STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	CIVIL ACTION NO: 2013-CP-07-01341
	)	
ROAD, LLC AND PINCKNEY POINT, LLC,	)	
	)	
Plaintiffs,	)	
	)	ORDER GRANTING DEFENDANT'S MOTION FOR JNOV
vs.	)	
	)	
BEAUFORT COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF SOUTH CAROLINA,	)	
	)	
Defendant.	)	
	)	

This matter comes before me on the post-trial motions of the Defendant, Beaufort County, for a judgment not withstanding the verdict. A hearing was held on this motion on August 9, 2016.

STANDARD FOR A JUDGMENT NOT WITHSTANDING THE VERDICT

A motion for JNOV should be granted when no reasonable jury could have reached the challenged verdict. Crossley v. State Farm Mut. Auto. Ins. Co., 307 S.C. 354, 415 S.E.2d 393 (1992). An order granting a JNOV is appropriate when no evidence exists that sustains the factual findings implicit in its decision. Smalls v. South Carolina Dep't of Educ., 339 S.C. 208, 528 S.E.2d 682 (Ct.App.2000); Hunter v. Staples, 335 S.C. 93, 515 S.E.2d 261 (Ct.App.1999).

ANALYSIS

I. Was there any evidence to support the jury's verdict as to Road, LLC's cause of action for breach of contract or breach of the covenant of good faith and fair dealing?

a. Breach of Contract

Beaufort County first asserts that it is entitled to JNOV because there is no evidence that the Defendant breached the Settlement Agreement as to Road, LLC or its covenant of good faith and fair dealing arising out of this Settlement Agreement. This court agrees.

Under the Settlement Agreement with the relevant parties, Beaufort County was obligated to do two (2) things: (1) to grant the road variance for Pinckney Point, LLC; and (2) to agree that the Road was private. The only evidence shows that Beaufort County had immediately and fully complied with its obligations under the Settlement Agreement by granting the variance and agreeing that the road to the property was private. Once these actions are completed, Beaufort County's obligations under the contract were fully executed.

Road, LLC has contended that a latent ambiguity existed in the Settlement Agreement which the parties agreed required the 229 acre parcel and adjacent road parcel to be used only as a residential development. However, John Kunkel, the representative of Road, LLC, testified that he did not believe the Settlement Agreement required the property to be only used as a residential development.

"When a contract is unambiguous, clear and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary and popular sense." C.A.N. Enters., Inc. v. S.C. Health & Human Servs. Fin. Comm'n, 296 S.C. 373, 377–78, 373 S.E.2d 584, 586 (1988). Extrinsic evidence may not be used to create an ambiguity in an otherwise unambiguous policy. Yarborough v. Phoenix Mut. Life Ins. Co., 266 S.C. 584, 592, 225 S.E.2d

344, 348 (1976). (finding it appropriate to consider extrinsic evidence only if an ambiguity exists within the contract). Even if an ambiguity exists in a contract, extrinsic evidence may not be considered if the ambiguity is a patent ambiguity. Smith v. Coxe, 183 S.C. 509, 516, 191 S.E. 422, 425–26 (1937) (finding parol testimony may be received in construing instrument with latent ambiguity); Polson v. Craig, 351 S.C. 433, 437 n. 2, 570 S.E.2d 190, 192 n. 2 (Ct.App.2002) (involving a will, and noting extrinsic evidence is admissible when there is a latent ambiguity, not a patent ambiguity); Bob Jones Univ. v. Strandell, 344 S.C. 224, 231, 543 S.E.2d 251, 254 (Ct.App.2001) ("A court may admit extrinsic evidence to determine whether a latent ambiguity exists.").

A patent ambiguity is one that arises upon the words of a will, deed, or contract. Smith, 183 S.C. at 516, 191 S.E. at 425–26. A latent ambiguity exists when there is no defect arising on the face of the instrument, but arising when attempting to apply the words of the instrument to the object or subject described. Id. (offering an example of a latent ambiguity as a named beneficiary in a will that is unambiguous on the face of the will, but creates a latent ambiguity where there are two people with that name). Interpretation of an unambiguous contract, or a policy contract a patent ambiguity, is for the court. Hann v. Carolina Cas. Ins. Co., 252 S.C. 518, 526–27, 167 S.E.2d 420, 423 (1969); B.L.G. Enters., Inc. v. First Fin. Ins. Co., 328 S.C. 374, 377, 491 S.E.2d 695, 697 (Ct.App.1997), aff'd

Importantly, the Settlement Agreement does not bind the property to be forever used as a residential development. This is a term that Road, LLC has alleged to be a latent ambiguity. There is no reasonable reading of the terms of

this agreement which would support this assertion by Road, LLC. Allowing reading such a term into this agreement is clearly in violation of the rules of contract interpretation as set forth above. The Settlement Agreement is clear and unambiguous and there is no suggestion that it was the intent of the parties to bind this property to be forever used as a residential development.

Additionally, to the extent that the jury may have found that the County breached its contract with Road, LLC because its purchase of the 229 acres turned the private road into a public road, this theory is unsupported by facts or law in this matter.

First, there was no evidence at trial that the County has invited the public to use the property or that the public was using the property. Additionally, there is no legal principal which would support the notion that if a government agency has an access easement over a private road that the road has de facto become a public road as asserted by Road, LLC.

The importance of the lack of evidence that the public has ever used this road cannot be understated. The evidence in this case is that only a few members of the County staff, and a grounds keeper who lived on the property prior to the County's purchase, have ever utilized the access easement over Road, LLC's property to enter the County property. Furthermore, an alleged act of trespass by a member of the uninvited public cannot be said to amount to public use. Thus, there is no evidence to support the notion that the County breached its contract with Road, LLC by turning the private road owned by Road, LLC into a public road.

Moreover, a review of the documents submitted during this trial indicate that the County had a twenty-five foot access easement over the Road parcel that existed prior to Road, LLC and Pinckney Point's involvement in this property that ran with the land when it was transferred from Agnes Garvin to Road, LLC. Additionally, Road, LLC gave Pinckney Point, LLC an access easement over the road property which would allow for Pinckney Point and its subtenants, licensees, customers, agents, employees, invitees, mortgagees, successors and assigns, access over the Road parcel. The Easement Agreement between Road, LLC and Pinckney Point, LLC explicitly states that the easement area is "for purposes of vehicular and pedestrian ingress and egress to and from Grantee's property [the 229 acre parcel] over Easement Area [the Road Parcel]". The Agreement further states, "[t]he rights granted herein shall be for the benefit of Grantee and for the benefit of any and all other occupants of Grantee's Property, and for respective subtenants, licensees, customers, agents, employees, invitees, mortgagees, successors and assigns." Paragraph Eight (8) of the Agreement entitled "Successors and Assigns" further indicates, "[t]his Agreement and the rights granted herein shall run with the land and be appurtenant to Grantee's property, shall run with the title to and burden the Easement Area and Grantor's Property forever, and shall be binding upon, inure to the benefit of and be enforceable by the parties hereto and their successors, successors-in-title and assigns."

Beaufort County, with the purchase of the 229 acre parcel, is a successor to Pinckney Point, LLC and the easement runs with the land. Thus, even while the road remains private, the County is within its rights to allow its subtenants,

licensees, customers, agents, employees, invitees, mortgagees, successors and assigns to access its 229 acre parcel pursuant to the access easement. Utilization of this access easement, in and of itself, does not make this road a public road. It maintains its status as a private road.

Based on my review of the record in this matter, I do not believe a reasonable jury could have found that there was a patent or latent ambiguity in the Settlement Agreement which would support the contention that the property purchased by the county could only used as a residential development. Likewise, there is no evidence in the record that the County's purchase of the property at the end of the subject road, nor its utilization of the road, has turned a private road into a public road.

b. Breach of Covenant of Good Faith and Fair Dealing

Road, LLC also alleged breach of implied covenant of good faith and fair dealing against Beaufort County. Both Plaintiffs at trial asserted that Beaufort County breached the implied covenant of good faith and fair dealing by dealing unfairly with Pinckney Point, LLC in its permit approval, and by purchasing the 229 acres from Equity Resource Partners. I find there is no evidence that would support a jury verdict to Road in this regard.

There exists in every contract an implied covenant of good faith and fair dealing. Adams v. G.J. Creel & Sons, Inc., 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995). However, there is no breach of the implied covenant where a party to a contract has done what provisions of the contract expressly gave him the right to do. Id.; See also Hotel & Motel Holdings, LLC v. BJC Enterprises, LLC, 414 S.C.

635, 653, 780 S.E.2d 263, 273 (Ct. App. 2015) (there is no breach of contract or implied covenant because the actions taken by the defendant, by assigning a note, were not barred by the contract and did not prohibit the other side from making payment on the note or fulfilling their obligations under the contract).

Generally, with the exception to contracts of insurance, the Courts have not set forth a hard and fast rule of what constitutes a breach of the implied covenant of good faith and fair dealing. However, the cases make clear that it is a by-product of the breach of the contract. In fact, the U.S. Supreme Court has stated that "The concept of good faith in the performance of contracts is a phrase without general meaning or meanings of its own." Northwest, Inc. v. Ginsberg, 134 S. Ct. 1422 (2014).

As to Road's contention that the County held up permitting to Pinckney Point causing Pinckney Point to be unable to find an investor because they did not have their entitlements, I find the facts in evidence do not support this contention and neither does the jury verdict in favor of the County as to Pinckney Point.

Importantly, nothing in the Settlement Agreement required Beaufort County to approve Pinckney Point's permitting requests except for the variance which was granted. With respect to the remaining permitting, all the evidence in this matter shows that Pinckney Point, LLC was to be treated as any other developer. There is no evidence that they were treated differently from any other developer by the County.

As stated previously, Beaufort County had, contemporaneous with the Settlement Agreement, given Pinckney Point the required variance and agreed to

have the Road declared private. Moreover, while not a condition of the Settlement Agreement, the evidence in this case was that the County gave Conceptual Site Plan approval so as to allow Pinckney Point, LLC to move forward with obtaining entitlements from other agencies and to finalize their engineering plans. The County further worked out the only conditional issue, the septic versus sewer issue, within a period of a few months. Said issue arose from a DRT practice that had been used, and applied to, many other like-kind developments in Beaufort County. As of February 2012, there were no issues remaining between the County and Pinckney Point, LLC. The County was simply awaiting submission by Pinckney Point for Final Approval. In fact, Pinckney Point had well over a year to submit for Final Approval but failed to do so with no alleged "interference" from the County.

There is no evidence that Pinckney Point was treated in any way differently from any other developer. There is evidence in the record that the County's actions did not cause Pinckney Point to fail to meet their obligations under the settlement agreement, but rather, Pinckney Point's own actions did.

John Kunkel testified that Pinckney Point, LLC made no attempt to find an investor until it realized their option was about to expire. When they did find an interested investor, Pinckney Point, LLC was not willing to meet the investor's terms. Pinckney took a business gamble that did not work out to their benefit, causing them to lose the property and fail their obligations under the Settlement Agreement.

Importantly, these actions relate to the County's alleged conduct directed at Pinckney Point, LLC. By its verdict in the County's favor as to Pinckney Point, LLC, the jury determined that there was no breach of contract or the covenant of good faith and fair dealing by the County on these grounds.

Additionally, by the time Beaufort County purchased the 229 acre parcel, the Settlement Agreement was a nullity given that the Pinckney Point, LLC, could no longer meet its obligations under the contract. Pinckney Point, LLC, through the testimony of Taylor Bush, admitted it did not have any ownership interest or an active option agreement pertaining to the 229 acres when the County purchased the property. The option agreement expired February 28, 2013 but Pinckney Point, LLC was given 11 more days by Equity Resource Partners to close. Additionally, Taylor Bush testified that as of the time Pinckney Point lost its option in early March 2013, they could not develop the property and, therefore, could not fulfill their obligations under the Settlement Agreement. This would include Pinckney Point's obligations to Dot Gnann and Road, LLC under the Settlement Agreement. The only evidence in the record is that Beaufort County performed its obligations under the settlement agreement and it was the failure of Pinckney Point to perform its obligations and subsequent loss of the property which caused Road's alleged damages. Pinckney Point, LLC failed to meet its obligations under its mortgage with BB&T and option agreements with Equity Resource Partners (hereinafter referred to as "ERP") and lost its right to and ability to perform under the Settlement Agreement. When this happened, Road's alleged damage had already occurred. Pinckney Point, LLC's business gambles are what led them to lose their interest in

the property, and along with it, Road's hope to see the anticipated return on its investment in the road parcel.

It is irrelevant that Pinckney Point hoped to recover some interest at some point in the future if someone else did not purchase the property first. When Pinckney Point can no longer perform under the contract, the contract can no longer be considered binding. Pinckney Point, rather than the County, breached the contract with Road, LLC when this occurred.

I have considered the documents and testimony in this matter and find there is no evidence that a reasonable jury could believe supported that Beaufort County breached its covenant of good faith and fair dealing arising out of the Settlement Agreement as to Road, LLC by either its actions related to permitting with Pinckney Point, LLC, or with regard to its subsequent purchase of the property.

Based on all of the above, I find there is no evidence upon which a reasonable jury could rely to find that Beaufort County breached either the terms of the Settlement Agreement or breached its implied covenant of good faith and fair dealing arising out of that agreement.

II. Was there any evidence to support the jury's finding for damages for lost profit?

Additionally, Beaufort County argues that ***even if*** there was evidence to support the jury verdict that there was a breach, Road, LLC's damages in the amount of $5 million dollars is not supported by any evidence in the record at trial. This court agrees.

The only testimony in the record as to the ***current value*** of Road's property was given by Tommy Hartnett, a certified appraiser. Mr. Hartnett testified that the

road parcel is currently valued, with the County as the owner of the 229 acre adjacent property, at $5 million dollars. The property was purchased by Road, LLC for $1.3 million dollars. Road, LLC cannot be said to have suffered a loss in value of their property. The only testimony is that, at the time of trial, it was worth $5 million dollars even with the County owning the adjacent parcel. Thus, there is no evidence of diminished value or damage to Road, LLC and the jury's decision is not supported by the evidence in the record.

Additionally, the evidence of lost profit damages to Road is too speculative to support the verdict of the jury. Road, LLC admits it would only be paid pursuant to the settlement agreement if Pinckney Point was able to find an investor whose terms it would agree to and be able to purchase back the 229 acre parcel from ERP. The evidence of this in the record is too speculative to support this finding.

In a breach of contract action, damages serve to place the non-breaching party in the position he would have enjoyed had the contract been performed. Carolina Winds Owners' Association, Inc. v. Joe Harden Builder, Inc., 297 S.C. 74, 374 S.E.2d 897 (Ct.App.1988), questioned in dictum on other grounds, Kennedy v. Columbia Lumber Co., 299 S.C. 335, 384 S.E.2d 730 (1989). That is, damages give him the benefit of his bargain. Id. In the normal case, the damage will consist of two distinct elements: (1) out-of-pocket costs actually incurred as a result of the contract; and (2) the gain above costs that would have been realized had the contract been performed. When a plaintiff seeks special damages for breach of contract, he must plead and prove both the fact of damage and the amount of damage with a reasonable degree of certainty. Jackson v. Midlands Human

Resources Center, 296 S.C. 526, 374 S.E.2d 505 (Ct.App.1988)(emphasis added). The fact of damage is proved by showing (1) that the plaintiff realized an actual loss he would not have incurred but for the defendant's breach of contract; and (2) the loss was a natural consequence of the breach which may reasonably be supposed to have been within the contemplation of the parties at the time the contract was made. Charles v. Texas Company, 199 S.C. 156, 18 S.E.2d 719 (1942); Goodwin v. Hilton Head Company, 273 S.C. 758, 259 S.E.2d 611 (1979); The Drews Company, Inc. v. Ledwith-Wolfe Associates, Inc., 296 S.C. 207, 371 S.E.2d 532 (1988)(emphasis added). The crucial requirement in lost profits determinations is that they be "established with reasonable certainty, for recovery cannot be had for profits that are conjectural or speculative." South Carolina Finance Corp., supra, at 122, 113 S.E. (2d) at 336. "The proof must pass the realm of conjecture, speculation, or opinion not founded on facts, and must consist of actual facts from which a reasonably accurate conclusion regarding the cause and the amount of the loss can be logically and rationally drawn." 22 Am. Jur. (2d) Damages § 641 (1988).

In this case, the Plaintiffs failed to put forth any evidence to support the requisite showing as set forth above. Initially, the Plaintiff must show that they would have realized an actual loss they would not have otherwise incurred but for the Defendant's breach of contract. In order to show breach on the part of the County, the Plaintiffs argued that if Pinckney Point, LLC had been given the 120 day extension, it would have found an investor, and it was not given the extension because of unspecified interference by the County. First, there is no evidence from

ERP that it would have given Pinckney any further extension. In fact, they declined to do so. Next, Pinckney nor Road offered testimony from any alleged investor(s), just that they are sure they would have found one. They did not even name who these future investors would have been. In addition to speculating that Pinckney Point not only could have repurchased the property subsequent to losing their option with Equity Resource Partners, they must speculate that Equity would not have found another buyer. The testimony is clear that ERP was looking to sell, and searching for a buyer, and the Plaintiff's' witnesses admit that ERP would have sold to whomever came up with the money first. The evidence was that ERP was not willing to give further extensions to Pinckney and were looking for other options to market the property.

Pinckney Point, LLC (and with them Road, LLC) offered no reliable evidence of Pinckney Point's ability to ever re-purchase the property, and no evidence that Equity Resource Partners would not have found, and sold, the property to another purchaser. Without being able to show these two things, Road cannot show lost profit damage, given the predicament Pinckney Point had put Road, LLC in when they lost their option on the 229 acre parcel. Road's complete showing of lost profits is premised upon multi-level speculative evidence and was not established with reasonable certainty.

DETERMINATION

Based on the foregoing, I find that there is no evidence to support the jury verdict in favor of Road, LLC in this matter as there is no evidence that Beaufort County breached a contract with Road, LLC, or breached a covenant of good faith

and fair dealing. Additionally, there is no evidence that Road, LLC has suffered any damage. Thus, I find that the jury's verdict of Five Million Dollars to Road, LLC is not supported by any evidence in the record and do

GRANT Beaufort County's Motion for JNOV on Road, LLC's claims.

And it is so **ORDERED.**

By:_____
Carmen Tevis Mullen
Judge, Fourteenth Judicial Circuit

_____, South Carolina

May _____, 2017.

Beaufort Common Pleas

Case Caption: Road LLC , plaintiff, et al VS Beaufort County , defendant, et al

Case Number: 2013CP0701341

Type: Order/Other

So Ordered

s/Carmen T Mullen 2142