THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CALHOUN COUNTY
Court of Common Pleas

Richard B. Ness, Special Referee for Calhoun County

Case No. 2013-CP-09-83
Appellate Case No. 2016-001867

Bonnie Riley, Appellant,

v.

Michael Outlaw Respondent.

RESPONDENT'S INITIAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF ISSUES ON APPEAL

A. DID THE TRIAL JUDGE CORRECTLY GRANT DEFENDANT A JUDGMENT BASED ON THE THEORY OF QUANTUM MERUIT?

B. DID THE TRIAL JUDGE CORRECTLY FIND THAT THE VERBAL CONTRACT FOR THE SALE OF LAND IN QUESTION WAS ENFORCEABLE AND THE COURT HAD JURISDICTION TO HEAR THE MATTER?

C. DID THE TRIAL JUDGE CORRECTLY GRANT THE DEFENDANT A JUDGMENT BASED ON THE EVIDENCE OF DAMAGES PRESENTED BY DEFENDANT?

STATEMENT OF THE CASE

Plaintiff Bonnie Riley filed her Summons and Complaint in this case on April 19, 2013, seeking an Order requiring Defendant to remove equipment from certain real property and to permanently prohibit Defendant from entering said real property. Defendant Michael Outlaw filed his Answer and Counterclaim on June 25, 2013, denying the allegations of the Complaint and requesting the enforcement of a verbal contract for the transfer of land or alternatively granting Defendant a judgment based on the theory of quantum meruit. Plaintiff filed her Reply to Defendant's Counterclaims on July 13, 2013.

The case was referred to Special Referee Richard B. Ness by a Consent Order of Reference filed on August 21, 2014. A final hearing was held on May 20, 2016, from which a Final Order of Judgment was entered on August 18, 2016. Special Referee Ness granted Defendant a judgment against Plaintiff in the amount of $17,965.00 and indicated that Plaintiff could satisfy the judgment by conveying certain real property to Defendant. A Supplemental Order was signed by Special Referee Ness on September 5, 2016, which allowed Plaintiff until December 31, 2016, to convey the real property to Defendant in satisfaction of the judgment.

Plaintiff filed her Notice of Appeal on September 13, 2016, and the trial transcript was received on October 31, 2016. Plaintiff's Initial Brief and Designation of Matters to be Included in the Record on Appeal were originally due November 30, 2016, but the Court granted Plaintiff an extension until December 7, 2016, to make her initial filings. On February 7, 2017, the Court granted Defendant's Motion to Relieve Counsel and substituted Russell A. Blanchard IV as attorney of record for Defendant. This Order granted Defendant thirty days from the date of the Order to file and serve his initial brief and designation of matters on appeal.

FACTS

The dispute in this matter arises from an agreement between Plaintiff and Defendant for the transfer of a parcel of land. Plaintiff and Defendant are neighbors, and Plaintiff has been involved in a relationship with Defendant's father for some time. (Trial Tr. 75:22- 76:6, May 20, 2016). Plaintiff told Defendant that if he would mow her yard she would transfer certain real property to him. (Trial Tr. 5:17–6:11; 6:17-18). When Plaintiff made this offer to Defendant both parties were physically present on the real property and accompanied by Defendant's father and son. (Trial Tr. 73:14-25). Plaintiff showed Defendant the land she offered to transfer to him and told him it was an acre of land. (Trial Tr. 5:10-11; 74:4). At the time of the agreement, no plat had been prepared, so Plaintiff used a line of oak trees to show Defendant where the new property line should be. (Trial Tr. 74:9-13). Defendant paid for a survey to be prepared which showed the real property as 1.19 acres and identified the tract as Parcel C. (Trial Tr. 75:11-12; 74:14-18). Throughout the proceedings, and in this brief, the property in dispute referred to as Parcel C. Both parties agree that Defendant did in fact have Plaintiff's yard mowed pursuant to their agreement. (Trial Tr. 7:15-19; 78:22-24). At the time of the hearing, Defendant had been cutting the grass on Parcel C for approximately eight and a half years. (Trial Tr. 78:1-3). Plaintiff went to attorney Martin Banks' office for the purpose of signing a deed conveying Parcel C to Defendant, but Mr. Banks told Plaintiff not to sign it because of concerns about Plaintiff's mortgage. (Trial Tr. 30:20-23; 44:16-21; 52:24- 53:13). Shortly thereafter, Plaintiff indicated she would not be signing a deed to Defendant. (Trial Tr. 54:4-12). Plaintiff then filed her Summons and Complaint to institute this action.

During the hearing of the case, Defendant called two witnesses. Attorney Martin Banks was called by Defendant out of order with Plaintiff's consent. (Trial Tr. 50:1-11). After Plaintiff

indicated that she had no further witnesses, Defendant called Ms. Brandy Outlaw. (Trial Tr. 90:23- 91:4).

ARGUMENTS

Standard of Review

The standard of review is different for actions at law and actions in equity, and the case at hand involves both legal and equitable causes of action. When a single case contains various types of causes of action, they are viewed "separately for the purpose of determining the appropriate standard of review." *Mason v. Mason,* 412 S.C. 28, 47, 770 S.E.2d 405, 414 (Ct. App. 2015). Which category an action falls under is determined by "the pleadings and the character of the relief sought." *Park Regency, LLC v. R&D Dev. of the Carolina,* 402 S.C. 401, 411, 741 S.E.2d 528, 533 (Ct. App. 2012). Defendant's counterclaim for quantum meruit is an equitable claim. *Columbia Wholesale Co., Inc. v. Scudder May N.V.*, 312 S.C. 259, 261, 440 S.E.2d 129, 130 (1994). "An appellate court reviewing a decision in an action in equity may determine facts in accordance with its own view of the preponderance of the evidence." *Park Regency, LLC,* 402 S.C. at 411, 741 S.E.2d at 533. This standard of review "does not require an appellate court to disregard the findings of the trial court or to ignore the fact that the trial court is in the better position to assess the credibility of the witnesses." *Regions Bank v. Wingard Props., Inc.,* 394 S.C. 241, 248, 715 S.E.2d 348, 352 (Ct. App. 2011). The Appellant still has to convince "the appellate court that the trial court committed error in its findings." *Id.* at 249, 715 S.E2d at 352. The appellate court should "affirm the findings of the trial court in an equity case unless the appellant satisfies th[e] court that the preponderance of the evidence is against the findings of the trial court." *Id.*

Alternatively, "an action for breach of contract is an action at law." *Mason,* 412 S.C. at 56, 770 S.E.2d at 420. When an action at law is tried before a judge, "the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably

supports the judge's findings." *Kuznik v. Bees Ferry Assocs.*, 342 S.C. 579, 589-590, 538 S.E.2d 15, 20 (Ct. App. 2000). As an action at law, Defendant's breach of contract claim would be reviewed under this standard.

I. THE TRIAL JUDGE CORRECTLY GRANTED DEFENDANT A JUDGMENT BASED ON THE THEORY OF QUANTUM MERUIT BECAUSE THE EVIDENCE PRESENTED SUPPORTED GRANTING DEFENDANT A JUDGMENT.

Plaintiff correctly states in her Initial Brief that Defendant asserted two counterclaims in his Answer and Counterclaim. In his Final Order, Special Referee Ness correctly found that Plaintiff entered into a verbal contract with Defendant for the sale of Parcel C and that Defendant had fully performed his obligations under the parties' agreement. (Final Order 4). Special Referee Ness further found that even if the agreement was not enforceable, Defendant was entitled to a judgment on the theory of quantum meruit. (Final Order 5). Contrary to Plaintiff's assertion, the Final Order does not characterize the quantum meruit claim as "the all-inclusive claim." (App. Initial Brief 4).

The equitable doctrine of quantum meruit allows Defendant to recover against Plaintiff when Defendant has been unjustly enriched. *Columbia Wholesale Co., Inc. v. Scudder May N.V.*, 312 S.C. 259, 261, 440 S.E.2d 129, 130 (1994). For Defendant to prevail on a theory of unjust enrichment, he must prove three elements: (1) a benefit conferred by Defendant upon the Plaintiff; (2) realization of that benefit by the Plaintiff; and (3) retention of the benefit by the Plaintiff under circumstances that make it inequitable for her to retain the benefit without paying Defendant for its value. *Chase Home Finance, LLC vs. Risher*, 405 S.C. 202, 208, 746 S. E. 2d 471, 476 (Ct. App. 2013).

Plaintiff incorrectly argues that Defendant failed to offer any proof and failed to go forward on his counterclaims. At no point during the proceeding did Defendant affirmatively

state he was not moving forward on his counterclaims. Defendant offered documents into evidence, cross examined Plaintiff's witnesses, and offered two of his own witnesses. Plaintiff actually consented to Defendant calling Mr. Martin Banks out of order (Trial Tr. 50:1-11), and after Plaintiff concluded her case, Defendant called Mrs. Brandy Outlaw as a witness. (Trial Tr. 90:23 – 91:5). Plaintiff's assertion that Defendant failed to go forward on his counterclaims is simply incorrect.

Plaintiff further argues that there is no evidence to support the finding that Plaintiff's retention of the benefit she received would be inequitable. Special Referee Ness specifically found that "the Plaintiff never stopped the Defendant from performing the service and allowed him to do so for nearly six (6) years prior to this litigation in which the Defendant received *no compensation* (emphasis mine) from the Plaintiff other than the promise of the conveyance of Parcel "C'." (Final Order 5). While the trial judge did not use the term inequitable, the implication of this finding of fact is clear. Plaintiff got something from Defendant and paid nothing for it even though the intention was that she would pay for it.

The evidence at trial supports the finding that Plaintiff's retention of the benefit is inequitable. Contrary to Plaintiff's assertion, Defendant did not exert absolute use and control over Parcel C. Defendant temporarily had a pole building on Parcel C to store farm equipment in. (Trial Tr. 85:6-15). When Plaintiff asked Defendant to remove the building, he did. (Trial Tr. 38:18- 39:5). This shows that Plaintiff was in fact still exercising control over Parcel C. Although Plaintiff cites broadly to numerous pages of transcript testimony, she does not point out any specific instance of Defendant exercising exclusive control over the property other than the use of the building. If this was one of many examples, what are the others?

Defendant clearly met his burden of proof on his counterclaim for Quantum Meruit. Defendant provided Plaintiff benefits in the form of grass mowing, concrete pouring, tree removal, and lot maintenance. (Trial Tr. 35:6-15; 38:11-12; 61:5-14). Plaintiff realized these benefits and she freely admits all these services were provided to her. Plaintiff did not pay Defendant for the benefits she received. (Trial Tr. 35:12-21). After receiving these benefits over many years, Plaintiff refused to live up to her end of the bargain. (Trial Tr. 35:25 – 36:4). Based on this evidence, Special Referee Ness correctly found that Defendant was entitled to a judgment against Plaintiff based on quantum meruit.

If in fact Defendant failed to present evidence on his counterclaims, Plaintiff could have moved for summary judgment on Defendant's counterclaims at the conclusions of the case. Plaintiff made no such motion. Having made no such motion, Plaintiff now asks the Appellate Court to ignore the findings of Special Referee Ness and reach of different conclusion. The preponderance of the evidence simply does not support the Plaintiff's argument.

II. THE TRIAL JUDGE CORRECTLY FOUND THAT THE VERBAL CONTRACT OF SALE WAS AN ENFORCEABLE CONTRACT AND HAD JURISDICTION TO HEAR THE MATTER.

Plaintiff argues that Defendant's counterclaim for breach of contract fails for lack of proof and for jurisdictional reasons. Plaintiff is incorrect on both arguments.

Plaintiff claims that *S.C. Code §32-3-10* deprives the Court of subject matter jurisdiction to hear any claim that a contract exists for the sale of real property if there is no writing signed by the party against whom the claim is made memorializing the agreement. In making this claim, Plaintiff is confusing a defense with a jurisdictional bar. The statute referred to by Plaintiff is a codification of the Statute of Frauds. *Bradshaw v. Ewing,* 297 S.C. 242, 245, 376 S.E.2d 264, 266 (1989). Plaintiff has not cited a single case to support the contention that this

creates a jurisdictional bar to Defendant's counterclaim. Plaintiff could have made a Motion for Summary Judgment at any point to have Special Referee Ness rule on whether the Statute of Frauds prevents the enforcement of the parties' agreement. No such motion was ever made. Plaintiff's jurisdictional argument is simply without merit.

As pointed out by Plaintiff, to prevail on his breach of contract counterclaim, Defendant must prove the existence of a binding contract, a breach of that contract, and damages proximately resulting from the breach of the contract. *Fuller v. E. Fire & Cas. Ins. Co.,* 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962). The issue addressed by the Statute of Frauds is the existence of a binding contract. "To remove an oral contract to convey real estate from the Statute of Frauds, [Defendant] must show part performance of the oral contract." *Bradshaw*, 240 S.C. at 245, 124 S.E.2d at 266. Partial performance can be shown "by evidence of the following: (1) improvements to the real estate; (2) possession of the real estate; (3) payment of the purchase price." *Id.* The burden of proof for establishing the existence of the contract is "competent and satisfactory proof, such as is clear, definite and certain." *Id.*

Defendant did in fact prove all three elements of partial performance by clear and convincing evidence. To support his findings, Special Referee Ness refers to Defendant's "complete performance" of the contract, "Plaintiff's appearance at the office of Martin Banks to sign the deed," and the fact that Plaintiff testified to the existence of the agreement and the terms of the agreement. (Final Order 5). As the Trial Judge points out, Plaintiff does not dispute the existence of the agreement. In fact Plaintiff testified numerous times regarding the terms of the agreement. (Trial Tr. 6:1-11; 49:14-17). Plaintiff never denies the existence of the agreement to transfer the land to Defendant. Plaintiff further admits that she went to Martin Banks office to sign the deed conveying Parcel C to Defendant. (Trial Tr. 29:14-23). Mr. Banks supported this

when he stated, "There was no question if I hadn't intervened she would have sign[sic] that deed." (Trial Tr. 57:24-25).

Along with the evidence cited by Special Referee Ness, the record also contains evidence of the three ways to prove part performance that are cited in *Bradshaw*. As previously pointed out and not disputed by the Plaintiff, Defendant mowed the grass on Parcel C from 2007 up through the week before the hearing. Defendant also mowed Plaintiff's grass for over four years from the beginning of the parties' agreement through early 2013. (Trial Tr. 32:22- 33:3; 78:9-24). Defendant limbed up and removed trees from the property. (Trial Tr. 82:7-10). Defendant put up a shed which constituted an improvement and temporary possession of the real property. (Trial Tr. 85:4-7). Ultimately, Defendant paid the full consideration called for in the parties' agreement by cutting Plaintiff's grass on her own yard and cutting the grass on Parcel C. To summarize, Plaintiff made Defendant an offer- If you cut my grass, I will transfer this land to you. (Trial Tr. 6:9-11, 17-18). Defendant accepted the offer. (Trial Tr. 73:24-25). Plaintiff identified the size of the parcel to transfer to Defendant and showed him where the new property line should be based on a line of oak trees. (Trial Tr. 5:10-11; 74:9-18; 83:10-19). Defendant paid a valuable consideration by performing the services that have been previously outlined. While Plaintiff claimed she was not satisfied with the grass cutting, she allowed her yard to be cut for many years and Parcel C to be cut for many more. It is also clear that Plaintiff breached the agreement because she has refused to transfer the land. (Trial Tr. 36:1-4). And as Special Referee Ness determined, Defendant was damaged by Plaintiff's breach in an amount based on the value of the work he had done pursuant to the agreement. (Final Order pg 5).

Because breach of contract is an action at law, Special Referee Ness' findings should only be overturned if there is no evidence to reasonably support his findings. All the evidence

cited above supports his findings, and his findings regarding the enforceability of the parties' agreement should be affirmed.

III. THE TRIAL JUDGE CORRECTLY GRANTED DEFENDANT A JUDGMENT IN AN AMOUNT SUPPORTED BY THE EVIDENCE PRESENTED AT THE HEARING.

Along with presenting sufficient evidence to support his counterclaims for quantum meruit and breach of contract, Defendant presented clear evidence to allow Special Referee Ness to calculate Defendant's damages. Plaintiff cites correct legal principles regarding the calculation of damages by the fact finder, but ignores the amount of evidence presented to Special Referee Ness that was used to calculate Defendant's damages.

The Trial Judge clearly lays out in his Final Order the mathematical formula that he used to calculate damages. The damages were based solely on the cost Defendant incurred in mowing both Plaintiff's yard and Parcel C. (Final Order 4). Special Referee Ness found that Defendant mowed both Plaintiff's yard and Parcel C for 68 months which covered the time from mid-2007 through February 2013 when the litigation was filed. (Final Order 4). After litigation was filed, Defendant mowed Parcel C for an additional 39 months which covered the time from February 2013 through the hearing date. (Final Order 4). Special Referee Ness further found that the cost to mow both Parcel C and Plaintiff's yard was $200.00, and the cost to mow just Parcel C was $100.00. (Final Order 4). Special Referee Ness then added in the cost of the survey which was $465.00 to come up with a total of $17,965.00. (Final Order 4). All of Special Referee Ness' findings and calculations are clearly supported by the evidence presented at the hearing. The Trial Judge used this method because "[t]he proper measure of compensation is the loss actually suffered by the [Defendant] as a result of the breach." *Minter v. GOCT, Inc.*, 322 S.C. 525, 528,

473 S.E.2d 67, 70 (Ct. App. 1996). Defendant's actual loss was the cost of the mowing of Parcel C and Plaintiff's yard.

Both Defendant and Plaintiff testified that Defendant's yard was mowed for approximately four years. (Trial Tr. 7:15-17; 78:4-8). Defendant clarified his testimony and stated that the mowing of Plaintiff's yard occurred from when "the deal started" through the filing of Plaintiff's lawsuit in early 2013. (Trial Tr. 78:9-24). The time period that Parcel C was being cut is clearly laid out in Defendant's testimony. He states that he has had Parcel C mowed for about eight and a half years (Trial Tr. 78:1-3), and further clarifies that the mowing of Parcel C occurred from when the parties deal began up to and through the week prior to the hearing. (Trial Tr. 77:23-25; 78:1-3). Plaintiff offered no testimony to dispute that Defendant had been mowing Parcel C for that time period. (Trial Tr. 41:20-24).

The testimony also supports the calculation of the cost of mowing. The cost to cut Plaintiff's yard was $100.00 (Trial Tr. 72:23- 25; 77:3-6), and an additional $100.00 was charged to cut Parcel C. (Trial Tr. 77:12-20; 78:25- 79:4). During the testimony of Mrs. Outlaw, Special Referee Ness directly questioned the witness to clear up any ambiguity regarding the amount paid for mowing Plaintiff's yard and Parcel C. Mrs. Outlaw's answers supported the figures previously provided. (Trial Tr. 100:20 – 101:13). Plaintiff is correct that Defendant did not provide checks or testimony from the mowers to support the cost of mowing. However, Defendant and his wife provided uncontroverted testimony to the amounts paid, and Special Referee Ness found this testimony to be credible.

Based on the principles cited by Plaintiff in her brief, Special Referee Ness made the correct calculation of damages, and that calculation is supported by the evidence submitted at trial. The general rule requires damages to be determined with reasonable certainty. *Minter*, 322

S.C. at 528, 473 S.E.2d at 70. Absolute certainty is not required. The cases cited by Plaintiff all involve situations where the measure of damages was speculative in nature. For example, in *Minter*, the damages were calculated based on anticipated future business profits. *Yadkin v. Materials*, 339 S.C. 640, 645, 529 S.E.2d 764, 767 (Ct. App. 2000), involved damage to real property which is valued based on diminution in market value. Finally, in *South Carolina Fin. Corp of Anderson*, 236 S.C. 109, 120, 113 S.E.2d 329, 335 (1960), damages were based on lost profits. However in this case, Defendant's damages were calculated based on clear evidence presented to Special Referee Ness and not disputed by any evidence offered by Plaintiff. Both parties testified to the time period of the mowing. Defendant and his wife provided clear testimony to the cost of mowing. Defendant was not trying to estimate a future loss. He testified to actual amounts paid out and the period over which they were paid. In her brief, Plaintiff is asking this Court to question the veracity of the evidence not the method of calculating damages.

CONCLUSION

For the reasons stated herein, this Court should affirm the judgment of the Special Referee dismissing Plaintiff's Complaint and granting Defendant a judgment against Plaintiff in the amount of $17,965.00.

March 9, 2017

Respectfully Submitted,

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Bonnie Riley, Appellant,

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PROOF OF SERVICE

I certify that I have served Respondent's Initial Brief and Designation of Matter to be Included in the Record on Appeal on Bonnie Riley, Respondents, by depositing a copy of it in the United States Mail, postage prepaid, on March 9, 2017, addressed to their attorney of record, Glenn Walters, Attorney at Law, P.A., P.O. Box 1346, Orangeburg, SC 29116.

March 9, 2017

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March 9, 2017

Ms. Jenny Abbot Kitchings
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Re: Bonnie Riley vs. Michael Outlaw
Case No.: 2016-001867

Dear Ms. Kitchings:

Enclosed for filing please find Respondent's Initial Brief. By copy of this letter I am serving the same on Appellant's attorney.

If you have any questions, please do not hesitate to contact me.

Yours truly,

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