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 Point Ventures, LLC....................................Respondent,

v.

James Lineberger..Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. Is there any evidence to support the Master-in-Equity's Findings of Fact?

II. Did the Trial Court correctly find as a matter of law that the proposed transaction was a sell?

III. Did the Trial Court correctly find as a matter of law that the sell was to be for fair market value?

IV. Did the Trial Court correctly find as a matter of law that the Mortgage should be satisfied upon payment of the Note?

V. Did the Trial Court correctly find that the interest on the Note be suspended as of August 15, 2015?

STATEMENT OF THE CASE

Respondent Quarter Pointe Ventures, LLC ("QPV"), the Plaintiff, commenced a declaratory judgment action pursuant to S.C. Code Ann. §§ 15-53-10, et seq. by filing its Complaint in the York County Court of Common Pleas on August 26, 2015. The Complaint sought a declaratory judgment that Appellant breached the Agreement by failing to provide a recordable Notice of Dissociation after the Membership Buyout Agreement; that the transaction is a sale pursuant to 26 U.S.C. § 707(a)(2)(B) requiring that Respondent's obligations to Appellant James Lineberger with respect to the Collateral would be satisfied upon payment of the Note, and require Appellant to Satisfy the Mortgage; the Court suspend interest on the Note from August 15, 2015, or such date that the Court found that Plaintiff was ready, willing and able to fulfill its obligations to tender the amount of the Note; that the Court require Appellant to provide Respondent a recordable Notice of Dissociation; Respondent be ordered to pay Defendant Lineberger 25% of any amount recovered from York County for the ROW, if and when any money is recovered.

Appellant served his Answer on September 30, 2015, denying the transaction was a sale, was not in compliance with the provisions of the Buyout Agreement, lack of disclosure, and breach of the implied covenant of good faith and fair dealing. The matter was referred to S. Jackson Kimball, the York County Master-in-Equity pursuant to an Order of Reference filed January 6, 2016, and a bench trial before the Master was held on April 14, 2016. Testifying on behalf of the Respondent was Christopher Barton. Testifying on behalf of the Defendant was James Lineberger.

On July 28, 2016, the trial court entered its Order for Judgment providing that Respondent was entitled to sell the property, establishing a sale price of $1,000,000.00; requiring Appellant to Satisfy the Mortgage upon the receipt of payoff of the Note with interest abated from August 15, 2015; establishing the amount of the Note to be satisfied as $411,644.62; requiring Appellant to execute and deliver a recordable Notice of Dissociation; and setting forth disposition of monies for the Right of Way, if abandoned by the government before July 31, 2018, or thereafter. (R. pp. 1-6).

On August 8, 2016, Appellant filed a Motion to Modify or Amend the Order pursuant to Rule 52, SCRCP to add additional findings of fact. The motion was heard on August 23, 2016 before Judge S. Jackson Kimball, who denied the relief sought through a Form 4 Order filed August 31, 2016.

Appellant served his Notice of Appeal on Respondent on September 29, 2016.

STANDARD OF REVIEW

The Master-in-Equity ruled upon a declaratory judgment brought by the Respondent. Declaratory judgment actions are neither legal nor equitable, and therefore, the standard of review depends on the nature of the underlying issues. Campbell v. Marion County Hosp. Dist., 354 S.C. 274, 279, 580 S.E.2d 163, 165 (Ct.App.2003). An issue at law will not be transformed into one in equity simply because declaratory relief is sought. See Legette v. Smith, 226 S.C. 403, 85 S.E.2d 576 (1955).

In an equitable proceeding, this court may find facts in accordance with its own view of the preponderance of the evidence. See Murrells Inlet Corp. v. Ward, 378 S.C. 225, 231, 662 S.E.2d 452, 455 (Ct.App.2008); see also Friarsgate, Inc. v. First Fed. Sav. & Loan Ass'n of South Carolina, 317 S.C. 452, 456, 454 S.E.2d 901, 904 (Ct.App.1995). However, even such a broad scope of review does not require this court to disregard the findings of the trial judge who saw and heard the witnesses and was in a better position to judge their credibility. Sloan v. Greenville County, 356 S.C. 531, 546, 590 S.E.2d 338, 346 (Ct.App.2003).

In an action at law tried without a jury, the appellate court will not disturb the trial court's findings of fact unless they are found to be without evidence that reasonably supports those findings. Horry County v. Ins. Reserve Fund, 344 S.C. 493, 497, 544 S.E.2d 637, 639-640 (Ct.App.2001). This is also denoted as the "any evidence" standard of review. See generally Hofer v. St. Clair, 298 S.C. 503, 381 S.E.2d 736 (1987).

"Unless the cause of action and the relief sought in a declaratory judgment action are distinctly equitable, the action will be considered one at law." Noisette v. Ismail, 299 S.C. 243, 247, 384 S.E.2d 310, 312 (Ct.App.1989). When reviewing an action at law, this

court's scope of review is limited to the correction of errors of law. S.C. Dept. of Transp. v. Horry Cnty, 391 S.C. 76, 81, 705 S.E.2d 21, 24 (2011).

ARGUMENTS

I. The Master-in-Equity's Findings of Facts are supported by Evidence.

Appellant has set forth its own Statement of Facts that differ from the Findings of Fact from the Trial Court. The Master-in-Equity found the following Facts in its July 28, 2016 Order, which are supported by Evidence and should be affirmed.

1. Company History

Respondent Quarter Pointe Ventures, LLC ("QPV") is a South Carolina limited liability company owning real property in York County. (R. p. 59, line 17–p. 60, line 19). Appellant James Lineberger ("Lineberger") is a resident of Union County, North Carolina and former member of QPV. (R. p. 152, lines 19 – 20). On or about August 8, 2006, QPV was formed to own and acquire real estate located in York County off Doby's Bridge Road (Property) in York County. (R. p. 60, lines 1 – 19). Members of QPV were Christopher R. Barton (25% interest), Meverell L. Pence, Jr. (25% interest), Roger L. Pence (25% interest) and James Lineberger (25% interest). (R. p. 60 lines 9-17); (R. p. 156, lines 3-8).

2. ROW and Closing of the Large Tract

On December 3, 2012, a portion of the Property was taken by York County for a road way and right of way, for which QPV was compensated. (R. p. 61, lines 8-11); (R. p. 62, line 8); (R. p. 63, lines 9-19); (R. p. 279, Ex 28A, schedule B). In February 2015, QPV was the maker of a note secured by a mortgage on the Property, which was in

arrears with Park Sterling Bank. (R. p. 60, lines 20-25); (R. p. 64, lines 1-10). Prior to any foreclosure action, QPV negotiated a partial sale of a portion of the Property, namely a one-half interest in approximately fourteen acres ("Large Tract"), with Merrifield Patrick Vermillion ("MPV") out of Charlotte, North Carolina. (R. p. 64, line 11 – p. 65, line 12); (R. p. 75, line 23-p. 76, line 8). Lineberger opted to take money and a Note to have his membership interest bought out of QPV, rather than to continue as a member of QPV and move forward with any future development. (R. p. 65, lines 13-23; p. 156, lines 3-15); (R. pp. 406 – 411, Ex. 55); (R. pp. 418-423, Ex. 57).

During a survey for the closing of the Large Tract with MPV, it was determined that York County took more of the Property than QPV believed it was compensated for by the County, due to designated Right of Way ("ROW" property). (R. p.55, line 10 – p. 57, line 1); (R. p. 272, Ex. 22). Prior to closing the Large Tract, QPV agreed to a buyout of all membership interest of Lineberger pursuant to the terms and conditions of the Agreement executed on March 16 and March 17, 2015. (R. p. 75, lines 8-16); (R. pp. 406 – 411, Ex. 55); R. pp. 418-423, Ex. 57). The Agreement provided for Lineberger to receive money, to take a Note for the balance owed, and to potentially be compensated, if future monies were realized from the ROW property. (R. p. 418, paragraph 5, Ex. 57).

Pursuant to the terms and conditions of the Agreement, a one-half interest in the Large Tract was sold for $1,300,000.00 to MPV, and following that both QPV and MPV placed their interest into a newly created LLC, Doby's Bridge Investors, LLC. (R. p. 72, line 21-p. 73, line 14). At the Large Tract closing, the Company paid off the note to Park Sterling Bank and transferred a one-half interest to MPV. (R. p. 74, line 16-p. 75, line 7); (R. pp. 29 – 30, Ex. C to Complaint); (R. pp. 428 – 429, Ex. 59). Lineberger received

$320,000.00 cash from the $500,000.00 in proceeds from the Large Tract closing, pursuant to the Statement of Distributions. (R. pp. 29 – 30, Ex. C to Complaint); (R. pp. 428 – 429, Ex. 59). He also received a Note in the amount of $395,000.00, representing his balance due on the Large Tract, and a guaranteed payment on the remaining smaller tract, containing 1.6 acres ("Small Tract"), also owned by QPV. (R. p. 70, line 5-p. 72, line 20); (R. pp. 15 - 24, Ex. A to Complaint); (R. pp. 424 - 427, Ex. 58).

The Small Tract was used as collateral ("Collateral") for the Note to Lineberger. (R. p. 70, line 5-p. 72, line 20); (R. pp. 15 - 24, Ex. A to Complaint); (R. pp. 424 - 427, Ex. 58). Lineberger also had the potential to receive 25% of portions of the Small Tract designated as Right of Ways ("ROW"), in hopes that the government would abandon the ROW and leave QPV free to sell the ROW unencumbered. (R. pp. 25-28, Ex. B to Complaint); (R. pp. 418-427, Ex. 57).

Testimony by both parties was that the likelihood of the County or the South Carolina Department of Transportation abandoning the ROW to QPV was slight at best and the likelihood of any recovery unknown. (R. p. 143, line 3-p. 146, line 14); (R. p. 163, line 7 - p. 164 line 16); (R. p. 272, Ex. 22). The amount of the Note to Lineberger from QPV was derived by estimating that the net sale from the Small Tract would gross a million dollars. (R. p. 71, line 7-p. 72, line 22). If it did not, QPV would bear the risk, as it was obligated for a net $250,000.00 to Lineberger. (R. p. 72, lines 3-17). Thus $145,000.00 of the Note represented the balance owed to Lineberger for his interest from the sale of the Large Tract and $250,000.00, based upon anticipated proceeds of the sale of the Smaller Tract, secured by the Mortgage. (R. p. 71, line 7-p. 72, line 22).

QPV fully paid Lineberger the $320,000.00 at the closing of the Large Tract, and executed the Agreement and the Note, and recorded the Mortgage. (R. p. 74, line 16-p. 75, line 7); (R. pp. 29 – 30, Ex. C to Complaint); (R. pp. 428 – 429, Ex. 59). Lineberger received copies of the closing documents and the recorded Mortgage, recorded in Book 14842, Page 19, in the York County Clerk of Court's Office. (R. pp. 31-41, Ex. D to Complaint); (R. pp. 430-440, Ex. 60). In addition to the payment and the Note, the Membership Buyout Agreement provided that if the remaining Property sold and produced a net profit of over One Million Dollars ($1,000,000.00), QPV would further compensate Lineberger for 25% of such net profits. (R. p. 180, lines 10-17); (R. pp. 25 - 28, Ex. B to Complaint); (R. pp. 418 - 427, Ex. 57). Furthermore, QPV agreed that if it received any additional compensation or return of property from York County for the ROW, another government entity or another company, that the Company would pay to Lineberger 25% of the additional compensation. (R. pp. 25 - 28, Ex. B to Complaint); (R. pp. 418 - 427, Ex. 57). QPV agreed to not restrict or encumber the Property until the Note was paid in full, and to give Lineberger notice of any sale. (R. pp. 25 - 28, Ex. B to Complaint); (R. pp. 418 - 427, Ex. 57).

3. The Dispute

On or about July 27, 2015, QPV noticed Lineberger that it was going to sell the Small Tract and requested a payoff of the Note. (R. p. 280). On July 31, 2015, Lineberger, through counsel provided a payoff of the Note and a per diem interest amount. (R. p. 281). On August 6, 2015, the purchaser requested additional time to perform due diligence. On August 12, 2015, the purchaser agreed to go forward with the transaction, resulting in same or similar arrangement as prior, in that QPV would sell

one-half interest in the property to MPV, and transfer its other one-half into a new entity, DB2 Associates, LLC for $1 million dollars[1]. (R. p. 398, Ex. 47); (R. p. 353, Ex. 41); (R. p. 355 – p. 374, 41A); (R. p. 375 – p. 388 , 41B); (R. p. 389, 41C); (R. p. 391 – p. 394, 41D); (R. p. 395, 41E).

Closing was set for August 15, 2015. (R. p. 111, lines 14-24). QPV requested Lineberger execute a Satisfaction of Mortgage that was to be held by the closing attorney in trust. (R. p. 404 - p. 405, Ex. 52). Lineberger refused to provide a Satisfaction of Mortgage and stated through counsel that the transaction was not a sale for fair market value. (R. p. 107, line 18 – p. 111, line 7). Further, he stated that the Mortgage would not be Satisfied until the property was sold and 25% of net profits over a million were paid to him, and any proceeds from the ROW at a future date and time. (R. p. 107, line 18-p. 111, line 7). However, he said that he would accept the payment of the Note without releasing or satisfying the Mortgage. (R. p. 193, lines 8-25).

II. The Trial Court correctly found as a matter of law that the proposed transaction was a sell.

The transaction for the small tract contemplated by QPV and MPV was the same as the Large Tract. In fact the mechanic's were the same, in both instances a new entity was created, QPV received money for one-half of the purchase price and contributed its

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[1] QPV showed the sale of the main tract was for $1,000,000.00 showing $500,000.00 in proceeds to the Company. QPV also has an agreement with MPV for the ROW. Such agreement is contingent upon abandonment of the ROW by government and no monies were to trade hands. Pursuant to the Operating Agreement between QPV and MPV, each entity would hold a ½ interest in the new LLC, with an adjusted tax basis of $1,000,000 in the real property. Additionally, the ROW areas would be valued at $209,316, with such funds not being paid, but a future payment if the ROW were abandoned by the government. Otherwise the ROW would revert of 100% back to the Company if not abandoned by July 31, 2018 and QPV's capital account would be adjusted. (Pl. Ex. 39, schedule 5.1, footnotes 1 and 2, bates 282).

remaining one-half interest into the new entity. Appellant's current position begs the question of why the transaction was a sale for the Large Tract, but not a sale for the Small Tract. 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.

Shortly after signing the Membership Buyout Agreement, Appellant had buyer's remorse. He left the Company and now regrets it. Almost immediately after receiving his agreed upon payment from the Large Tract sale, he refused to provide the original Notice of Dissociation, making demands. (R. pp. 254-258; pp. 265-269).

Essentially, Appellant would like to exercise control over QPV and benefit if QPV makes any additional money from investing in development, all without investing any of his own money or having any risk in the new entity, after taking his money out. (R. p. 107, line 23-p. 111, line 7). As my grandmother would say, Appellant would like to have his cake and eat it too.

These transactions are recognized by the Internal Revenue Service and are denoted as a "disguised sale" pursuant to 26 U.S.C. § 707. Section 707(a)(2)(B) provides that if there is a direct or indirect transfer of money or other property by a partner to a partnership, a related direct or indirect transfer of money or other property by the partnership to such a partner, and the transfers, when taken together, are properly characterized as a sale or exchange of property, then such transfers shall be treated as a transaction between the partnership and one who is not a partner. In other words, it will be treated as a sale rather than a contribution and distribution. See 1992 WL 1466104 (IRS FSA). While QPV will only be taxed on its on-half interest, the total sale would be

the combination of the total value of the real property, One Million Dollars ($1,000,000.00) for the Small Tract. (R. pp. 283-352, Ex. 39A).

III. The Trial Court correctly found that the property was to be sold at Fair Market Value.

Appellant takes great lengths to argue and retry the case by citing selective portions of the transcript that he contends shows that QPV engaged in bad faith, self-dealing and breach of the covenant of good faith and fair dealing. However, these were not the factual findings of the Trial Court. (R. pp. 2-4, July 28, 2016 Order pp. 2-4).

Appellant argues that winding up provisions of the Limited Liability Act should apply to Respondent. Appellant is simply wrong as a matter of law. The trial court correctly found that the pivotal issue was whether the Small Tract was sold at fair market value (R. p. 240, line 19-p. 242, line 5). The trial court found that is was. (R. p. 5, July 28, 2016 Order p. 5). More importantly, Appellant offered no evidence by way of appraisal or any expert testimony that the One Million Dollar ($1,000,000.00) sale price was below fair market value. Rather, Appellant bases his contention on two offers by the same broker, with the same terms that would effectively tie up the property for 9 months and no guarantee that the Property would be purchased. (R. p. 138, line 19-p. 139, line 21); (R. p. 147, line 5-p. 148, line 24). As articulated by Appellant at trial, he was in no hurry for the Property to be sold. (R. p. 190, line 12-p. 193, line 7).

Appellant also argues that the contingency in the contract between Respondent and MPV for the ROW was improper, establishing a value of $209,316.00 between those parties with $52,329.00 representing 25% to Appellant, if abandoned, was an error. (R. p. 5, July 28, 2016 Order p. 5, finding 4). While Appellant speculates about the value of the contingency, Appellant offered no credible value for the ROW. Moreover, the ROW is

not owned by QPV and can't legally be transferred or encumbered by QPV because it is not owned by QPV. Appellant's Mortgage less and excepts the ROW, because QPV couldn't give Appellant a Mortgage on property it did not own. (R. p. 109, line 18-p. 0111, line 7); (R. p. 258, bates 151).

Respondent using its business judgment opted to sell the Small Tract in the same manner it sold the Large Tract, which was acknowledged by the Appellant. (R. p. 190, line 12-p. 193, line 7). The fact that Respondent and its members opted to reinvest in the property is inconsequential to Appellant. Appellant argues this act was self-dealing, but offers no case law, but rather cites to a winding up statute under the Limited Liability Act. However, QPV was not winding up.

From the beginning, Appellant wanted to renegotiate the deal. (R. pp. 265-269, Ex. 20). He alleged that he should receive 25% of any gains from the development. (R. p. 108, line 1-p. 109, line 11). Appellant didn't care how long it took to sell the property, as he had interest accruing. QPV had other interest, namely eliminating the debt, which is a prudent business decision by a company. If Appellant had presented competent evidence that the property was worth Two Million, but only being sold for One Million, he would have an argument that there was self-dealing or bad faith. Assuming the property was sold at $1.1 million, Appellant never provided any evidence that such a sale would have netted over a million in profits. Taxes, insurance, commissions, closing costs, and recording fees were never discussed or calculated by Appellant to show that he would have receive more than the minimum $250,000.00 he was guaranteed under the Agreement.

The trial court correctly denied Appellant's Motion, as the evidence found by the trier of fact was that the property was sold at fair market value and Respondent's actions did not warrant a finding of bad faith, self-dealing or breach of any covenant. (R. pp. 7-8); (R. p. 240, line 19-p. 242, line 5).

IV. The Trial Court correctly found that the Mortgage should be satisfied upon the payment of the Note.

Appellant contends and argues that payment of the Note should not require the Satisfaction of the Mortgage. Appellant contends a contingent liability (recovery if the ROW is abandoned), is sufficient to allow the Mortgage to remain on the Small Tract.

S.C. Code Ann. § 29-3-310 provides that a holder of a mortgage who has received full payment or satisfaction of the debt discharge or satisfy the Mortgage. A Note and a Mortgage are separate and distinct. While a Mortgage follows a Note, a Note does not follow a Mortgage. See generally S.C. Nat'l Bank v. Halter, 293 S.C. 121, 128, 359 S.E.2d 74, 77 (Ct.App.1987) ("The assignment of a mortgage as distinct from the debt it secures is nugatory and confers no right upon the transferee absent some indication that the parties also intended to transfer the debt."). Accordingly, language in the Mortgage does not create a debt. While the Mortgage describes additional obligations of the Agreement, the Note does not. The Note is the only evidence of actual debt.

The Agreement references the Note and also the contingent or conditional future obligations regarding the ROW. (R. pp. 418-423, Ex. 57). The provision for the release by the SCDOT or York County of the property to the Appellant, and the subsequent sale of the property, are conditions precedent to the existence of a debt. "A condition precedent is any fact, other than mere lapse of time, which, unless excused, must exist or occur before a duty of immediate performance by the promisor can arise." Ballenger

Corp. v. City of Columbia, 286 S.C. 1, 4, 331 S.E.2d 365, 368 (1985) (citation omitted). "Whether a stipulation in a contract constitutes a condition precedent is a question of construction dependent on the intent of the parties to be gathered from the language they employ." Id. "Words and phrases such as 'if,' 'provided that,' 'when,' 'after,' 'as soon as,' and 'subject to' frequently are used to indicate that performance expressly has been made conditional. Id.

As the condition precedent has not been satisfied, the Agreement is not a Note or evidence of debt. The Mortgage states that is security for the obligations under the Note and Agreement. The legal description of the Mortgage is less and except the Right-of-Ways. (R. pp. 31-4l, Ex. D to Complaint); (R. pp. 430-440, Ex. 60).

Appellant contends that the trial court erred because of the contingent obligation based upon those conditions precedent. Such a reading of the Agreement would constitute a restraint on alienation, in that there would be no definitive time or manner in which Appellant would release the Mortgage. South Carolina disfavors restraint on alienation. McCravey v. Otts, 90 S.C. 447, 74 S.E. 142 (1912). ("Under South Carolina common law, any unreasonable limitation upon the power of alienation is against public policy and must be construed as having no force and effect.'). Appellant's contention that he can impede or hold up Respondent from selling or otherwise disposing of its real property in perpetuity while waiting for the SCDOT or York County to determine if they will abandon the Right-of-Ways is simply against public policy in South Carolina.

V. The Trial Court correctly found that the Interest on the Note should be abated after August 15, 2015.

Plaintiff requested a payoff, had a closing date, and was ready willing and able to perform. Signature pages were executed (R. pp. 412-417, Ex. 56). Appellant refused to provide a Satisfaction of Mortgage for the closing, despite providing a payoff for the Note. (R. pp. 404-405, Ex. 52). Appellant's action thus prevented the closing. Respondent, based on the Appellant's actions requested that the interest stop as of August 15, 2015, the date of the closing. "It is a long recognized principle in our courts that a valid tender stops the running of interest." Ruscon Const. Co. of Fla. v. Beaufort-Jasper Water Authority, 259 S.C 314, 319, 191 S.E.2d 715, 717, (1972) citing Smith v. Stinson, 1 Brev. 1 (1793); Ryan v. Baldrick, 3 McCord 498 (1826).

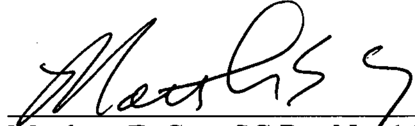
Appellant contends that the tender was not absolute because there was no money for the contingent ROW. They further contend that their "good faith" refusal of acceptance does not stop the interest. However, Appellant's refusal was not in good faith. He attempted to change the terms of the agreement and refused to execute the Release of the Mortgage, thwarting the closing.

QPV has never contended that it did not owe the contingent liability, if there was any recovery or return of property to QPV by the Government. Appellant's protection of rights was requested by QPV in its Declaratory Judgment Action. (Complaint). The trial court properly ruled as a matter of law. This Court pursuant to Rule 220(c), SCACR, may also affirm the trial court's suspension of interest.

CONCLUSION

For the reasons set forth above, Respondent respectfully requests that this Court affirm the Orders of the Lower Court.

Respectfully submitted,



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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR, July 17, 2017.

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