IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
COURT OF COMMON PLEAS

RECEIVED
MAR 11 2019
SC Court of Appeals

Joseph M. Strickland, Master-in-Equity Judge

Appellate Case No. 2018-001156

Quality Lawn Care and Landscaping, Inc. d/b/a Design South Landscape Co.………...Appellant,

v.

Coogler Construction Company, Inc.,.……………………..………………………………Respondent.

FINAL BRIEF OF APPELLANT

T. Jeff Goodwyn, Jr.
Goodwyn Law Firm, LLC
2519 Devine Street
Suite A
Columbia, SC 29205
JGoodwyn@Goodwynlaw.com
(803) 251-4517
(803) 251-4527 fax
Attorney for Appellant

TABLE OF CONTENTS

Table of Authorities ii

Statement of Issues on Appeal 1

Statement of the Case 1

Statement of Facts 1

Standard of Review 3

Argument 4

I. Because the Written Contract Between the Parties Provided No Tolerances as to The Location of the Wall, Plaintiff Cannot Be Said to Have Breached the Contract as to the Wall's Location 4

II. Even If Appellant Can Be Said to Be Responsible for Any Variance in the Location of the Wall, The Only Section of the Wall That Needed to be Replaced Was at the Corner of the Parking Lot. It Was an Error of Law to Require Appellant to Pay for Tearing Down and Replacing the Entire Wall. The Proper Legal Remedy Is to Repair Only the Section That Affects the Completion of the Project 6

Conclusion 7

TABLE OF AUTHORITIES

CASES

- Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 564, 658 S.E.2d 80, 90 (2008)....................3
- Fox v. Moultrie, 379 S.C. 609, 666 S.E.2d 915 (2008)....................4
- South Carolina Finance Corp. of Anderson v. West Side Finance Co., 236 S.C. 109, 113 S.E.2d 329 (S.C. 1960)....................7
- Stanley Smith & Sons v. Limestone College, 283 S.C. 430, 322 S.E.2d 474 (S.C. App. 1984)....................5
- Townes Associates, LTD v. City of Greenville, 226 S.C. 81, 221 S.E.2d 773 (1976)....................3

STATEMENT OF ISSUES ON APPEAL

I. Did the Master in Equity err as a matter of law in finding Appellant in breach of contract when the retaining wall he contracted to build was located in a slightly different location than designed when the contract provided no tolerances?

II. Did the Master in Equity err as a matter of law by finding and concluding that Appellant should be responsible for paying for the tear down and re-build of the entire 450 foot wall when the only a small section of wall needed to be replaced?

STATEMENT OF THE CASE

This case was tried before the Honorable Joseph M. Strickland, Master in Equity, October 30, 2017 – November 1, 2017 on Appellants claim for breach of contract seeking to be paid for the work he performed constructing a retaining wall and Respondent's counterclaim for breach of contract for allegations that the wall was not properly located. The Court issued an order dated April 25, 2018 finding in relevant part that Appellant breached the contract by failing to properly locate the wall and that the proper remedy was to tear down the entire wall and re-build it at Appellant's expense. Appellant filed a timely motion to reconsider May 7, 2018 which was denied in an order dated June 12, 2018. Appellant filed a timely Notice of Appeal to this Court June 20, 2018.

STATEMENT OF FACTS

This controversy is over a retaining wall that Quality Lawn Care and Landscaping, Inc., d/b/a Design South Landscape Co. ("Quality") constructed as a subcontractor to Coogler Construction Company, Inc. ("Coogler") on the Killian Lakes apartment project

located in Richland County, South Carolina. Coogler in turn was a subcontractor to Edward Rose Development Company, L.L.C. ("Rose"). Rose was also the owner of the apartment complex.

Quality constructed two retaining walls on the Killian Lakes complex for Coogler. Quality was paid for almost all of the first wall, but was never paid for the second wall. The contract between Coogler and Quality (the "Contract") set no tolerances on how far off the design location the wall could be. The location of the second wall ("Wall H"), was staked out by a surveyor, Henry Walker, that was hired by Rose. Quality built the wall where Rose staked its location.

When a corner of the wall was slightly too close to the corner of a parking lot, Coogler decided to tear down and rebuild the entire 450 foot retaining wall and not pay Quality for any of its work. Quality sued Coogler for the amount it claims it is owed under its subcontract with Coogler for construction of Wall H and the remaining payment on the first wall, as well as what it claims was extra work. Coogler counterclaimed for the amount of money it paid for removing and replacing all 450 feet of Wall H over its budgeted amount for Wall H and for some trucking invoices.

This case revolves around the survey for Wall H from which Quality actually constructed the wall and on how far off the design alignment Wall H was when Quality completed the work it did on Wall H.

Wall H is a segmental retaining wall which means that it is made from blocks rather than from cast-in-place concrete. The blocks are supposed to be 8 inches high, 18 inches long, and 12 inches deep, but their actual dimensions vary causing the need to adjust the

exact location of the wall to keep the wall aesthetically suitable. Retaining walls are installed to allow an abrupt change in elevation, with a "high side" and a "low side."

For retaining walls of this type, the precise location of the wall is not at all critical except in areas of the wall that closely border other structures, like buildings or parking lots. For the portions of the wall that simply mark the edge of green space, aesthetics is the predominating concern since a few feet more or less of green space is of no consequence. Wall H in this case was 450 feet long and consisted of only one critical area that closely bordered the parking lot. The Master found that despite no tolerance being provided in the Contract, the wall was not located properly and that Coogler was justified in tearing down and rebuilding the entire retaining wall at Quality's expense.

The evidence shows that the surveyor made a mistake in this area that caused the wall to be 1½ feet closer to the parking lot than designed meaning that even if the parking lot could not have been made to fit within the wall, Quality would not have been the responsible party. The surveyor also testified that he used a set of AutoCAD drawing to place the hubs and stakes for this wall that was different than the plans provided Quality.

STANDARD OF REVIEW

In an action at law referred to a master or special referee for final judgment, appellate courts will correct errors of law, but must affirm the master's factual findings unless no evidence reasonably supports those findings. *Townes Associates, Ltd. v. City of Greenville*, 226 S.C. 81, 221 S.E.2d 773 (1976). The appellate court undertakes a *de* novo review of all issues of law, and is free to decide matters of law with no particular deference to the trial court. *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 564, 658 S.E.2d 80, 90 (2008). In an action in equity referred to a master for final judgment with direct

appeal to the Court of Appeals, the appellate court may determine facts in accordance with its own view of the preponderance of the evidence. *See, e.g.*, *Fox v. Moultrie*, 379 S.C. 609, 666 S.E.2d 915 (2008).

ARGUMENT

I. Because the written contract between the parties provided no tolerances as to the location of the wall, Plaintiff cannot be said to have breached the contract as it the wall's location.

As was well established at trial and agreed to by both parties, Plaintiff was not responsible for staking the location of the wall. Instead, the developer, Edward Rose, hired a surveyor, Henry Walker, to stake the location of the wall. (R. p. 468, ll. 1-8). Respondent also agreed that Plaintiff should not be held to be responsible for any locations errors caused by an improper staking of the layout of the way caused by the surveyor. (R. p. 468, ll. 9-21)

While the contract between the Developer and the Respondent called for .1 foot tolerances between the design location and actual location of the stakes for the wall (see Trial Exhibit 37, R. p. 881), the contract between Appellant and Respondent had no required tolerances. (see Trial Exhibit 1, R. p. 724; R, p. 507, l. 16 – p. 508, l. 15). In fact, Coogler's owner, Joey Coogler, agreed with Michael Young that the precise location of the wall is often sacrificed for aesthetics in the areas of the wall where the precise location of the wall is not important. (R. p. 464, l. 18 – p. 465, l. 8; p. 411, l. 23 – p. 412 l. 16). The minor variations of the location of the wall in the non-critical areas in this case were reasonable and expected for these types of segmented retaining walls. The as-built v. design drawing shows just how close the wall was built to the design. (see Trial Exhibit 36, R. p. 878).

In addition to sacrificing location for aesthetics, there was other evidence showing that the wall was staked out in the wrong location by the surveyor, Henry Walker. Mr. Walker testified that he used an AutoCAD file with coordinates different than the plans given to Plaintiff. (R. p. 594, l. 2 – p. 596, l. 20). Interestingly, neither Defendant nor Mr. Walker brought this AutoCAD file to trial. (R. p. 613, l. 5 – p. 614, l. 3). Plaintiff was able to demonstrate at trial how these difference cause location differences compared to the plans Plaintiff was provided. (R. p. 124, l. 11 – p. 126 l. 6).

In addition, the text messages between Joey Coogler and Michael Young showed that the surveyor had a 5 foot set off in the critical corner where the parking lot was being built where there should have been a 3½ foot set off. (R. p. 627 l. 19 – p. 628, l. 11). This 1½ foot difference caused by the surveyor is the difference between the wall allegedly being too close at this critical area and Plaintiff should not be held responsible for this mistake.

"The parties must manifest their mutual assent to all essential terms of the contract in order for an enforceable obligation to exist." (*See* Stanley Smith & Sons v. Limestone College, 283 S.C. 430, 322 S.E.2d 474 (S.C. App. 1984). Because the parties agree that the precise location of these types of segmented retaining walls is often sacrificed for aesthetic purposes, a tolerance becomes an essential term before the builder can be said to have breached the contract. Because the Contract did not specify any tolerances and variations in location, it was an error of law for the Court to find that Appellant breached the Contract because the wall was inches away from where the design drawing that Appellant didn't even receive a copy of showed the wall was to be located in the critical corner area.

Even if the wall was not exactly where it was laid out to be by the surveyor and one believes that Plaintiff was responsible for the deviations, there were no tolerances for location provided for in the Contract that would allow a fact finder to hold Plaintiff in breach (See Trial Exhibit 1, R. p. 724). Testimony by both Michael Young and Joey Coogler confirmed that due to the variations in the size of the stones used to build the walls, reasonable deviations as to location were common for this type of segmented retaining wall to ensure proper aesthetics. Because the Contract specified no tolerances, Plaintiff had no way to know that the inches Respondent was claiming the wall deviated in the critical area near the parking lot corner would lead to a demand to tear the entire wall down and rebuild it. It is patently unfair to hold Appellant in breach of the Contract based on a slightly different location of the wall when Respondent didn't stake the location of the wall and the Contract didn't specify any tolerances for the location of a wall that was built very close to the design location. As a result, it was an error of law for the Court to have found Appellant in breach of the Contract and this Court should reverse this finding and the trial court's award for damages based on this finding.

II. Even if Appellant can be said to be responsible for any variance in the location of the wall, the only section of the wall that needed to be replaced was at the corner of the parking lot. It was an error of law to require Appellant to pay for tearing down and replacing the entire 450 feet of wall. The proper legal remedy is to repair only the section that affects the completion of the project.

If the court finds that the contract did not require tolerances to enforce a variation that is only a matter of inches, tearing down all 450 feet of wall was not the proper remedy when a partial reconstruction could have remedied the problem. "The measure of damages for breach of contract is the loss actually suffered by the contractee as a result of the

breach." *See* South Carolina Finance Corp. of Anderson v. West Side Finance Co., 236 S.C. 109, 113 S.E.2d 329 (S.C. 1960).

There were no terms in the contract to let Plaintiff know that tearing down the entire wall, even in the areas properly located, would be the chosen remedy should any portion of the wall not be located properly. If there is one area of the wall that is too close to the parking and Plaintiff's work is determined to be the cause, a partial tear down and re-build would be the appropriate remedy. *Id.* Plaintiff testified that he offered this multiple times, but due to an internal dispute with the developer, the developer insisted that that entire wall, even the portions properly located, be torn down and re-built. (R. p. 366, l. 7 – p. 367, l. 23). It is unfair to hold Plaintiff to a standard that he is not told about in advance and then require Plaintiff to not only not get paid for his work, but to have him pay to rebuild the entire wall, even the sections that were properly located. As a result, it was an error of law for the Court to have required Appellant to pay for the entire wall to be torn down and re-built and this Court should reverse these findings and conclusions of law and the case be remanded for a determination of the cost to rebuild only the critical area of the wall.

CONCLUSION

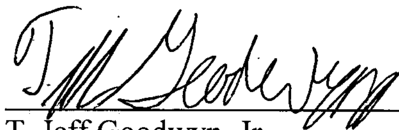
The Contract provided no tolerances for the location of the wall nor was any remedy specified if the wall was not satisfactorily located. As a result, the Master in Equity erred as a matter of law in finding Appellant breached the Contract because the wall was not exactly where designed. This is especially true since a third party staked the location of the wall.

If Appellant is found to be responsible for the variance in the location of the wall at the critical spot near the parking lot, the proper measure of damages would be to only

repair the affected portion, not the entire wall. It was undisputed at trial that the precise location of these types of segmented retained walls is often sacrificed for aesthetic purposes meaning that the wall was properly located for all but the portion next to the parking lot. It was an error of law for the Court to have required Appellant to pay for the entire 450 foot wall to be torn down and re-built it when a partial rebuild would have sufficed. As a result, this Court should reverse these findings and conclusions of law and the case be remanded for a determination of the cost to rebuild only the critical area of the wall.

Respectfully Submitted,

GOODWYN LAW FIRM, LLC



T. Jeff Goodwyn, Jr.
2519 Devine Street, Suite A
Columbia, SC 29205
JGoodwyn@Goodwynlaw.com
(803) 251-4517
(803) 251-4527 (fax)
Attorney for Appellants

Columbia, South Carolina
March 11, 2019

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
COURT OF COMMON PLEAS

Joseph M. Strickland, Master-in-Equity Judge

RECEIVED
MAR 11 2019
SC Court of Appeals

Appellate Case No. 2018-001156

Quality Lawn Care and Landscaping, Inc. d/b/a Design South Landscape Co............Appellant,

v.

Coogler Construction Company, Inc.,...Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR.

GOODWYN LAW FIRM, LLC

T. Jeff Goodwyn, Jr., Esquire
2519 Devine Street, Suite A
Columbia, SC 29205
(803) 251-4517
(803) 251-4527 fax
JGoodwyn@Goodwynlaw.com
Attorney for the Appellant

Columbia, South Carolina
March 11, 2019