THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable D. Craig Brown, Circuit Court Judge

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SC Court of Appeals

Case No. 2016-CP-10-0507
Appellate Case No. 2018-001729

Buck Investments, LC.....Respondent

v.

ROA, LLC, Deborah Rice-Marko and
PNC Bank, N.A., successor to RBC Bank (USA).....Defendants

Of Whom ROA, LLC is the.....Appellant.

RESPONDENT'S INITIAL BRIEF

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STATEMENT OF THE CASE[1]

This action surrounds a contract for the sale of real property known as 438 King Street in Charleston County, South Carolina and having TMS# 460-16-02-066 ("the Property"). [Complaint and Answer and Ex 1 -contract]. Respondent, Buck Investments, LC ("Buck") sought to purchase the Property from Appellant, ROA, LLC ("ROA"). [Compl. TT 133; Ex 1].

Buck and ROA began discussions regarding the sale of the Property in or around November 2012. [TT 131]. On or about March 20, 2013, Deborah Rice-Marko ("(Rice-Marko"), executed a contract on behalf of ROA, LLC ("ROA") to sell the Property. [Ex 1; TT133; 208]. The purchase price for the Property was $3.5 million. [TT131; 208; Exhibit 1]. The existence of a valid contract was never disputed. [TT 310].

Buck supplied earnest money of $50,000.00 to the designated escrow agent for this transaction. [TT 133; 138; Ex 7]. The closing on the Property was set for April 3, 2013. [TT 136]. ROA failed to close on the Property on April 3, 2013, or thereafter, despite indicating that it was willing to close. [TT 148-153; Ex's 12-15; 17]. At no time, prior to the closing dates did ROA disclose to Buck that there was potentially an impediment to the closing. [TT 151; 191; 205-06; 191]. ROA ultimately failed to close the sale of the Property, and Buck notified ROA of its obligation to cure the default under the contract. [TT 149; Ex 11]. Subsequent to the default of ROA, its lender, PNC Bank, NA ("PNC") asserted rights in the real property based on its alleged mortgage interest, and filed a foreclosure action, styled as *PNC Bank, N.A., successor to RBC Bank (USA) v. Liberty Cottages, et al,* C.A. No.: 2013-CP-10-2624 ("foreclosure action"). [TT 254-255; 266; Def Ex 7].

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[1] Respondent agrees with Appellant's procedural history set forth in its Statement of the Case section. Respondent, however, diverges from Appellant's recount of the "Statement of Facts" which should be considered on appeal.

Buck filed the instant action on August 2, 2013. [Compl.]. A trial began on July 23, 2018. [TT 1]. During the course of the trial, it was conceded that at all times Buck was ready, willing, and able to perform on the contract. [TT 148-49; Ex 27]. During the trial, no evidence was presented that prior to the contract being signed, ROA disclosed it was in financial distress, despite there being significant issues. [TT 209-17; Ex 2; 3; 20]. This information was not disclosed to Buck. [TT 218]. At all times, Buck was aware of the existence of a mortgage on the property, but at no time was it disclosed to Buck that ROA was in arrears on its financial obligations, that it was potentially unable to perform its obligations at closing, or that the lender would not agree to release its encumbrances on the Property. [TT143; 209-17]. Instead, at all times, Buck was left to believe that ROA intended to sell the Property, despite ROA's knowledge of financial constraints. [TT 144-151; 214-216; Exs 2, 3, 8-10; 13-15]. ROA contended that the defense of impossibility was applicable and should be decided by the jury. [TT 313-314].

The sole cause of action submitted to the jury was for breach of contract. [TT 335-347]. The trial court granted a directed verdict against ROA's impossibility defense, as well as equitable estoppel, but allowed the defense of waiver to be considered by the jury. [TT 307-328]. Buck knew a mortgage was on the property, but was never told it was in arrears and the land records would not reveal that fact. [TT142-43; 210]. The jury properly rejected ROA's defense and returned a verdict on July 25, 2018, in favor of Buck for $900,000.00. [Verdict]. Post-trial motions for JNOV by ROA were properly denied. [Order denying motion].

STANDARD OF REVIEW

"When reviewing the trial court's ruling on a motion for a directed verdict . . ., this Court must apply the same standard as the trial court . . . ." Shenandoah Life Ins. Co. v. Smallwood,

402 S.C. 29, 34-35, 737 S.E.2d 857, 859-60 (S.C. Ct. App. 2013). "On appeal from an order granting a motion for a directed verdict, therefore, the appellate court must determine whether it would have been reasonably possible for the jury to return a verdict for the party opposing the motion." Id. at 860.

"On review from a trial court's denial of a motion for JNOV, this Court applies the same standard as the trial court and views the evidence and all reasonable inferences in the light most favorable to the nonmoving party." Allegro, Inc. v. Scully, 418 S.C. 24, 32, 791 S.E.2d 140, 144 (S.C. Ct. App. 2016). "Only the grounds raised in the directed verdict motion may properly be reasserted in a JNOV motion. A motion for a JNOV is merely a renewal of the directed verdict motion." RFT Management Co. LLC v. Tinsley & Adams LLP, 732 S.E.2d 166, 170-71 (S.C. 2012). The trial court must deny a motion for a directed verdict or JNOV if the evidence yields more than one reasonable inference or its inference is in doubt. Id. at 171. "Moreover, "[a] motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict." Id. "In deciding such motions, neither the trial court nor the appellate court has the authority to decide credibility issues or to resolve conflicts in the testimony or the evidence." Id.

ARGUMENT

I. WHETHER THE CIRCUIT COURT PROPERLY DIRECTED A VERDICT AGAINST ROA, LLC'S IMPOSSIBILITY DEFENSE?

The burden of proving impossibility rested with ROA. Hawkins v. Greenwood Dev. Corp., 328 S.C. 585, 593, 493 S.E.2d 875, 879 (S.C. Ct. App. 1997)(citations omitted). ROA provided no testimony regarding its alleged inability to pay an "ascertainable sum of money" to satisfy the banks mortgage. Indeed, as noted by the trial judge, ROA provided "absolutely no testimony . . . of that." (TT p. 312). No representative of PNC testified. [TT 96-305]. Rice

Marko offered no testimony regarding ROA's financial condition, or even her own. [TT 207-261]. Furthermore, ROA did not move for directed verdict against Buck on impossibility, but rather, stated "we believe that issue should go to the jury." (TT 313-314). ROA cannot ask for relief it did not seek at directed verdict in the context of either a JNOV or appeal. RFT Management, 732 S.E.2d at 170-71.

In turning to the impossibility defense, the trial court was correct to direct a verdict, because ROA's inability furnish money to a third party does not excuse its performance of the contract it entered with Buck. Morin v. Innegrity, LLC, 424 S.C. 559, 819 S.E.2d 131 (S.C. Ct. App. 2018). The trial court's reliance on Morin was proper and is on point.

Morin started a business out of his home and founded Innegrity. Id. at 135. It later added investors in exchange for ownership and an employment agreement with Morin. Id. The employment agreement included a promise that Innegrity would remove Morin as a guarantor of the company's loans if he was fired without cause. Id. Innegrity struggled through the recession, and Morin personally guaranteed loans in an effort to raise additional capital. Id. As Innegrity continued to struggle, the board fired Morin without cause, and defaulted on loans that he guaranteed, subjecting Morin to lawsuits. Id. Morin filed a breach of contract claim against Innegrity after being terminated without cause in the face of an employment agreement. Id. In part, Innegtrity asserted that it was an impossibility to remove Morin as a guarantor on the loans he personally guaranteed, and sought reversal of its JNOV motion at trial. Id. Innegrity alleged that it "conclusively established its affirmative defense of impossibility of performance at trial by showing the company was insolvent at the time of Morin's termination, and that the lenders in question had rejected their request to remove Morin from his guarantees." Id.

The Court of Appeals disagreed with Innegrity and held that the impossibility defense failed as a matter of law as it applied to the alleged financial inability to perform, and **the acts of third parties**. Id. at 136-137 (emphasis added). As it related to the acts of third parties, the court disagreed that performance was rendered impossible, as follows:

> "Equally unavailing is Innegrity's claim it was "impossible" to force the lenders to remove Morin's obligations. Innegrity assumed the risk it would be able to relieve Morin of the guarantees, whether by making alternative arrangements with the lender or paying off the loan. Even the most generous interpretation of impossibility will not save a contracting party who bargains for his own folly by guaranteeing performance despite impracticability. This is the lesson of Holmes' rainmaker. *See supra Farnsworth, Farnsworth on Contracts*, § 9.6 at 643. *See also Restatement (Second) of Contracts* § 261 (1981), cmt. c." Id.

The Morin case mirrors that of ROA's assertion of impossibility in this action. Here, ROA asserts it is impossible to perform because either they cannot pay the difference in the amount of the contract (to be paid by Buck), or PNC will not release them from the mortgage so as to convey clear title. This ignores three key points.

First, PNC is a third party to the contract and cannot form the basis for impossibility per Morin. Second, ROA's alleged inability to secure other financing to fill any shortfall between that which Buck was willing to pay and what was demanded by PNC cannot be the basis the defense per Morin. Third, even if ROA had no monetary means to satisfy PNC, it provided no evidence of that at trial as noted during directed verdict. (TT 312-314). The Morin court makes clear that South Carolina law does not recognize the defense of impossibility for an alleged financial inability to perform, or the alleged inability to force a third party to perform.

The holding of Morin is based upon sound South Carolina law and legal principals. Generally, if a party by his contract charges himself with an obligation possible to be performed,

he must make it good unless its performance is rendered impossible by an act of God, the law, or other party. Jones v. Bates, 241 S.C. 189, 127 S.E.2d 618 (S.C. 1962); 17 Am.Jur.2d Contracts § 404 (1964). Subjective impossibility, possibility which is personal to the promisor and does not inhere in the nature of the act to be performed, does not excuse nonperformance of a contractual obligation. B's Co. v. B.P. Barber & Assoc., Inc., 391 F.2d 130 (4th Cir.1968)(applying South Carolina law). "Accordingly, the fact that one is unable to perform a contract because of his inability to obtain money, whether due to his poverty, a financial panic, or failure of a third party on whom he relies for furnishing the money, will not ordinarily excuse nonperformance in the absence of a contract provision in that regard." Moon v. Jordan, 301 S.C. 161, 164, 390 S.E.2d 488, 490 (S.C. Ct. App. 1990). Any alleged inability to financially perform by ROA does not create a legal impossibility so as to excuse ROA's legal liability.

Furthermore, ROA's argument that there was no "ascertainable sum of money" that PNC would accept to release the Property to Buck is factually inaccurate. ROA brief at 8-9. Factually, it was presented at trial that ROA reached an agreement with PNC to release the Property for $4 million. [TT 240-243; Ex 21, 22]. Prior to trial a letter of intent to purchase was submitted to ROA for $5.125 to sell the property, which is obviously more than was necessary to release the Property. [TT 240-243; Ex 21, 22]. Thus, the very premise for which they base their argument is flawed – factually. [TT 240-243; Ex 21, 22].

ROA relies on an intermediate court of appeals case from Arkansas, Serio v. Copeland Holdings, LLC, 2017 Ark. App. 280, 521 S.W.3d 131 (Ark. Ct. App. 2017), for its position that impossibility applies in the context of a third-party lienholder. First, this opinion is not binding on this Court. Second, it is in direct contravention to the holding in Morin. Third, it was decided

before Morin. Fourth, even considering Serio, Arkansas requires that the person claiming impossibility "must show that he took virtually every action within his power to perform his duty under the contract. It must be shown that the thing to be done cannot be effected by any means." Id. at 138. There was no testimony by ROA as to what was performed, attempted to be performed, or any effort by ROA to perform prior to closing, other than "negotiations" with PNC which were never disclosed to Buck or even the context of those negotiations at trial. [TT 151; 191; 205-06; 207-261].

Lastly, and for the first time on appeal, ROA cites to Olbum v. Old Home Manor, Inc., 313 Pa.Super. 99, 459 A.2d 757 (Pa. Super. Ct. 1983), as supportive of their defense of impossibility. As with Serio, *supra*, Olbum is not binding on this court, nor is it particularly persuasive. Putting aside the fact that Olbum was never cited below, its central purpose is to release a continuing contractual obligation to pay funds following exhaustion of coal supplies. Here, it has no application because there is no evidence that ROA was unable to provide money to PNC to satisfy any encumbrance. There was simply no evidence to support the notion of impossibility and the arguments presented are insufficient under Morin. It is no mystery that the property was encumbered which Buck acknowledged at trial. [TT 142-143]. ROA, however, never disclosed any reason why it was unable to close on April 3, 2013, nor did it provide any testimony regarding any inability to satisfy PNC. [TT 218]. The closing date was to occur on April 3, 2013, but the foreclosure action was not commenced until May 2013, thus, the existence of the foreclosure action cannot be a legal excuse, because it did not exist at the time the closing was to occur. Any argument that Buck should have been aware of an undisclosed impediment to closing is unsupported in the Record, unsupported by the facts, and unsupported by the timeline of events leading up to the admitted breach of contract. [TT 136; 143; 151; 209-18; Exhibits 2; 3;

20; 23; 27]. Furthermore, the argument ignore the fact that Buck was read, willing, and able to perform on the deal all the way up to and including trial and sought specific performance. [TT 268-303]. Factually, it was presented at trial that ROA reached an agreement with PNC to release the Property for $4 million. [TT 240-243; Ex 21, 22]. Prior to trial a letter of intent to purchase was submitted to ROA for $5.125 to sell the property, which is obviously more than was necessary to release the Property. [TT 240-243; Ex 21, 22]. Thus, the impossibility defense was inapplicable and Olbum does not support otherwise.

The Court should affirm the granting of a directed verdict in favor of Buck on the defense of impossibility. Further, as ROA never asked for a directed verdict on the defense of impossibility in its favor, it cannot do so now as it was not preserved. RFT Management, 732 S.E.2d at 170-71.

II. WHETHER THE CIRCUIT COURT PROPERLY DENIED ROA, LLC'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT REGARDING THE DEFENSES OF WAIVER AND ESTOPPEL FOLLOWING A JURY VERDICT WHICH REJECTED THESE DEFENSES?

"Waiver is a voluntary and intentional abandonment or relinquishment of a known right. It may be expressed or implied by a party's conduct, and it may be applied to bar a party from relying on a statute of limitations defense." Parker v. Parker, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994) (citation omitted). The party asserting waiver has the burden of proof. SPUR at Williams Brice Owners Ass'n, Inc. v. Lalla, 415 S.C. 72, 91, 781 S.E.2d 115, 125 (S.C. Ct. App. 2015). "Generally, the party claiming waiver must show that the party against whom waiver is asserted possessed, at the time, actual or constructive knowledge of his rights or of all the material facts upon which they depended." Id. In order for a party to waive a right, the party must have known of the right and known that the right was being abandoned. King v. James,

388 S.C. 16, 30, 694 S.E.2d 35, 42 (S.C. Ct. App. 2010). The determination of whether one's actions constitute waiver is a question of fact. Id.

The "[e]ssential elements of estoppel as related to the party claiming the estoppel are: (1) lack of knowledge and of means of knowledge of truth as to facts in question; (2) reliance upon conduct of the party estopped; and (3) prejudicial change in position." Zabinski v. Bright Acres Assocs., 553 S.E.2d 110, 114 (2001). The "[e]lements of equitable estoppel as to the party estopped are: (1) conduct by the party estopped which amounts to a false representation or concealment of material facts; (2) the intention that such conduct shall be acted upon by the other party; and (3) knowledge, actual or constructive, of the true facts." Id.

In this action, ROA asserts that the doctrines of waiver and estoppel precluded Buck from arguing that the ROA breached any obligation to Buck under the contract. ROA takes the position that Buck had an obligation under the contract to inspect the title to the property, which would have evidenced a mortgage recorded by PNC Bank, and thus provided Buck the opportunity to demand ROA prove to Buck that PNC Bank was going to consent to the transfer of the property. Buck admits it did this. [TT 142-143]. However, such an inspection would not reveal whether any loan on the property was in default. [142-43; 210; 216].

Essentially, ROA wants Buck (and the judiciary) to ignore the duty of good faith and fair dealing implicit in every contract which was owed to Buck. Crenshaw v. Erskine College, 424 S.C. 287, 818 S.E.2d 218 (S.C. Ct. App. 2018). ROA implicitly wants to shift any personal responsibility it had in disclosing pertinent facts surrounding the status of the property which could have only been known to ROA at the time of contract. There has not been any evidence presented that Buck waived its rights under the contract. There was no evidence of an

intentional relinquishment of a known right. ROA conceded at trial that Buck was at all times been ready, willing, and able to perform the contract. Mrs. Rice-Marko testified at trial that she had knowledge of the threat of foreclosure at all relevant times and failed to notify Buck of the same. [TT 209-17; Ex. 2 – 6; 20]. ROA was the only one with knowledge about the true condition of the mortgages and the threat of foreclosure and did not disclose that information to Buck, despite that obligation being clearly set forth in the contract. Furthermore, Buck sought specific performance on this contract all the way up to and including during trial. [TT 268-303]. As such, it cannot be said that Buck waived its rights by failing to inquire about a fact that was withheld from Buck.

As set forth above, the doctrine of equitable estoppel does not apply in this instance. The law first requires that the party claiming estoppel lack the knowledge or means of knowledge of truth as to facts in question. Here, ROA knew the real facts. [TT 214-218; Exs. 2, 3, 6, 20]. ROA does not contend that it lacked knowledge in this case which lead them to rely on something Buck knew and withheld which resulted in a prejudicial change in ROA's position. To the contrary, it was Buck that relied on ROA, and had Buck known of the threat of foreclosure it would not have continued with the contract/deal. [TT 149; 174]. Likewise, ROA did not allege that Buck made any false representation or concealment of facts with the intention that ROA act upon it. Again, the crux of this case is that ROA – not Buck – failed to disclose the true facts to Buck. [TT 209-217]. The doctrines of waiver and estoppel are inapplicable to this matter, and the trial court was correct in refusing equitable estoppel [TT 327-328], allowing the waiver issue to proceed to the jury [TT 335-347].

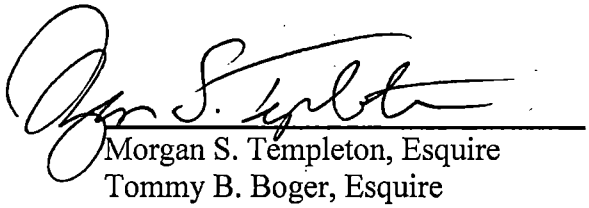
Nonetheless, even if waiver was applicable, the trial court properly denied ROA's motion for directed verdict and JNOV on the issue, because the evidence presented did not establish as a matter of law waiver or estoppel. Put another way, the evidence provided more than one reasonable inference that Buck did not waive its rights under the contract, nor that Buck should be estopped from asserting its rights under the contract. The waiver defense was allowed to be presented to the jury and was properly rejected. [TT 335-361]. Accordingly, the denial of ROA's motion for JNOV as it relates to waiver and estoppel should be affirmed.

CONCLUSION

For the foregoing reasons, Respondent, Buck Investments, LC, respectfully requests the Court affirm the ruling of the Circuit Court.

March 18, 2019

WALL Ttempleton & HALDRUP, P.A.



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PROOF OF SERVICE

I, Amy R. Eversole, of Wall Templeton & Haldrup, do hereby certify that I have served Respondent's Initial Brief, by depositing the same in the United States Mail, properly posted on March 19, 2019 addressed as follows to counsel of record:

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The Honorable Jenny Abbott Kitchings
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Re: *Buck Investments, LC vs. ROA, LLC et al*
Case No: 2018-001729

Dear Ms. Kitchings:

Please find enclosed an original and copy of Respondent's Initial Brief, Designation of Matter to be Included in the Record on Appeal and Proof of Service for each in the above referenced matter. Please file the original and return a filed-stamped copy to me in the envelope provided for your convenience.

By copy of this letter to counsel of record, I am serving him with the enclosed.

Thank you for your time and attention to this matter.

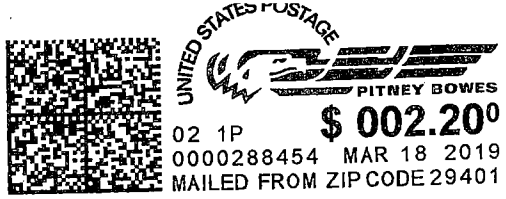
Sincerely,

WALL TEMPLETON & HALDRUP, P.A.

Morgan S. Templeton

MST:are
Enclosures

cc: Louis H. Lang, Esq.



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