

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Master-in-Equity

Appellate Case No. 2016-002060

RECEIVED

APR 03 2017

SC Court of Appeals

Quarter Pointe Ventures, LLC Respondent,

v.

James Lineberger Appellant.

INITIAL BRIEF OF APPELLANT

Jeremy D. Melville
SC Bar No. 77473
W. Mark White
SC Bar No. 7016
SPENCER & SPENCER, P.A.
226 East Main Street
Rock Hill, SC 29731
Phone: (803)327-7191

ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF CASE 1

STATEMENT OF FACTS 3

ARGUMENTS

 I. QPV'S PROPOSED CONVEYANCE OF ONLY A 50% INTEREST IN
 THE SMALL TRACT IS AN IMPROPER BASIS FOR
 EXTINGUISHING LINEBERGER'S RIGHT TO ADDITIONAL
 COMPENSATION FOR THE SMALL TRACT UNDER THE BUYOUT
 AGREEMENT 12

 A. Express Language of Buyout Agreement . . . 13

 B. The Implied Covenant of Good Faith
 and Fair Dealing 14

 C. Business Judgment Rule Does Not Apply . . 18

 II. THE TRIAL COURT ERRED IN FINDING THAT THE FAIR
 MARKET VALUE OF THE SMALL TRACT DOES NOT EXCEED
 \$1,000,000.00 19

 III. QPV'S PROPOSED CONVEYANCE OF ONLY A 50% INTEREST IN
 THE RIGHT-OF-WAY AREA IS AN IMPROPER BASIS FOR
 LIMITING LINEBERGER'S RIGHT TO ADDITIONAL
 COMPENSATION FOR THE RIGHT-OF-WAY AREA UNDER THE
 BUYOUT AGREEMENT 20

 IV. THE TRIAL COURT ERRED IN ORDERING THAT LINEBERGER
 FILE A SATISFACTION OF MORTGAGE WHERE OBLIGATIONS
 SECURED BY THE MORTGAGE REMAIN OUTSTANDING . . 23

 V. THE TRIAL COURT ERRED IN SUSPENDING ACCRUAL OF
 INTEREST ON THE NOTE 24

CONCLUSION 26

TABLE OF AUTHORITIES

Cases

South Carolina

Boddie-Noell Properties, Inc. v. 42 Magnolia P'ship,
344 S.C. 474, 544 S.E.2d 279 (Ct. App. 2000)

Commercial Credit Corp. v. Nelson Motors, Inc.,
247 S.C. 360, 147 S.E.2d 481 (1966)

Fisher v. Shipyard Vill. Council of Co-Owners, Inc.,
415 S.C. 256, 781 S.E.2d 903 (2016).

Kuznik v. Bees Ferry Assocs., 342 S.C. 579,
538 S.E.2d 15 (Ct. App. 2000)

Lee v. Univ. of S.C., 407 S.C. 512,
757 S.E.2d 394, 397 (2014)

Miles v. Miles, 393 S.C. 111,
711 S.E.2d 880, 883 (2011)

Reid v. Reid, 280 S.C. 367,
312 S.E.2d 724 (Ct. App. 1984)

Ruscon Const. Co. of Fla. v. Beaufort Jasper Water Auth., 259
S.C. 314, 320, 191 S.E.2d 715, 717 (1972)

Sentry Eng'g & Const., Inc. v. Mariner's Cay Dev. Corp.,
287 S.C. 346, 338 S.E.2d 631 (1985)

Statutes

S.C. Code Ann. §33-44-103(b)

S.C. Code Ann. § 33-44-409(b)

S.C. Code Ann. § 33-44-409(d)

Other Authorities

Rule 52(a), SCRCF

Restatement (Second) of Contracts § 205(a) (1981)

Restatement (Second) of Contracts § 205(d) (1981)

STATEMENT OF ISSUES ON APPEAL

- I. CAN QPV'S PROPOSED CONVEYANCE OF ONLY A 50% INTEREST IN THE SMALL TRACT BE USED AS THE BASIS FOR DETERMINING LINEBERGER'S RIGHT TO ADDITIONAL COMPENSATION FOR THE SMALL TRACT UNDER THE BUYOUT AGREEMENT?
- II. DID THE TRIAL COURT ERR IN FINDING THAT THE FAIR MARKET VALUE OF THE SMALL TRACT DOES NOT EXCEED \$1,000,000.00?
- III. CAN QPV'S PROPOSED CONVEYANCE OF ONLY A 50% INTEREST IN THE RIGHT-OF-WAY AREA BE USED AS THE BASIS FOR LIMITING LINEBERGER'S RIGHT TO ADDITIONAL COMPENSATION FOR THE RIGHT-OF-WAY AREA UNDER THE BUYOUT AGREEMENT?
- IV. DID THE TRIAL COURT ERR IN ORDERING THAT LINEBERGER FILE A SATISFACTION OF MORTGAGE WHERE FINANCIAL OBLIGATIONS SECURED BY THE MORTGAGE UNDER THE BUYOUT AGREEMENT REMAIN OUTSTANDING?
- V. DID THE TRIAL COURT ERR IN SUSPENDING INTEREST ON AMOUNTS DUE LINEBERGER WHERE QPV'S TENDER WAS CONDITIONAL AND THE BASIS FOR LINEBERGER'S REFUSAL WAS REASONABLE AND IN GOOD FAITH?

STATEMENT OF THE CASE

On August 26, 2015 Quarter Pointe Ventures, LLC ("Quarter Pointe") filed a declaratory judgment action in the Court of Common Pleas for York County seeking a declaration that a proposed conveyance of real property from QPV to an entity in which QPV holds a 50% ownership interest is a "sale" for purposes of establishing compensation owed to Lineberger under a Buyout Agreement and seeking satisfaction of a Mortgage held by Lineberger.

Lineberger filed an Answer to the Complaint. In the Answer Lineberger asserted among other things, that the amount of compensation offered by QPV does not comply with the terms

of the Buyout Agreement, that the Mortgage remains valid security for QPV's remaining obligations to Lineberger, and that QPV has violated the implied covenant of good faith and fair dealing. (Answer, pp. 1-4.)

On April 14, 2016, a hearing on QPV's declaratory judgment action was held before the Honorable S. Jackson Kimball, III. At the hearing the Court received evidence into the record. Christopher Barton, one of QPV's remaining three members, testified on behalf of QPV. (Trial Transcript, pp. 9:22-10:1-3.) Lineberger testified on his own behalf.

After the hearing, the trial court requested supplemental briefing from the parties. Both parties submitted post-trial briefs.

On July 28, 2016 the trial court entered an Order for Judgment against Lineberger. (Order, pp. 5-6.)

Appellant filed a timely motion with the trial court pursuant to Rule 52(a), SCRPC, seeking to alter or amend the Order. On August 23, 2016 a hearing was held on Appellant's Motion to Amend before the Honorable S. Jackson Kimball, III. By Form 4 Order entered on August 31, 2016, the trial court denied Appellant's motion.

STATEMENT OF FACTS

QPV was formed on August 8, 2006 by Lineberger, Christopher R. Barton, Meverell L. Pence, Jr., and Roger L. Pence, each having a 25% interest in QPV. (Order, p.2.) QPV was formed for the purpose of acquiring, developing and selling a parcel of real property located in York County, South Carolina. (Trial Transcript, pp. 10:6-13:17, 103:24-104:5.)

The real property acquired by QPV consists of three sub-parts which are material to this action: a parcel containing approximately 14 acres, York County Tax Parcel # 020-12-01-190 ("Large Tract"), a parcel measuring approximately 1.665 acres, York County Tax Parcel # 020-12-01-189 ("Small Tract"), and strips of land on the border of the Small Tract which are marked in gray and designated as "Right of Way by Maintenance" on a plat prepared by ESP Associates, P.A. ("ESP Plat") which is recorded Plat Book E311, Page 3 in the York County Register of Deeds Office (collectively, "Right-of-Way Area") (Plaintiff Exhibit 20A).¹

The Right-of-Way Area are strips of land within the property and bordering the Small Tract. The Right-of-Way Area are currently controlled by York County for roadway purposes,

¹ Through out the record the Right-of-Way Area are referred to as "ROW", "gray Area," "R/W" and "ransom strips". These all refer to the same shaded area designated as Right of Way by Maintenance on the ESR Plat (Plaintiff Exhibit 20A.)

but may be abandoned, in whole or in part, by York County. (Def. Exhibit 7; Trial Transcript, pp. 91:5-96:14.) The acreage of the Right-of-Way Area is separate and independent from the acreage of the Large Tract and Small Tract. (Plaintiff Exhibit 20A.)

Sale of Large Tract/Buyout Agreement

In or about 2013 QPV entered into negotiations with MPV Properties, LLC ("MPV Properties") to form a joint venture for development of the Large Tract. (Trial Transcript, pp. 14:13-15:18, 22:21-23:5.) Lineberger was uncomfortable with this proposed joint venture with MPV Properties and began negotiations with the other three members of QPV for an agreement that would allow QPV to proceed with the joint venture with MPV Properties on the Large Tract, while allowing Lineberger to maintain an interest with respect to the development and sale of the Small Tract. (Trial Transcript, p. 107:7-108:2.) Lineberger and QPV executed a Membership Buyout Agreement ("Buyout Agreement") dated March 17, 2015 (Trial Transcript, p. 25:1-16.) On or about the time of executing the Buyout Agreement, QPV and MPV Properties formed a new entity - Doby's Bridge Investors, LLC - to purchase the Large Tract from QPV for \$2.6 million. (Trial Transcript, pp. 14:18-15:12.)

Agreement between QPV and Lineberger

The Buyout Agreement unambiguously sets forth the formula for determining the compensation to be paid by QPV to Lineberger for his interest in QPV. (Buyout Agreement, p. 1.) In establishing the valuation of Lineberger's interest, the Buyout Agreement independently addresses each of the three portions of the property held by QPV (Large Tract, the Small Tract, and Right-of-Way Area).

With respect to the sale of the Large Tract, Lineberger would receive compensation as follows. Lineberger agreed to a cash payment of \$320,000.00 and to accept a promissory note ("Note") from QPV for the balance of the amount owed to him for his interest in the conveyance of the Large Tract. (Trial Transcript, pp. 18:4-21:21, 24:16-25:16.) Under the Note payments were to commence on March 2, 2017. (Note, ¶ 3.) Lineberger's intention in not demanding payment in full and in delaying payments under the Note was to allow QPV to maintain funds for payments on the underlying loan issued to QPV for the property and to allow QPV time to maximize the value that may be received upon sale of the Small Tract. (Trial Transcript, p.112:5-14.)

With respect to the Small Tract, Lineberger was to receive compensation as follows. The Buyout Agreement states that "[QPV] has plans to sell the [Small Tract], but cannot

anticipate the future sales price for the [Small Tract]." (Buyout Agreement, p. 1.) Therefore, QPV and Lineberger agreed upon a formula whereby Lineberger would receive \$250,000.00, to be included as part of the Note, plus a 25% interest in the profits realized upon a sale in excess of \$1,000,000.00. (Buyout Agreement, p. 2, ¶ 3; Trial Transcript, 21:17-22:9.) The Buyout Agreement specifically provides as follows: "In addition to the full repayment of the Note including interest upon the sale of the [Small Tract], if the sale of the [Small Tract] produces a net profit over One Million Dollars (\$1,000,000.00), [QPV] further agrees to compensate Lineberger for 25% of such net profits over One Million Dollars (\$1,000,000.00). . . . This is additional compensation to Lineberger over and above the Cash Payment and full repayment of the Note." (Buyout Agreement, p. 2, ¶ 3.)

With respect to the Right-of-Way Area, Lineberger was to receive compensation as follows. The Buyout Agreement provides that "[i]f [QPV] receives any additional compensation for the ROW or additional property for the [Small Tract], the [QPV] agrees to compensate Lineberger for 25% of the additional compensation received from York County or other governmental entity . . . or other purchaser. . . . [QPV] shall not deed any portion of the ROW for its own gain without compensation to Lineberger. This is additional compensation

to Lineberger over and above the Cash Payment and full repayment of the Note." (Buyout Agreement, pp. 2-3, ¶ 5.)

Mortgage Securing Obligations Under Buyout Agreement

As security for QPV's payment of compensation for Lineberger's membership interest, QPV executed a Mortgage dated March 16, 2015 ("Mortgage") in favor of Lineberger. The Mortgage encumbers the Small Tract and the Right of Way Area, collectively. (Mortgage, Exhibit "A".) Article 1 of the Mortgage provides that "[t]he obligations secured by this Mortgage (the "Secured Obligations") are as follows: Payment of all indebtedness and the performance of all obligations of [QPV] under the Note and this Mortgage including payment of all sums due and owing to [Lineberger] hereunder, together with interest thereon and performance of all obligations under the Membership Buyout Agreement." (Mortgage, § 1.01.) Accordingly the Mortgage secures the payment of QPV's obligations under the Note, Mortgage and the Buyout Agreement. (Trial Transcript, p. 130:10-17; Mortgage, § 1.01)

Marketing the Small Tract After Buyout Agreement

Lineberger testified that he and the other members initially valued the Small Tract at around \$1,400,000.00 to \$1,500,000.00. (Trial Transcript, p. 125:11-126:15.) QPV had marketed the Small Tract with an asking price of \$1,400,000.00. (Trial Transcript, pp. 90:6-16, 112:15-21.)

On March 24, 2015 QPV received an initial offer from Durban Acquisitions, LLC ("Durban") to purchase the Small Tract for \$1,100,000.00. (Trial Transcript, pp. 38:18-39:17; Def. Exhibit 1.) QPV summarily dismissed the offer without negotiation. (Trial Transcript, pp. 39:1-17; Lineberger, p. 126:3-15.)

On or about July 7, 2015, a second prospective purchaser, Barnes Development Company ("Barnes") made an initial offer to purchase the Small Tract, for \$1,100,000.00. (Def. Exhibit 10; Def. Exhibit 18.) Yet again QPV summarily dismissed the offer without negotiation. (Trial Transcript, p. 126:3-15.)

As it turned out, QPV had its motivations for not negotiating with prospective purchasers.

Joint Venture and QPV's Conflict of Interest

As described above, QPV owns a one-half interest in the Large Tract in a joint venture with MPV Properties. Christopher Barton, testifying on behalf of QPV, testified that, Harris Teeter had expressed interest in establishing a location on the Large Tract. (Trial Transcript, p. 88:12-18; Def. Exhibit 22.) QPV and MPV Properties were concerned that a third-party purchaser of the Small Tract could develop the Small Tract in such a way to compete with the plans for the Large Tract. (Trial Transcript, p. 62:18-64:8; Def. Exhibit 2; Def. Exhibit 23.) For example, a third-party purchaser

could develop the Small Tract for use as the site of a convenience store, an ideal use given the location of the Small Tract. (Trial Transcript, p. 120:22-121:4.) Despite the fact that prospective purchasers were *beginning* negotiations with an initial offer of \$1,100,000.00 for the Small Tract (and not including the Right-of-Way Area), QPV testified that it dismissed negotiations with these interested purchasers because "they represent a lot of clients that do supermarkets and grocery stores." (Trial Transcript, p. 39:19-21.)

Rather than attempt to market the Small Tract, QPV began discussions with MPV Properties to form another joint venture whereby they would purchase the Small Tract and control its development so as to protect their interest in the Large Tract. QPV agreed to sell 50% of its interest in the Small Tract to MPV Properties. (Trial Transcript, p. 98:11-12.) As a vehicle to accomplish this transfer, QPV and MPV Properties formed a new entity, DB2 Associates, LLC ("DB2 Associates"). (Def. Exhibit 5; Plaintiff Exhibit 39A.) QPV and MPV Properties each hold a 50% interest in DB2 Associates.

QPV and MPV Properties agreed as follows: DB2 Associates would purchase the Small Tract for \$1,000,000.00. MPV Properties would contribute \$500,000 to QPV for a 50% undivided interest in the Small Tract. Upon sale or

development of the Small Tract, MPV would get the first \$500,000.00 and QPV would get the next \$500,000.00. QPV and MPV Properties agreed to split all profits equally thereafter. (Def. Exhibit 4; Trial Transcript, pp. 43:1-45:22.)

At some point in the negotiations between QPV and MPV Properties, QPV agreed to include the Right-of-Way Area in the total property to be conveyed to DB2 Associates. (Trial Transcript, pp. 72:15-73:24, 79:2-80:14, 128:11-129:5; Def. Exhibit 8; Def. Exhibit 11; Def. Exhibit 17.) Some of the Right-of-Way Area was included as part of the \$1,000,000.00 valuation of the Small Tract. (Def. Exhibits 8, 11.) QPV and MPV Properties attributed a value of \$209,316.00² to the remaining portion of Right of Way Area. (Def. Exhibit 8.)

In total, DB2 Associates was paying consideration of \$1,209,316.00 for the Small Tract and the Right-of-Way Area, collectively. (Trial Transcript, pp. 68:1-69:3.) Per the Affidavit of Consideration and Substitute Form 1099-C prepared by QPV in anticipation of the closing, QPV was to receive a total of \$604,658.00 for 50% of its interest in the Small Tract and Right-of-Way Area (Trial Transcript, pp. 55:20-56:17, 65:25-67:16, 74:6-77:2, 83:25-85:1; Def. Exhibit 8; Def. Exhibit 13; Def. Exhibit 14.)

² This valuation was determined based off the Small Tract's \$1,000,000 valuation and converted to a per square foot figure which was applied to the square footage of the Right-of-Way Area. (Trial Transcript, pp. 77:3-78:1; Def. Exhibit 8.)

On July 27, 2015, QPV notified Lineberger's attorney that they "have a potential purchaser for the [Small Tract] and need a payoff for Mr. Lineberger's Note - effective August 3, 2015." (Defendant Exhibit 9.) In this same exchange QPV further represented that "[t]he Purchase Price is less than a million dollars" and that "[t]he County has not released the R/W to my client and still contends it is government property, so no additional monies are expected." (Def. Exhibit 9.) Lineberger was not given notice or otherwise made aware that QPV intended to convey the Right-of-Way Area as part of the proposed conveyance to DB2 Associates. (Trial Transcript, pp. 129:6-12, 132:11-21.)

Despite the fact that QPV would continue to own a 50% interest in the property and would be conveying the Right-of-Way Area for valuable consideration, QPV contended that its obligations under the Buyout Agreement would be satisfied simply upon payoff of the Note. (Trial Transcript, p. 56:9-17; Lineberger, pp. 129:6-12, 132:11-21.) QPV's offer was conditioned on satisfaction of the mortgage and potentially Lineberger's waiver of rights to additional compensation under the Buyout Agreement. Lineberger properly rejected QPV's offer.

ARGUMENT

I. QPV'S PROPOSED CONVEYANCE OF ONLY A 50% INTEREST IN THE SMALL TRACT CANNOT BE USED AS THE BASIS FOR DETERMINING LINEBERGER'S RIGHT TO ADDITIONAL COMPENSATION UNDER THE BUYOUT AGREEMENT

Under the Buyout Agreement Lineberger is entitled to compensation for three distinct items. First, Lineberger is entitled to payment of amounts due under the Promissory Note in the principal amount of \$395,000.00. (Buyout Agreement, p. 2, ¶ 2.) Second, Lineberger is entitled to 25% of the "net profits" on proceeds in excess of \$1,000,000.00 from the sale of the Small Tract. (Buyout Agreement, p. 2, ¶ 3.) Third, Lineberger is entitled to "25% of the compensation received from York County or other governmental entity . . . or other purchaser" for the Right-of-Way Area (Buyout Agreement, pp. 2-3, ¶ 5.)

Triggering this action is the proposed conveyance of the Small Tract and Right-of-Way Area (collectively, "Subject Property") by QPV to DB2 Associates, LLC ("DB2 Associates"). This conveyance is not an arm's length transaction. DB2 Associates is a limited liability company in which QPV has a 50% interest. MPV Properties holds the other 50% interest in DB2 Associates. In the proposed conveyance, QPV will effectively be conveying a 50% interest in the Subject Property to MPV Properties.

Despite the fact that QPV would only be conveying 50% of its interest in the property, QPV argues that this conveyance is a legitimate means to extinguish Lineberger's right to additional compensation under the Buyout Agreement. QPV's position lacks support under the plain language of the Buyout Agreement and applicable law.

Just as QPV could not avoid this obligation by transferring 100% interest in the Small Tract to a strawman, QPV can not avoid its obligations to Lineberger by an inside transfer of a 50% interest to MPV Properties. The remaining members of QPV cannot continue to gain net profits in the Small Tract while cutting out Lineberger's right to receive his share of the net profits per the Buyout Agreement. This bad act is compounded exponentially by their decision to value the transfer for less than the value of initial offers made by disinterested third parties.

A. Express Language of Buyout Agreement

"If [a contract's] language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and the contract's language determines the instrument's force and effect." Lee v. Univ. of S.C., 407 S.C. 512, 517-18, 757 S.E.2d 394, 397 (2014). "Generally, where an agreement is clear and capable of legal construction, the court's only function is to interpret its lawful meaning

and the intent of the parties as found within the agreement." Miles v. Miles, 393 S.C. 111, 117, 711 S.E.2d 880, 883 (2011) (internal citations omitted).

Paragraph 3 of the Buyout Agreement plainly states that Lineberger is entitled to 25% of "net profits" from the sale of the Small Tract in excess of \$1,000,000. It strains credulity to argue that the plain and ordinary meaning of "sale," without any further qualifying language, encompasses a conveyance of less than a complete interest in property. Moreover, the determination of the existence or amount of "net profits" for the Small Tract is impossible until QPV has conveyed its entire interest in the Small Tract.

B. Implied Covenant of Good Faith and Fair Dealing

Looking beyond the express language of the Buyout Agreement, South Carolina courts instill an implied covenant of good faith and fair dealing into contracts reasons presented by this case.

"Under South Carolina law, there exists in every contract an implied covenant of good faith and fair dealing." Shelton v. Oscar Mayer Foods Corp., 319 S.C. 81, 91, 459 S.E.2d 851, 857 (Ct. App. 1995) (emphasis in original); Boddie-Noell Properties, Inc. v. 42 Magnolia P'ship, 344 S.C. 474, 484, 544 S.E.2d 279, 284 (Ct. App. 2000).

A contract includes not only what is expressly stated but also what is necessarily to be implied

from the language used and external facts, such as the surrounding circumstances; and terms which may clearly be implied from a consideration of the entire contract are as much a part thereof as though plainly written on its face.

In the absence of an express provision therefor, the law will imply an agreement by the parties to a contract to do and perform those things that according to reason and justice they should do in order to carry out the purpose for which the contract was made.

Commercial Credit Corp. v. Nelson Motors, Inc., 247 S.C. 360, 367, 147 S.E.2d 481, 484 (1966).

"The policy of the law is to supply in contracts what is presumed to have been inadvertently omitted or to have been deemed perfectly obvious by the parties, the parties being supposed to have made those stipulations which as onest, fair, and just men they ought to have made." Id. (citing 17 Am.Jur.2d Contracts, § 255).

The obligation of good faith and fair dealing and the duty of loyalty³ are sacrosanct in the context of limited liability companies. Both provisions are unwaivable and cannot be eliminated, even by agreement among the members of a limited liability company. S.C. Code Ann. § 33-44-103(b). The South Carolina Limited Liability Act of 1996 provides that

³ A member must "account to the company and to hold as trustee for it any property, profit, or benefit derived by the member in the conduct or winding up of the company's business or derived from a use by the member of the company's property, including the appropriation of a company's opportunity" and "refrain from dealing with the company in the conduct or winding up of the company's business as or on behalf of a party having an interest adverse to the company." S.C. Code Ann. § 33-44-409(b)(1)-(2).

"[a] member shall discharge the duties to a member-managed company and its other members under this chapter or under the operating agreement and exercise any rights consistently with the obligation of good faith and fair dealing." S.C. Code Ann. § 33-44-409(d).

The Restatement (Second) of Contracts provides further illumination on the implied covenant of good faith and fair dealing: "Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving 'bad faith' because they violate community standards of decency, fairness or reasonableness." Restatement (Second) of Contracts § 205(a) (1981). "Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified. But the obligation goes further: bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty." Restatement (Second) of Contracts § 205(d) (1981).

The record in this case is replete with evidence that QPV's subterfuge is a breach of the covenant of good faith and fair dealing. The record contains evidence that the joint venture between QPV and MPV Properties regarding the Small

Tract had a two-fold purpose. The first purpose was to allow QPV and MPV Properties to maintain control over the Small Tract and prevent a third party purchaser from competing with QPV's plans for development of the Large Tract. (Trial Transcript, p. 62:18-64:8; Def. Exhibit 4; Def. Exhibit 23.) The second purpose was to "end things" with Lineberger and evade the possibility that QPV would have to share any additional compensation with Lineberger upon development and sale of the Small Tract. (Def. 3.) The conveyance was originally structured such that the joint venture-entity, DB2 Associates, would purchase the Small Tract for \$1,000,000.00. (Def. Exhibit 2; Def. Exhibit 4.) This contrived sales price was pegged to allow QPV to receive the maximum value for a 50% interest (\$500,000.00) in the Small Tract without triggering additional compensation to Lineberger under the Buyout Agreement (excess over \$1,000,000.00). (Buyout Agreement, p. 2, ¶ 3.)

In addition to evidence of the bad-faith motives of QPV, the record contains evidence that QPV attempted to conceal from Lineberger material facts regarding the scope of the property being conveyed in the transfer, the basis for valuation, and the terms of the joint venture between QPV and MPV Properties. (Transcript, pp. 129:6-12, 132:11-21.)

The record reveals that the proposed conveyance violates the covenant of good faith and fair dealing to the extent it seeks the extinguishment of Lineberger's right to additional compensation upon QPV's complete conveyance.

C. Business Judgment Rule not applicable

The trial court's ruling was in large part dependent on a misplaced application of the business judgment rule. "Under the business judgment rule, a court will not review the business judgment of a corporate governing board when it acts within its authority and it acts without corrupt motives and in good faith." Fisher v. Shipyard Vill. Council of Co-Owners, Inc., 415 S.C. 256, 270, 781 S.E.2d 903, 910 (2016). "[T]he rule will not apply if the directors have engaged in self-dealing, fraud, or other unconscionable conduct." Kuznik v. Bees Ferry Assocs., 342 S.C. 579, 599, 538 S.E.2d 15, 25-26 (Ct. App. 2000).

The trial court found "that Lineberger does not have discretion to determine to whom QPV should sell the small tract, or the amount for which it should be sold. Such business decisions are left entirely to QPV." (Order, pp. 4-5.) The trial court's ruling is premised on a fundamental misapplication of the business judgment rule.

The business judgment rule cannot be used as a means of sanitizing the bad faith actions and self-dealing by QPV in

this matter. QPV is attempting to avoid its obligations to Lineberger via inside transfer of a 50% interest in the Small Tract to MPV Properties. The remaining members of QPV are seeking to maximize their share of net profits at the expense of Lineberger. For these reasons the business judgment rule is inapplicable to this case.

II. THE TRIAL COURT ERRED IN FINDING THAT THE FAIR MARKET VALUE OF THE SMALL TRACT DOES NOT EXCEED \$1,000,000.00

The trial court's finding with respect to the fair market value of the Small Tract is not supported by the record.

"A property's 'fair market value' is the amount of money which a purchaser willing but not obligated to buy the property would pay an owner willing but not obligated to sell it, taking into account all uses to which the property is adapted and might in reason be applied." Reid v. Reid, 280 S.C. 367, 373, 312 S.E.2d 724, 727 (Ct. App. 1984).

All credible evidence in this action establishes that the fair market value of the Small Tract exceeds \$1,000,000.00. During the hearing the representative of QPV unambiguously conceded that the Small Tract could have been sold for more than \$1,000,000.00. (Trial Transcript, p. 89:22-25.) Lineberger testified that he and the other members initially valued the Small Tract at \$1,400,000.00 to \$1,500,000.00. (Trial Transcript, pp. 125:11-126:15.) QPV had in fact

marketed the Small Tract at \$1,400,000.00. (Trial Transcript, pp. 90:6-16, 112:15-21.)

Moreover, QPV had received initial offers from two separate purchasers - Durban Acquisitions, LLC and Barnes Development Company - to purchase the Small Tract for \$1,100,000.00. (Trial Transcript, pp. 38:18-39:17; Def. Exhibit 1; Def. Exhibit 10; Def. Exhibit 18.) These were *initial* offers which QPV summarily rejected due to their conflict of interest with respect to development of the Large Tract.

The only evidence in the record to support the trial court's conclusion is the contrived valuation attributed to the Small Tract by QPV and MPV Properties in forming their joint venture. Given the evidence of QPV's bad faith and self-dealing as set forth in previous sections of this Brief, QPV's valuation lacks any degree of credibility. Because the trial court's decision rested solely on QPV's valuation and ignored more credible evidence, the trial court's decision should be reversed.

III. QPV'S PROPOSED CONVEYANCE OF ONLY A 50% INTEREST IN THE RIGHT-OF-WAY AREA IS AN IMPROPER BASIS FOR LIMITING LINEBERGER'S RIGHT TO ADDITIONAL COMPENSATION FOR THE RIGHT-OF-WAY AREA UNDER THE BUYOUT AGREEMENT

The Buyout Agreement provides the terms between QPV and Lineberger regarding the conveyance of the Right-of-Way Area

and the compensation owed to Lineberger for the same. The Buyout Agreement provides as follows "[i]f [QPV] receives any additional compensation for the ROW . . . [QPV] agrees to compensate Lineberger for 25% of the additional compensation received from York County or other governmental entity . . . or other purchaser." (Buyout Agreement, p. 2, ¶ 5.) The Buyout Agreement further provides that "[QPV] shall not deed any portion of the ROW for its own gain without compensation to Lineberger. This is additional compensation to Lineberger over and above the Cash Payment and full repayment of the Note." (Buyout Agreement, pp. 2-3, ¶ 5.)

The Order from the trial court only authorizes the sale of the Small Tract, not the Right-of-Way Area. However, the record shows that the conveyance proposed by QPV would include a conveyance of the Right-of-Way Area as well. QPV and MPV Properties attributed a value of \$209,316.00 to the Right-of-Way Area. (Def. Exhibit 8.) Therefore, by virtue of the conveyance to DB2 Associates, QPV is effectively transferring a 50% interest in the Right-of-Way Area to MPV Properties for consideration of \$104,658.00. (Def. Exhibit 8.)

The trial court ruled that Lineberger shall be entitled to additional compensation of \$52,329.00 if the Right-of-Way Area is abandoned by the government before July 31, 2018. The trial court in effect limited Lineberger's right to additional

compensation to 25% of the value attributed to it by QPV and MPV Properties, \$209,316.00. The trial court erred in two respects.

First, the issue of attributing a value to the Right-of-Way Area was not part of QPV's declaratory judgment petition and not an issue before the trial court. (Complaint; Transcript, pp. 3:16 - 4:10.) To the extent the Order attributes a value to the Right-of-Way Area, the Order should be reversed.

Second, it was improper for the trial court to limit Lineberger's right to additional compensation for the Right-of-Way Area on the basis of the value attributed to it by QPV and MPV Properties. The reasoning for this argument is the same as the reasoning set forth above with respect to determining Lineberger's right to additional compensation for the Small Tract.

QPV is only conveying a 50% interest in the Right-of-Way Area in the conveyance to DB2 Associates. Under the Buyout Agreement, Lineberger is entitled to 25% of the compensation ultimately received by QPV for the Right-of-Way Area. This cannot be determined on the basis of a conveyance of a 50% interest. This can only be determined once it is known how much compensation QPV ultimately receives for its entire interest in the Right-of-Way Area. As such the trial court's

limitation on the amount which may be due to Lineberger is premature and the trial court's decision should be reversed.

IV. THE TRIAL COURT ERRED IN ORDERING THAT LINEBERGER FILE A SATISFACTION OF MORTGAGE WHERE OBLIGATIONS SECURED BY THE MORTGAGE REMAIN OUTSTANDING

The Mortgage continues to secure outstanding obligations owed by QPV to Lineberger under the Buyout Agreement; therefore, the trial court's order to satisfy the mortgage was erroneous.

QPV executed the Mortgage as security for payment of compensation owed to Lineberger for the purchase of his membership interest in QPV. The Mortgage encumbers the Small Tract and the Right of Way Area, (collectively, "Subject Property"). (Mortgage, Exhibit "A".) The Mortgage secures QPV's obligations under the Note, Mortgage and the Buyout Agreement. (Trial Transcript, p. 130:10-17; Mortgage, § 1.01) Specifically, the Mortgage secured the following obligations: (1) payment of amounts due under the Promissory Note held by Lineberger; (2) payment of 25% of net profits received by QPV upon a sale of the Small Tract; and (3) payment of 25% of compensation received by QPV for the Right of Way Area.

In this case, QPV sought a satisfaction of Mortgage based exclusively on its offer to pay amounts under the Promissory Note. The trial court erred in only considering QPV's obligations under the Promissory Note.

The Mortgage was a material component of the agreement between Lineberger and QPV with respect to QPV's purchase of Lineberger's membership interest. In addition to securing the Promissory Note, the Mortgage secures Lineberger's right to additional compensation realized upon a sale of QPV's interest in the Small Tract and 25% of the compensation ultimately received by QPV for its interest in the Right-of-Way Area. As more fully set forth in Sections I and II above, the transaction proposed by QPV is a conveyance of only 50% of QPV's interest in the Small Tract and Right-of-Way Area. As such, the obligations of QPV remain outstanding and the Mortgage remains a valid lien securing payment of these obligations.

V. THE TRIAL COURT ERRED IN SUSPENDING ACCRUAL OF INTEREST UNDER THE NOTE

The trial court ruled that interest under the Note ceased accruing as of August 15, 2015, finding that this was the date QPV tendered payment to Lineberger. (Order, p.5.)

Under South Carolina law, a valid tender stops the running of interest. However "[o]ur courts have also recognized that a tender to be valid must be unconditional. A tender could only be in money, in the proper amount due, and without conditions annexed to its acceptance." Ruscon Const. Co. of Fla. v. Beaufort Jasper Water Auth., 259 S.C. 314, 320, 191 S.E.2d 715, 717 (1972) (internal citations omitted).

Moreover, a party's refusal to accept a tender does not stop the running of interest, where the basis of the refusal is in good faith and reasonable. See Ruscon, 259 S.C. at 320, 191 S.E.2d at 717 (holding that assessment of interest not precluded where party had good faith and reasonable belief that acceptance of tender would result in waiver of right to indemnification); Sentry Eng'g & Const., Inc. v. Mariner's Cay Dev. Corp., 287 S.C. 346, 354, 338 S.E.2d 631, 635-36 (1985) (holding that interest continues to accrue despite tender in full amount of arbitration award where party had good faith and reasonable belief that acceptance of tender would waive right to attorneys' fees).

In this case the trial court suspended the running of interest from August 15, 2015, the date QPV tendered payoff to Lineberger for amounts under the Note. Because QPV's tender had conditions annexed to it, the trial court's ruling was improper. QPV's offer to tender payment was conditioned on a Satisfaction of Mortgage and potentially a waiver of Lineberger's right to additional compensation set forth under the Buyout Agreement. Lineberger's refusal to accept tender on this basis was in good faith and reasonable, particularly in light of the limited information available to Lineberger and the objective merit to his position in this appeal. QPV's tender was made to Lineberger prior to full disclosure of

material details regarding the proposed transaction, some of which were withheld from Lineberger until the hearing in this matter on April 14, 2016. (Transcript, pp. 46:13-49:18.) For these reasons the trial court erred in suspending the accrual of interest under the Note.

CONCLUSION

For the reasons stated above, the Order should be REVERSED.

Respectfully submitted,

By: 

W. Mark White
Jeremy D. Melville
SPENCER & SPENCER, P.A.
226 East Main Street
P.O. Box 790
Rock Hill, SC 29731
Tel: (803) 327-7191

ATTORNEYS FOR JAMES LINEBERGER