

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Honorable Maite Murphy – Circuit Court Judge

Case No. 2010-CP-18-2127

Burbage SmoakRespondent

v.

George Mitchell Appellant

FINAL BRIEF OF APPELLANT

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FINAL REPLY BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES ON APPEAL

- I. WAS THE JUDGE'S FAILURE TO ADDRESS THE SPECIFIC ELEMENTS OF APPELLANTS' EQUITABLE CLAIMS A REVERSIBLE ERROR?
- II. DID THE APPELLANT HAVE AN EQUITABLE RIGHT OF REDEMPTION?

STATEMENT OF THE CASE

George Mitchell (hereinafter referred to as "Appellant") answered the allegations this suit for Breach of Contract/Collection of Unpaid Installments and for a Declaratory Judgment to Declare Contract Breached and to Extinguish and Foreclose Appellants Right in the Property/Quiet Title. On March 15, 2001 the Appellant and Burbage Smoak (hereinafter referred to as "Respondent") entered into a contract for the purchase of a parcel of real property, located Dorchester County, South Carolina. The contract was termed a "Bond for Title" whereby title to the land would not convey to the Appellant until the contractual amount was tendered to Respondent.

1. Underlying Case

The parties were involved in prior action in regards to the same parcel of property from which a judgment was filed for Breach of Contract/Collection of Unpaid Installments and for a Declaratory Judgment to Declare Contract Breached and to Extinguish and Foreclose Appellants Right in the Property/Quiet Title. Appellant was in breach of the terms of the Bond for Title, that he was indebted to the Respondent in the amount of Thirty-Four thousand (\$34,000.00) Dollars and that he should remove himself and his personal property from the premises.(R. p. 1)

2. Procedural History of this Case

Respondent filed a Complaint on August 3, 2010 for Breach of Contract/Collection of Unpaid Installments and for a Declaratory Judgment to Declare Contract Breached and to Extinguish and Foreclose Appellants Right in the Property/Quiet Title. (R. p. 8) Appellant

answered Respondents Complaint on November 8, 2010. (R. p. 15) The Respondent replied on November 9, 2010 with a general denial. (R. p. 20) A final hearing was held before the Honorable Maite Murphy on November 9, 2011. The Final Order and Judgment was signed and filed with the Clerk of Court for Dorchester County on May 9, 2012. (R. p. 4)

FACTS

The relevant facts in this matter are undisputed. The lower court's order extinguished all of Appellants' rights in the subject property (R. p. 4) after Appellant had paid substantial sums to the Respondent after Appellant's breach of the terms of the Bond for Title. Appellant was not afforded an equitable right of redemption. (R. p. 8)

STANDARD OF REVIEW

Actions to foreclose or cancel an instrument are actions in equity. Wilder Corp. v. Wilke, 324 S.C. 570, 576, 479 S.E.2d 510, 513 (1996) (citations omitted).(R. p. 4) In an action in equity, while this Court is free to take its own view of the preponderance of the evidence, this does not require us to disregard the findings of the trial judge who saw and heard the witnesses and, accordingly, was in a better position to judge their credibility. Donnan v. Mariner, 339 S.C. 621 , 626, 529 S.E.2d 754, 757 (Ct. App. 2000). (R. p. 4)

ARGUMENTS

I. WAS THE JUDGE'S FAILURE TO ADDRESS THE SPECIFIC ELEMENTS OF APPELLANTS' EQUITABLE CLAIMS A REVERSIBLE ERROR?

The Bond for Title by its very terms calls for forfeiture in the event of a breach by the Defendant. (R. p. 83) In this case a substantial forfeiture, of over Forty Thousand (\$40,000) Dollars for payments already tendered to the Respondent under the contract toward the purchase of the property.(R. p. 67) In the factually similar case of Cody Discount, Inc. vs. Merritt, 386

S.C. 570, 629 S. E. 2d 697 (S.C. App, 2005), (R. p. 4) citing, Lewis v. Premium Inv. Corp., 351 S.C. 167, 172, 568 S.E.2d 361, 363 (2002);(R. p. 4) the Cody Court expressed its disfavor of forfeiture by stating:

The courts of South Carolina have long held that forfeitures or penalties are not favored in either law or equity. Lewis v. Premium Inv. Corp., 351 S.C. 167, 172, 568 S.E.2d 361, 363 (2002); Ducworth v. Neely, 319 S.C. 158, 162, 459 S.E.2d 896, 899 (Ct.App.1995); see also Litchfield Co. of South Carolina, Inc. V. Kiriakides, 290 S.C. 220, 349 S.E.2d 344 (Ct. App.1986); Alexander v. Herndon, 84 S.C. 181, 65 S.E. 1048 (1909). Concomitantly, “a provision in an installment land contract declaring forfeiture in the event of purchaser default can, in particular circumstances, constitute a penalty.” Lewis, 351 S.C. at 172, 568 S.E.2d at 364.

In Lewis, our supreme court held that in certain contractual instances where a stipulated sum (in the event of default) constitutes a penalty, “it would be inequitable to enforce the forfeiture provision without first allowing the purchaser an opportunity to redeem the installment contract by paying the entire purchase price.” Id. As noted in the master’s order, there are a number of case-specific factors to consider in making such a determination. These factors include the amount of equity the purchaser has accumulated, the length and number of defaults, the amount of forfeiture, the speed in which equity is sought, and the amount of money the purchaser would forfeit in relation to the purchase price of the property. Id. at 174, n. 5, 568 S.E.2d at 364, n.5. , id at page 700. (R. p. 5)

In Cody Discount, the court again confirmed the premise that forfeitures and penalties are not favored even after a breach or default by the purchaser. The factors enumerated by the court in Cody Discount, citing Lewis, supra clearly requires the court to make some inquiry into whether the amount of equity the purchaser has accumulated, the length and number of defaults, the amount of forfeiture, the speed in which equity is sought and the amount of money the purchaser would forfeit in relation to the purchase price. (R. p. 5) In the present case the only finding of the court was that the respondent has meet his burden of breach of the Bond for Title contract by a preponderance of the evidence. (R. pp. 73-74.) There was no analysis of these factors by the court even in light of the testimony by both parties as to the exact amounts tendered, that there was a substantial amount tendered to the Respondent by appellant, (R. pp. 73-74) that appellant made substantial improvements to the property which would be lost in the event of a forfeiture, (R. p. 37) and Respondent’s failure to pursue a remedy for an unreasonable time while continuing to receive payments from the Appellant toward fulfilling the contract. (R. p. 46) The Appellant testified that there are sufficient disputed facts as to the

actions of the Respondent which prevented him from tendering the remaining installment payments; (R. p. 83) there was also the issue of whether he should be allowed to complete payment to Respondent of the remainder of the contract price. (R. pp. 68,) Respondent accepted the benefits of the contract after declaring the contract in default and Appellants imperfect performance thereunder. Appellant asked the court to allow him the opportunity to tender the remainder of the contract price to Respondent,(R. p. 70) so as to preserve his interest this parcel on which he lives and had made substantial improvements. (R. p. 64)

II. DID THE APPELLANT HAVE AN EQUITABLE RIGHT OF REDEMPTION?

The court in Lewis v. Premium Inv. Corp., 351 S.C. 167, 172, 568 S.E.2d 361, 363 (2002),(R. p. 4) another case that addressed the purchaser's rights in regard to installment land contracts based its decision on well-founded principles of contract law when it declared that forfeiture, in certain circumstances constitutes a penalty and that it would be inequitable to enforce the forfeiture provision without first allowing the purchaser the right of redemption. (R. p. 6) The court based its conclusion in part because the penalty disproportionate to the damages resulting from the breach. ((R. p. 6) In this case the actual amount of damages suffered by the Respondent is still unclear as both he and the Appellant have differing calculations as to the final sum still outstanding on the contract. (R. pp. 46- 47, 67) The language and tenor in both the Cody Discount and the Lewis decisions are that the right of redemption will be afforded the purchaser in the interest of justice when also considering the various case specific factors. (R. p. 5) In this case the Respondent would have received a substantial sum from the Appellant and (emphasis added) a return of the property, which by his own admission he now intends to re-sell. (R. p. 52) In addition he has an improved building areas and infrastructure improvements such a water well and a septic system all of which were done at the Appellants expense. (R. p. 51) Equity demands equity and in this case the Respondent did not act his right to declare the Appellant in breach of the Bond for Title until the contract price was nearly paid. (R. pp. 41-43) The prior action gave the Appellant Forty-Five (45) days to vacate the premises and (R. p.42) remove his belongings but the respondent failed to act until bring the present action and procuring substantially more money from the Appellant. The lack of any affirmative actions on

his part was ostensibly an attempt to work things out. (R. p.41-42) No right was ever afforded the Appellant, only an inquiry by Respondent's counsel as to the Appellant ability to pay any requisites amount owed Respondent. (R. p. 70-72)

Appellant asserts that the Respondent has also waived his right for possession and extinguishing the equitable claims of the Respondent through the equitable doctrine of Waiver. Waiver has been defined by the court in Clarence Olin Freeman, v. Patricia A. McBee, formerly Patricia A. Freeman 280 S.C. 490, 313 S.E. 2d 325 (S.C. App. 1984) (R. p. 6) stated:

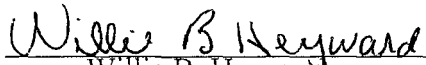
"Waiver is an intentional relinquishment of a known right and may be implied from circumstances indicating an intent to waive [cites omitted]. Acts inconsistent with the continued assertion of a right, such as a failure to insist upon the right, may constitute a waiver." Bonnette v. State, 277 S.C. 17, 282 S.E.2d 597 at 598 (1981). (R. p. 7)

Respondent knew he had the right, through the prior Confession of Judgment Order R. p. 41) to reclaim the property and failed to do so. The substantial difference being that now, after there have been substantial payments tendered by the Appellant, he can now attempt to enforce the prior order, keep all of the tendered payments, improvements to the property and still re-claim the property for himself.

CONCLUSION

Appellant asks that in view of the fore-going arguments that he be given the equitable right to redeem the property after some determination is made as to the exact amount owed the Respondent. The initial bargain contemplated by the parties was for the Appellant to pay the full amount of the contract price. Removal of any equitable interest that Appellant has in the subject property would amount to a gross injustice to the Appellant and a financial windfall to the Respondent. Appellant simply asks for the opportunity to make the Respondent whole by fulfilling the contract price in the Bond for Title hereby the Respondent would have received the full benefit of the bargain.

Respectfully submitted by,


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December 2, 2012

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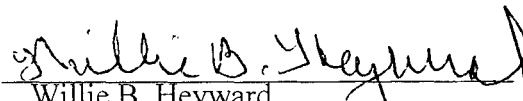
v.

George Mitchell.....Appellant

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Initial Brief of Respondent filed herewith complies with Rule 211(b), SCACR.

December 3, 2012


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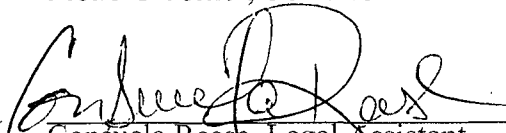
v.

George Mitchell.....Appellant

PROOF OF SERVICE

I certify that I have served the Final Brief of Appellant on all counsel of record by depositing copies of the same in the United States Mail postage prepaid, on December 3, 2012 addressed as follows:

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