

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

Quarter Pointe Ventures, LLC Respondent,

v.

James Lineberger Appellant.

FINAL REPLY BRIEF OF APPELLANT

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SC Court of Appeals

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ARGUMENTS

The arguments asserted in Respondent's Brief are a reflection of the misunderstandings of fact and law that seized the proceedings in the lower court.

I. QPV's Argument Fails to Address the Express Terms of the Agreement

QPV's position in this matter seemingly rests on the baseless notion that the Agreement¹ severed all ties and obligations between QPV and Lineberger. However, as addressed in detail in Appellant's Brief, pursuant to the Agreement QPV granted to Lineberger a 25% interest in profits to be derived from the sale of the Small Tract² and a 25% interest in compensation to be received for the conveyance of the ROW Areas.³ (Appellant's Brief, pp. 5-7, 12-13.) This is hardly a severance of ties between the parties. To the contrary, the

¹ Except as otherwise defined herein, all capitalized terms used in this Reply Brief shall have the same meaning and definition as defined and used in the Initial Brief of Appellant.

² "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, ¶ 3, R.p. 16.)

³ "If [QPV] receives any additional compensation for the ROW or additional property for the [Small Tract], [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, ¶ 5, R.pp. 16-17.)

express language of the Agreement demonstrates that Lineberger and the remaining members remained connected in a profit-seeking enterprise with the common purpose of maximizing their return on investment.

The argument asserted by QPV in Respondent's Brief sidesteps the profit-sharing relationship that continued between QPV and Lineberger by virtue of the express terms of the Agreement. QPV's position seems to tacitly suggest that express terms of the Agreement providing a dissociating member with a continued equitable interest in the company should not be taken at face-value in the context of the purchase of the dissociating member's interest in the company. However, Respondent has not set forth any authority supporting the proposition that a contractual term providing for an equitable interest in profits and compensation is less enforceable in this context than it would be in any other contract.⁴ QPV's position would effectively render material provisions of the Agreement nothing more than illusory promises.⁵

⁴ Though one may second-guess the wisdom of a provision that provides for a continued equitable interest in company property, the wisdom or folly of such terms is not grounds for disregarding such terms. See McPherson v. J. E. Sirrine & Co., 206 S.C. 183, 206, 33 S.E.2d 501, 510 (1945).

⁵ Under the illusory promise doctrine, courts are to avoid "constructions of contracts that would render promises illusory because such promises cannot serve as consideration for a contract." M & G Polymers USA, LLC v. Tackett, 135 S. Ct. 926, 936, 190 L. Ed. 2d 809 (2015).

II. QPV's argument disregards the scope of the implied covenant of good faith and fair dealing

A.

Under South Carolina law every contract contains 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). The South Carolina Supreme Court has made it clear that a party can breach the implied covenant of good faith and fair dealing by actions short of fraud, misrepresentation or bad-faith. U.S. for Use & Benefit of Williams Elec. Co. v. Metric Constructors, Inc., 325 S.C. 129, 133, 480 S.E.2d 447, 449 (1997). Among other actions that can trigger a violation, the South Carolina Supreme Court has identified the following as a breach of the implied covenant of good faith and fair dealing: where one party is responsible for non-performance of a contract and then that same party benefits as a result of the non-performance. Metric Constructors at 133, 480 S.E.2d at 449.

Authority from other jurisdictions further articulates the scope of the implied covenant of good faith and fair dealing as it relates to an agreement such as the one at issue in this action.

As aptly stated by the Fourth Circuit Court of Appeals: "[U]nder the covenant of good faith and fair dealing, a party impliedly promises to refrain from doing anything that will

have the effect of injuring or frustrating the right of the other party to receive the fruits of the contract between them." E. Shore Markets, Inc. v. J.D. Assocs. Ltd. P'ship, 213 F.3d 175, 184 (4th Cir. 2000); see also De La Concha of Hartford, Inc. v. Aetna Life Ins. Co., 849 A.2d 382, 388 (Conn. 2004) (stating that "every contract carries an implied duty requiring that neither party do anything that will injure the right of the other to receive the benefits of the agreement"); Southface Condo. Owners Ass'n, Inc. v. Southface Condo. Ass'n, Inc., 733 A.2d 55 (Vt. 1999) (stating that "[t]he purpose of the implied covenant of good faith and fair dealing is to ensure that parties act with faithfulness to an agreed common purpose and consistency with the justified expectations of the other party"); Rosenthal v. Sonnenschein Nath & Rosenthal, LLP, 985 A.2d 443, 450 (D.C. 2009) (stating that the covenant of good faith and fair dealing "subjects to liability parties whose conduct frustrates the overarching purpose of the contract by taking advantage of their position to control implementation of the agreement's terms").

"Despite the appearance in its name of the terms 'good faith' and 'fair dealing,' the covenant does not establish a free-floating requirement that a party act in some morally commendable sense. . . . When used with the implied covenant, the term 'good faith' contemplates 'faithfulness to the scope,

purpose, and terms of the parties' contract.'" Allen v. El Paso Pipeline GP Co., 113 A.3d 167, 183 (Del. Ch. 2014). "The parameters of both concepts turn not on a court's beliefs about what was morally or equitably appropriate under the circumstances, but rather *on the contract itself and what the parties would have agreed upon had the issue arisen when they were bargaining originally.*" Id. (emphasis in original).

"One certainly breaches the promise of good faith owed in contract and as fiduciary in a partnership by working actively to decrease directly the profits of the business venture." Clancy v. King, 405 Md. 541, 570-71, 954 A.2d 1092, 1109 (2008).

B.

QPV's proposed transaction breaches the implied covenant of good faith and fair dealing under even the most conservative of applications of the covenant. QPV has exclusive control over the disposition of real property in which Lineberger has an equitable interest under the Agreement. QPV is seeking to convey those assets in a transaction that would extinguish Lineberger's equitable interest while preserving the equitable interest of the remaining members of QPV. Further, the transaction will not merely preserve the interest of the remaining members, the transaction will improve the remaining members' position at

Lineberger's expense. The members of QPV will continue to have an interest in and control over the real property. The members of QPV will continue to hold the opportunity to share in profits derived from the real property. Lineberger's equitable interest will be extinguished and effectively usurped by the remaining members of QPV.

At its worst QPV's conduct is riddled with fraud and bad faith. At its best, QPV's conduct amounts to the usurpation of Lineberger's equitable interest for the financial gain of the remaining members of QPV. Such conduct equates with or exceeds the conduct deemed a breach of implied covenant of good faith and fair dealing set forth by the South Carolina Supreme Court in Metric Constructors, Inc. 325 S.C. at 133, 480 S.E.2d at 449.

III. The grounds offered by QPV to justify the usurpation of Lineberger's interest are untenable

A.

In Respondent's Brief, QPV states that "the transaction would be no different than if QPV sold the real property to an MPV created entity and then took half of their proceeds and purchased a one-half interest in the new entity." (Respondent's Initial Brief, p. 9.) In short, QPV seeks to justify the means utilized to usurp Lineberger's interest by identifying an alternative and equally objectionable means that QPV could have utilized to usurp Lineberger's interest.

This is not an argument, it is a subterfuge. QPV fails to recognize that it is the usurpation of Lineberger's interest itself, not the specific means of usurpation, that constitutes the breach of implied covenant of good faith and fair dealing.

B.

QPV attempts to justify the usurpation of Lineberger's interest by suggesting that the terms of a prior unrelated conveyance between QPV and MPV Properties with respect to the Large Tract supersede the express terms of the Agreement. QPV's argument is fundamentally flawed. Lineberger was a member of QPV at the time of negotiations for the conveyance of the Large Tract. Lineberger was privy to information regarding the conveyance of the Large Tract. As a member of QPV, Lineberger was in a position to protect his equitable interest with regards to the conveyance of the Large Tract, and did in fact do so. (Trial Trans., R.p. 155, line 8 - p. 157, line 19.)

Moreover, QPV's argument is simply incompatible with the Agreement. The Agreement grants to Lineberger a continued equitable interest in the profit-seeking enterprise and instills in QPV an obligation to act in accordance with the implied covenant of good-faith and fair dealing with regards to Lineberger's interest. Lineberger is no longer a member of QPV and no longer in the same position to protect his

equitable interest. Lineberger must rely on the implied covenant of good faith and fair dealing to ensure that QPV does not act so as to injure or frustrate his equitable interest. In this case QPV's proposed transaction clearly frustrates (extinguishes) Lineberger's equitable interest in order to benefit the remaining members of QPV.

C.

Finally, QPV attempts to justify the usurpation of Lineberger's interest based on a misapplied fair market value analysis.

QPV contends that the pivotal issue in this action was an analysis of fair market value. (Respondent's Initial Brief, p. 10.) QPV's position would have some support if this case involved a sale of QPV's interest in an arm's length transaction. In such a case fair market value would become intertwined with a determination of the reasonableness of QPV's business judgment. But this case does not involve an arm's length transaction to a third-party purchaser. This case involves a self-dealing transaction in which QPV will continue to hold an interest in the real property and Lineberger's interest will be extinguished for the benefit of the remaining members of QPV. QPV's "business judgment" violates Lineberger's equitable interest.

Under the Agreement QPV expressly agreed to share profits and compensation with Lineberger post-dissolution. QPV is now unilaterally seeking to avoid this obligation in breach of the Agreement. Neither the Agreement nor South Carolina law provides QPV with the right to extinguish and usurp Lineberger's equitable interest on the basis of fair market value. QPV's focus on fair market value is a diversion drawing attention away from the actual objectionable conduct at issue - the usurpation of Lineberger's equitable interest by QPV.

IV. QPV's Argument for Summarily Disregarding Offers from Interested Third-Party Purchasers is Untenable

QPV attempts to justify its rejection of the two offers of \$1.1 million on two grounds.

QPV argues that Lineberger has no say in the business decisions of the Company post-dissociation and because the sale of the Small Tract (and ROW Areas) was a business decision, Lineberger has no right to question the decision. QPV's justification once again disregards the fact that QPV granted to Lineberger a continued equitable interest in the real property owned by QPV and the right to share in profits upon the disposition of the same. Pursuant to the covenant of good faith and fair dealing, QPV is accountable to Lineberger with respect to its business decisions to the extent such

decisions injure or frustrate Lineberger's equitable interest. To this end, QPV's argument is self-defeating.

QPV further argues that its rejection of the offers was justified because the offers contained a nine-month contingency which threatened to delay closing. (Respondent's Initial Brief, p. 10.) QPV's argument is pretext. A request for a due diligence period in an offer to purchase commercial real estate is hardly out of the ordinary and certainly not offensive enough to justify foregoing further negotiations. But more importantly, if the nine-month due diligence contingency was in fact the only problem with the offers, it defies logic for persons united in a profit-seeking enterprise to forego negotiations with interested and motivated prospective purchasers. Yet, QPV did not engage in any negotiations with these interested and motivated prospective purchasers.

QPV's decision to forego negotiations is only illogical under the assumption that QPV would act in accordance with the covenant of good faith and fair dealing. QPV's decision to forego negotiations becomes logical in the absence of the covenant of good faith and fair dealing. Absent the covenant of good faith and fair dealing QPV is free to disregard Lineberger's equitable interest and extinguish his bargained-for right to share in profits. Absent the covenant of good

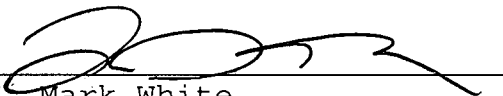
faith and fair dealing, a sale to a third-party for \$1.1 million or greater (where profits must be split with Lineberger) has less appeal to QPV than a partial conveyance of the property that will both eliminate Lineberger's equitable interest and allow QPV to continue in the profit-seeking enterprise with respect to the property. It is this reality that renders the implied covenant of good faith and fair dealing a necessity. The need for the implied covenant of good faith and fair dealing is no more glaring than under the facts of this case.

CONCLUSION

For the reasons stated above and in Appellant's Initial Brief, the Orders on appeal in this action should be REVERSED.

Respectfully submitted,

July 18, 2017

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CERTIFICATE OF COUNSEL

The undersigned counsel hereby certifies that the Final Brief of Appellant and Final Reply Brief of Appellant comply with Rule 211(b), SCACR.

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