

STATE OF SOUTH CAROLINA)
)
COUNTY OF ORANGEBURG)

IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL CIRCUIT

Barry Phillip Wright,)
)
Plaintiff,)

CASE NO.:2015-CP-38-01104

vs.)

ORDER DISMISSING PLAINTIFF'S
CAUSES OF ACTION

Henry Smith,)
)
Defendant.)

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MAR 31 2017

SC Court of Appeals

FILED FOR RECORD
WINNIE B. CLARK
2016 MAR 21 A 10:37
CLERK OF COURT

This matter came to be heard by this court on a nonjury trial held on September 7, 2016. Plaintiff Barry Phillip Wright ("Buyer") brought the following causes of action against Defendant Henry Smith ("Seller") arising from a contract for the sale of real property: specific performance; breach of contract; breach of contract accompanied by a fraudulent act; fraud in the inducement; and constructive fraud. Buyer's claims for specific performance, fraud in the inducement, and constructive fraud were withdrawn by Buyer's counsel at trial, leaving only claims for breach of contract and breach of contract accompanied by a fraudulent act before this court. After due deliberation, for the reasons stated below, this court dismisses Buyer's causes of action.

FACTS

On July 17, 2015, Buyer and Seller entered into a contract for the sale of real property located at 2199 Russell Street in Orangeburg, South Carolina for a purchase price of \$58,000.00. The contract specified that the parties would have thirty days from July 17, 2015 to close the sale, and specifically stated that time was of the essence. Pursuant to the terms of the contract, Buyer was required to pay earnest money of \$1,000.00 at the signing of the contract which was to be held

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in trust by Attorney Glenn Walters ("Walters") until the closing of the sale of the property. At the signing of the contract, Buyer presented a check for \$1,000.00 drawn on an account belonging to Labrena E. Aiken-Furtick ("Aiken-Furtick") in satisfaction of the aforementioned requirement. Four days later, however, Buyer retrieved the check from Walters' office. At that time, Buyer left at Walters' office a check for \$1,000.00 made payable to Aiken-Furtick, who is neither a party to the contract nor an agent of Walters.

Thirty days after the execution of the contract, Seller appeared at Walters' office for the closing, but was told that no closing was scheduled. A telephone call was made to Buyer by Walters' staff and Seller, and Buyer expressed to them that he was unaware of any closing. After a contentious conversation between Buyer and Seller, Seller stated that he would sell the property to someone else. Seller thereafter found a new buyer for his property. However, before Seller could close with the new buyer, Buyer filed a lis pendens and this lawsuit preventing the proposed sale.

Seller ultimately cancelled the new sale and sold the property to Buyer at the originally agreed-upon price of \$58,000.00 on September 28, 2015, forty-one days after the scheduled closing of the sale of the property. Buyer filed the present causes of action on September 17, 2015, and Seller answered on October 8, 2015.

DISCUSSION

A. Because Seller never breached the contract, Buyer's claims for breach of contract and breach of contract accompanied by a fraudulent act necessarily fail.

To establish a claim for breach of contract, a plaintiff must prove the existence of a contract, its breach, and the damages caused by such breach. E.g., Branche Builders, Inc. v. Coggins, 386 S.C. 43, 48 (Ct. App. 2009). To establish a claim for breach of contract accompanied by a fraudulent act, a plaintiff must prove (1) a breach of contract, (2) fraudulent intent relating to the breaching of the contract, and (3) a fraudulent act accompanying the breach. Ball v. Canadian Am.

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Exp. Co., 314 S.C. 272, 276 (Ct. App. 1994). A claim for breach of contract accompanied by a fraudulent act requires proof of fraudulent intent relating to the breaching of the contract and not merely to its making. Harper v. Ethridge, 290 S.C. 112, 119 (Ct. App. 1986) ("[T]he fraudulent act is any act characterized by dishonesty in fact, unfair dealing, or the unlawful appropriation of another's property by design.").

Here, this court finds that Seller never breached the contract and, therefore, Buyer's causes of action fail. At trial, Buyer contended that Seller breached the contract for the sale of the property because Seller did not provide Buyer with notice of a closing date within thirty days of the execution of the contract. However, there is simply no provision in the contract, nor requirement by law, that Seller give Buyer notice of a closing date within thirty days of the execution of the contract. Buyer also alleged that Seller breached the contract because of Seller's delay in obtaining and providing the payoff amount due on his mortgage. However, Seller obtained the payoff from First Citizens Bank on August 14, 2015, three days before the scheduled closing on August 17 pursuant to the terms of the parties' contract. Lastly, Buyer claims that Seller breached the contract because Seller refused to perform after thirty days had passed from the execution of the contract. However, the contract between the parties specifically stated that "Time is of the Essence to close upon the acceptance of said contract within thirty (30) days of the execution." Therefore, after thirty days from execution of the contract, there was no need for Seller to perform.

Because Seller never breached the contract—indeed, Seller ultimately sold the property to Buyer for the agreed-upon price—Buyer's causes of action for breach of contract and breach of contract accompanied by a fraudulent act necessarily fail.

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B. Although Buyer breached the contract by failing to pay earnest money to be held in trust until closing of the sale of the property, Seller suffered no damages as the sale of the property ultimately closed at the stated contract price.

Seller claims that Buyer breached the contract between the parties by failing to pay over the earnest money required by the contract to Walters. The contract stated that Buyer was to pay \$1,000.00 in earnest money at the signing of the contract to be held in trust by Walters until the closing of the sale of the property. At trial, evidence was introduced to establish that, four days after the signing of the contract, Aiken-Furtick retrieved the check from Walters' office, and Buyer replaced the first check with a check made payable Aiken-Furtick, a person not associated in any way to the purchase or sale of the property. Therefore, Buyer did, in fact, breach the contract.

However, while Buyer breached the contract, Seller sustained no damages resulting from Buyer's breach. The sale of the property ultimately closed at the stated contract price of \$58,000.00, albeit forty-one days after the closing was scheduled to occur. See Branche Builders, 386 S.C. at 48 ("In a breach of contract action, damages serve to place the nonbreaching party in the position he would have enjoyed had the contract been performed."); see also Minter v. GOCT, Inc., 322 S.C. 525, 528 (Ct. App. 1996) ("The proper measure of compensation is the loss actually suffered by the plaintiff as a result of the breach."). Because the parties ultimately adhered to the contract at the price originally contemplated, Seller was not damaged by Buyer's failure to pay over earnest money in trust until the closing of the sale of the property. See, e.g., Branche Builders, 386 S.C. at 48 ("The elements for breach of contract are the existence of a contract, its breach, *and the damages caused by such breach.*") (emphasis added).

Accordingly, because Seller has failed to prove damages, an essential element of a cause of action for breach of contract, Seller's claim fails.

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CONCLUSION

THEREFORE, IT IS ORDERED that Buyer's cause of action for breach of contract be, and hereby is, dismissed.

IT IS FURTHER ORDERED that Buyer's cause of action for breach of contract accompanied by a fraudulent act be, and hereby is, dismissed.

AND IT IS SO ORDERED.



Edgar W. Dickson
Presiding Judge, 1st Judicial Circuit

September 21, 2016
Orangeburg, South Carolina

CERTIFICATE OF SERVICE BY MAIL

I, Peggy T. Smith, Administrative Assistant to Judge Edgar W. Dickson, hereby certify that I have on this 21st day of September, 2016, served a copy of the foregoing Order Dismissing Plaintiff's Causes of Action upon the counsel of record specified below by placing the same in the U.S. Mail, postage prepaid to:

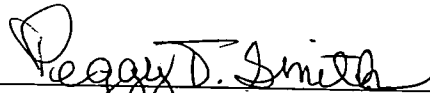
Virgin Johnson, Jr., Esquire
Johnson & Williams Attorneys
P. O. Box 2107
Orangeburg, S. C. 29116

Lawrence Keitt, Esquire
Law Office of Lawrence Keitt
P. O. Box 811
Orangeburg, S. C. 29116

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SC Court of Appeals



Peggy T. Smith

Administrative Assistant

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STATE OF SOUTH CAROLINA,
COUNTY OF ORANGEBURG

Barry Phillip Wright,

Plaintiff

Henry Smith,

Defendant.

IN THE COURT OF COMMON PLEAS
IN THE FIRST JUDICIAL CIRCUIT

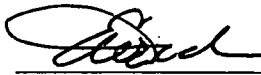

CASE NO.: 2015-CP-38-01104

ORDER WAIVING MEDIATION

This matter comes before the Court upon motion of counsel for the Plaintiff, Barry Wright, for an Order waiving mediation in the above referenced case. Both parties have agreed that mediation will not be helpful and both parties have consented to waiving mediation.

IT IS THEREFORE ORDERED that mediation is waived in this matter.

AND IT IS SO ORDERED.

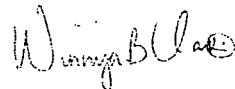



Honorable Edgar W. Dickson
Chief Administrative Judge

This 25th day of Aug., 2016
Orangeburg County, South Carolina.

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ORANGEBURG, SC

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ORANGEBURG COUNTY, SC

STATE OF SOUTH CAROLINA,
COUNTY OF ORANGEBURG

IN THE COURT OF COMMON PLEAS
IN THE FIRST JUDICIAL CIRCUIT

Barry Phillip Wright,

CASE NO.: 2015-CP-38-01104

Plaintiff

ORDER FOR CONTINUANCE

Henry Smith,

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Defendant.

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SO Court of Appeals


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ORANGEBURG COUNTY SC

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The Court has continued this matter until the September 2016 Term of Non-Jury Court. The parties must mediate this matter and be prepared for trial before the September 2016 Term of Non-Jury Court.

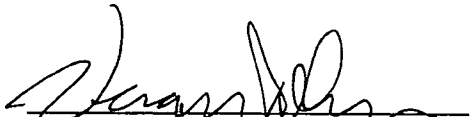
IT IS THEREFORE ORDERED that this matter is rescheduled to the September 2016 Term of Non-Jury Court and the mediation must be completed before the September 2016 Term of Non-Jury Court.

AND IT IS SO ORDERED.

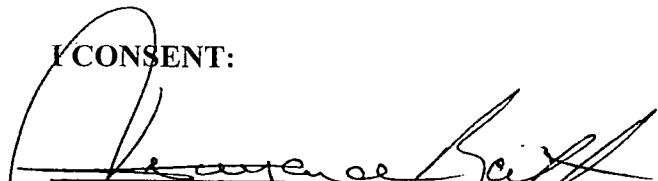

The Honorable Diane Schafer Goodstein

This 12 day of July, 2016
Orangeburg County, South Carolina.

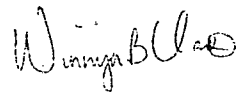
I SO MOVE:


Virgin Johnson, Jr., Esquire
Attorney for Plaintiff

I CONSENT:


Lawrence Keitt, Esquire
Attorney for Defendant

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