of that, but there seem to be some serious problems e.g. the rotted wood to the left of the front entry door, looked like it could be termites...even if it is not termites, that was a big concern." (R. p. 82.)

3. The Foreclosure

On August 14, 2011, Myers and Thies accepted the Melots' offer on the Property of $640,000.00. On October 10, 2011, the Melots withdrew their offer on the Property. On February 16, 2012, Wells Fargo initiated foreclosure of the Property (Case No.: 2012-CP-10-1160) alleging that payments had not been made since September 1, 2011 with a balance of $422,839.99.

In addition to the Wells Fargo mortgage, Bank of America possessed a second mortgage on the Property with a balance of $370,000.00. On February 17, 2012, Bank of America was served with the Notice of *Lis Pendens*, Summons, and Complaint. Bank of America neither appeared in this action nor made any efforts to collect on its second mortgage on the Property. (R. p. 40:1-40:16.) In addition, on March 5, 2012, the Melots served a subpoena on Bank of America for all of its documents reflecting loans to Respondents related to the Property. The documents provided that the balance was charged off to $0.00 with no records indicating that Respondents remained indebted to Bank of America. (*See* R. pp. 47-73; R. pp. 42:2-46:3.)

The Property was ultimately sold as a short sale for $500,000.00.

Standard of Review on Appeal

In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed on appeal unless they are found to be without evidence which reasonably supports the judge's findings. *Brown v. Dick Smith*

Nissan, Inc., 414 S.C. 101, 777 S.E.2d 209, 210 (2015) (citing *Temple v. Tec-Fab, Inc.*, 381 S.C. 597, 599-600, 675 S.E.2d 414, 415 (2009).

Argument

1. This Court should reverse and render judgment for the Melots because the Agreement provided two bases to withdraw and terminate the Agreement.

While in Utah for Mrs. Melot's cancer treatments, Mr. Melot sought to find a home to replace their home that had been destroyed by a fire. When he discovered the Property, Mr. Melot made an offer through the listing agent, Hoy. But, two contingencies existed as part of that offer drafted by the listing agent: (1) an inspection addendum and (2) a short sale addendum.

In contract construction, "the primary objective is to ascertain and give effect to the intention of the parties." *Ecclesiastes Prod. Ministries v. Outparcel Assoc., LLC*, 374 S.C. 483, 497, 649 S.E.2d 494, 501 (Ct. App. 2007) (quoting *Southern Atl. Fin. Servs., Inc.*, 281 S.C. 415, 418, 315 S.E.2d 370, 372 (1984)). The intention of the parties "must, in the first instance, be derived from the language of the contract." *Id.* It is well-settled that if "the language is perfectly plain and capable of legal construction, it alone determines the document's force and effect." *Id.*

1.1. The Melots were not obligated to close if they were not satisfied with their inspection of the Property.

The Agreement provides two references to inspections in its contingency sections. The first, in paragraph 29 of the "Agreement to Buy and Sell Real

Estate," provides that the sale is contingent upon "Home inspection." (R. p. 120.) The second, contained in Addendum 1, provides the following: "Buyers have the right to inspect property after all third party approval is given. Buyers further understand property will be sold "as-is" with no repairs to be made by Sellers. If the Buyers are not satisfied with the inspections, they are not obligated to close." (R. p. 122.)

Following their trip to Utah for Mrs. Melot's cancer treatment, the Melots visited the Property for the first time on August 18, 2011. This was four days after the Agreement had been finalized. At Mr. Melot's first inspection of the Property, he noticed multiple issues, including—but not limited to—HVAC problems, water damage and wood rot around the house, the flooring was in disrepair, and the entire house needed to be painted. (R. p. 165, ¶ 11.)

As a result of these issues, Mr. Melot sought to get answers to what the problems were and to determine what the costs associated with those answers would be. First he met with a paint contractor, G&R Painting, on September 6 to discuss remediation of the painting problems. (*See* R. p. 75.) Additionally, on that same day via email he requested the following: "When Sam [Hoy's handyman] gets to [the Property], have him look at the siding on front between dining room windows—significant water damage. Also, I noticed that the AC drain pan in the attic was kinda (sic) full and lot of condensation occurring, he could take a look at that as well." (R. p. 75.) Next, Mr. Melot sought estimates from two companies,

in addition to G&R Painting, to address some of the issues: Michael Shiver of PermaCoat Charleston and RW Cauble & Company.

RW Cauble & Company provided an estimate on September 2, 2011 of $3,993.90 to address the flooring issues throughout the Property. (R. p. 89.) Mr. Shiver provided an estimate on September 22, 2011 of $27,750.00 to address wood rot on all sides of the house. (R. pp. 85-88.) And, G&R Painting provided an estimate on September 23, 2011 of $6,437.50 to address the issues with the interior painting. (R. pp. 83-84.)

As a result of Mr. Melot's multiple personal inspections of the Property and the estimates provided by the subcontractors, on October 5, 2011, the Melots sent an email to Hoy withdrawing their offer to purchase the Property. As part of that withdrawal, one of the reasons was the condition of the Property. Mr. Melot stated that "after seeing HVAC issues and begin (sic) shown many places of rot on the outside of the house by a painter who quoted a paint job, we had become increasingly uncomfortable with the prospect of mold and also with the extent of the repairs that we would have to make." (R. p. 74.)

Additionally, following the Melot's withdrawal, Hoy continued to receive feedback regarding the Property's condition. On November 5, 2011, Hoy received a Feedback Response on the Property, which provided, "Home was in terrible condition, trip hazards on the front walk are of a concern. House was dirty as well." (R. p. 79.) On March 27, 2012, Myers and Thies received an email from

Hoy, which provided, "The home is continuing to be shown, but there is common fear about the condition of the house." (R. p. 81.) On March 27, 2012, Hoy received a Feedback Response on the Property, which provided, "[C]ondition was a problem, price certainly accounts for some of that, but there seem to be some serious problems e.g. the rotted wood to the left of the front entry door, looked like it could be termites...even if it is not termites, that was a big concern." (R. p. 82.)

In this case, the Agreement provided that the Property would be sold "as-is" and that no repairs would be made by Sellers. More importantly, if the Melots were not "satisfied with the inspections, they are not obligated to close." The Melots made this offer without first seeing the Property due to Mrs. Melot's deteriorating health from cancer and provided an inspection contingency in the Agreement. Once they had the opportunity to inspect the house and determine the extent of the repairs, the Melots walked away from the deal as provided in the Agreement. This is exactly the type of contingency the Melots intended to cover with that language.

1.2. The Melots could terminate the Agreement prior to bank approval of the short sale.

The plain language of the contract at issue expressly states that the contract was contingent on bank approval of the short sale, and that the Purchasers could terminate the contract prior to bank approval.

In *M& M Group, Inc. v. Holmes*, a purchaser was found not to have breached a real estate sales contract that contained a financing contingency when she was unable to secure financing. 379 S.C. 468, 477, 333 S.E.2d 262, 266 (Ct. App. 2008). In reaching this conclusion, the Court found "use of the language 'is contingent upon' is unequivocal and patently indicates the parties' respective obligations to buy and sell the business are contingent on Holmes' ability to secure financing." *Id.*

The contract at issue contains a Short Sale Addendum, which is excerpted below:

> 1. Contingency: Purchaser and Seller acknowledge that the purchase price is less than the amount of Seller's debt(s) . . . Therefore, *this contract is contingent upon: (a) Lender's approval of the purchase price and other terms of the Contract* . . . (b) Lender's agreement to accept a payoff which is less than the balance due . . . and (c) lender's release and satisfaction of the mortgage(s) and for other lien(s) upon receipt of discounted payoff amount(s).

(R. p. 121, emphasis added.) The contract's language, "is contingent upon," unequivocally and patently indicates that the respective obligations of the parties to purchase and sell the property are contingent upon bank approval. As a matter of law, the Melots owed no obligation to consummate the purchase until lender approval had been obtained. Lender approval had not been obtained, and therefore there was no breach of the contract.

In order for there to be a binding contract between parties, there must be a mutual manifestation of assent to the terms. *Potomac Leasing Co. v. Otts Mkt., Inc.*,

292 S.C. 603, 606, 358 S.E.2d 891, 893 (1989). In this instance, because the Property was a short sale, contract formation was dependent on the assent of the bank as to price and other terms of the contract. In fact, the purpose of the Short Sale Addendum is to put the purchaser on notice that the bank is a party to the transaction. Therefore, until the lender approved of the price and other terms of the contract, there was no meeting of the minds, and the contract was unenforceable.

The contract states:

> If Seller has not obtained and provided Purchaser or Purchaser's Agent written notice of Lender's approval of the transaction, as set forth above, within *20 days prior to the closing date* specified in the Contract, Purchaser may terminate the Contract, and in such event Purchaser shall be entitled to a refund of the earnest money deposit, and neither party shall have any rights or obligations hereunder.

(R. p. 121, emphasis added.) At the time of the Melots' withdrawal, the seller had not obtained bank approval, and the closing date in the contract is "30 days after approval." (R. p. 115.) The 20 days that the seller had to terminate the contract had not commenced at the time of the Melots' withdraw. For this reason, the Melots were permitted to terminate the contract and are entitled to a refund of their earnest money.

2. This Court should reverse and render judgment for the Melots because Respondents suffered no damages.

Not every breach of contract action entitles the non-breaching party to damages. It is axiomatic that without damages proximately caused by the breach a plaintiff is not entitled to a damages award.

"This being an action for the breach of contract, the burden was upon the [Respondent] to prove the contract, its breach, and the damages caused by such breach." *Maro v. Lewis*, 389 S.C. 216, 697 S.E.2d 684, 688 (S.C. App. 2010) (citing *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962). "The general rule is that for a breach of contract the defendant is liable for whatever damages follow as a natural consequence and a proximate result of such breach." *Id.* "The purpose of an award of damages for breach of contract is to put the plaintiff in as good a position as he would have been in if the contract had been performed." *Maro v. Lewis*, 389 S.C. 216, 697 S.E.2d 684, 688 (S.C. App. 2010) (citing *Minter v. GOCT, Inc.*, 322 S.C. 525, 528, 473 S.E.2d 67, 70 (Ct. App. 1996). "The proper measure of compensation is the loss actually suffered by the plaintiff as a result of the breach." *Id.*

On August 14, 2011, Respondents accepted the Melots' offer on the Property of $640,000.00. On October 10, 2011, the Melots withdrew their offer on the Property, and on February 16, 2012, Wells Fargo initiated foreclosure of the Property.

In addition to the Wells Fargo mortgage, Bank of America possessed a second mortgage on the Property with a balance of $370,000.00. But, Bank of America neither appeared in this action nor made any efforts to collect on its second mortgage on the Property. (R. p. 40:1-40:16.)

Moreover, the subpoena of all of Bank of America's documents reflecting loans to Respondents related to the Property provided that the balance was charged off to $0.00 with no records indicating that Respondents remained indebted to Bank of America. (R. pp. 47-73; R. pp. 42:2-46:3.)

If the purpose of a damages award in a breach of contract case is to to put the plaintiff back to the point where they would have been if the contract had been performed, then the trial court erred in awarding Respondents damages. If the closing would have taken place, Respondents would still owe money to Bank of America. The sale would have still been a short sale. And, much like what happened here, Bank of America would not have appeared or made any efforts to collect on the remainder of its second mortgage. In this case, Bank of America walked away from the second mortgage as many banks did during the crisis. The record and the evidence reflects that Respondents did not actually suffer damages as a result of the Melots withdrawing their offer, and as such the trial court erred in awarding damages to Respondent.

Conclusion

This Court should reverse the trial court and render judgment in favor of the Melots for two reasons: (1) because the Melots had the right to withdraw their offer under the contract and (2) Respondents suffered no damages. The plain language states that the Melots were not obligated to close if they were not satisfied with the inspection of the Property and that they had the right to terminate the contract prior to lender approval. To read the contract in any other manner would be a perversion of the intent of the parties. Lastly, the record and the documents received from Bank of America reflect that Bank of America walked away from the second mortgage on the Property and Respondents suffered no damages.

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