THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from Charleston County
Court of Common Pleas

The Honorable D. Craig Brown, Circuit Judge

Appellate Case No. 2018-001729
Circuit Court Case Number 2016-CP-10-0507

Buck Investments, LLC ..... 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.

APPELLANT'S INITIAL REPLY BRIEF

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REPLY TO RESPONDENT'S STATEMENT OF THE CASE

Respondent does not dispute the procedural history detailed in the Statement of the Case portion of the brief of Appellant, ROA, LLC (ROA). Respondent does, however, take issue with portions of ROA's Statement of Facts (Respondent's brief at 6, fn. 1).

ROA respectfully submits its Statement of Facts accurately and completely sets out the facts relevant to the issues raised in this appeal.

Specifically, Respondent suggests the "[s]ubsequent to the default of ROA, its lender ... asserted rights to the real property based on its alleged mortgage interest and filed a foreclosure action...." Respondent's brief at 6. This is not a complete or accurate statement of the facts.

The sales contract regarding the King Street property had a closing date of April 3, 2013, but also provided a 30 day grace period if the closing did not occur on April 3, 2013. (Buck Ex. 1, ROA ___). The 30 day grace period ran on May 3, 2013, the same day PNC Bank (PNC) filed its foreclosure action, which forms one of the bases for ROA's impossibility of performance defense under the contract.[1] (Portion of ROA Ex. 7, PNC Foreclosure Complaint, ROA ____).

Respondent now concedes it knew of PNC's "alleged mortgage interest," but says it did not know 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." Respondent's brief at 7.

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[1] Another basis for ROA's impossibility defense is the absolute discretion PNC had under the terms of its mortgage to accept or reject the sale of the King Street property. No one, not even the Court, could force PNC to release the mortgage. "[Buck] cannot compel PNC to consent to the [sales contract] due to PNC's Mortgage." (Order granting PNC Bank Summary Judgment, ROA ___).

Respondent knew of the mortgage encumbering the property. It also knew, or should have known, of the mortgage provision giving PNC absolute discretion to accept or reject any sales contract. Further, Respondent knew or should have known of the mortgage modification agreement having a maturity date of July 15, 2013. (Modification of Mortgage, Ex. GG to PNC Foreclosure Complaint, Portion of ROA Ex. 7, ROA ___). Respondent also knew there was a "lender issue" causing some concern regarding the closing. "FYI it must be a lender issue." (E-mail dated April 5, 2013, from Edgar A. Buck, Jr. to attorney, ROA Ex. 6, ROA ____).

Respondent says ROA "reached an agreement with PNC" to release the mortgage encumbering the King Street Property for $4,000,000.00. Respondent's brief at 11. However, this "agreement" was not reached until July 2017, long after the contract grace period expired on May 3, 2013, and long after Respondent brought suit for breach of contract. (Transcript p. 241, ll. 14-21, and Second Amended Complaint, ROA ___, ___). Accordingly, this "agreement" is irrelevant to the impossibility of performance defense asserted by ROA at trial.[2] "[C]ourts have long recognized that impossibility ... of performance at the *time that performance is due* may excuse enforcement of a contract...." *Edge Group WAICCS, LLC v. Sapir Group, LLC,* 705 F.Supp.2d 304, 381 (S.D.N.Y.) (Emphasis added, applying New York law). Respondent's brief at page 11, also makes reference to a 2018 letter of intent to purchase the Kings Street property received by ROA, which is equally irrelevant to the impossibility of performance issue on appeal. *Id.*

[2] Respondent sued ROA "on the contract" by way of its specific performance cause of action, regarding which ROA was granted a directed verdict (or an involuntary non-suit), because Respondent had an adequate remedy at law – its breach of contract, damages cause of action, its suit "off the contract.) Transcript, p. 219, l. 19 – p. 292, l. 6.

REPLY ARGUMENTS

I.

When, on May 3, 2013, the contract grace period expired, there was no ascertainable sum the payment of which could remove the mortgage encumbrance on the King Street property.

Respondent relies on *Morin v. Innegrity, LLC,* 819 S.E.2d 131, 424 S.C. 559 (Ct. App. 2018), to support its argument that the Circuit Court did not err in granting it a directed verdict on ROA's impossibility defense.

Morin does not support Respondent's argument.

The employment contract at issue in *Morin* contained an unconditional promise to remove Morin as a guarantor if he was terminated without cause by his employer, Innegrity. Here, the King Street property sales contract provided ROA would "remove at closing those exceptions *which can be removed by paying an ascertainable sum of money* such as mortgages, liens, unpaid taxes, and special assessments." (Buck Ex. 1, ¶ 4, ROA ____, emphasis added).

The King Street sales contract, unlike the Morin's employment contract, contemplated the encumbrance of one or more mortgages on the property and their removal by ROA *if that could be accomplished through the payment of an "ascertainable sum of money."*

PNC's 11:47 a.m., May 3, 2016 foreclosure complaint filing, asserts its right to sell the King Street property, along with all the other property described in the complaint, at public auction, and asks the foreclosure court to determine the amount owed under all the mortgages it held, *in toto*. There was, therefore, no "ascertainable sum of money," as contemplated by the King Street sales contract, by which ROA could pay to remove the PNC mortgage as an encumbrance on the King Street property.

The *Morin* contract contained an unconditional promise the opposing party could not perform. The King Street property sales contract promise to remove encumbrances was conditional – the existence of an ascertainable sum of money to be paid to release the property from the mortgage encumbrance. The lack of an ascertainable sum of money to be paid to release the mortgage excused ROA's performance.

Further, as the *Morin* court said, early impossibility cases "were uniform that once a party contracted to perform an act, their failure to perform the act promised breached the contract, *unless it expressly excused performance or allocated the risk of nonperformance elsewhere." Id.* at 568, 819 S.E. 2d at 136. The King Street sales contract contemplated title exceptions, premising their removal on an "ascertainable sum of money." PNC's mortgage could not be removed by an "ascertainable sum of money" and, therefore, rendered ROA's performance impossible.

A party pleading 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...." *Serio v. Copeland Holdings, LLC,* 521 S.W.3d 131, 138 (Ark. 2017) quoting *Frigillana v. Frigillana,* 584 S.W.2d 30, 33 (Ark. 1979). "Impossibility of performance ... sufficient to excuse the nonperformance on the part of either party means an impossibility consisting in the nature of the thing to be done, and not the inability of the party to do it, and it must be shown that the thing required under the contract cannot be accomplished. *Id.,* citing *Whipple v. Driver,* 140 Ark. 393, 215 S.W. 669 (1919). *See also Thornton v. Interstate Securities Co.,* 35 Wash. App. 19, 666 P.2d 370 (1983) ("Impossibility of performance encompasses both strict impossibility and impracticality due to extreme and unreasonable

difficulty, expense, injury or loss; the unexpected, yet foreseeable event which renders performance impossible must be fortuitous and unavoidable on part of promisor.").

Here, the "nature of the thing to be done" as provided by the contract, was the removal of encumbrances on the King Street property by payment of an "ascertainable sum of money." There being no ascertainable sum of money, ROA was excused from performance under the King Street sales contract by the defense of impossibility. The Circuit Court erred in granting Respondent a directed verdict dismissing this defense.

II.

ROA was entitled to judgment notwithstanding the verdict on its waiver and estoppel defenses.

The King Street property sales contract imposed upon Respondent an obligation to inspect the title to the property before closing and to identify any exceptions to the title that Buck required ROA to cure. The recorded PNC mortgage plainly requires PNC's consent to any transfer of the property, gives PNC unfettered discretion to withhold its consent, and was a matter of public record when the parties executed the King Street sales contract. Respondent concedes it knew about this mortgage.

Respondent could have demanded that ROA provide Buck with evidence of PNC's consent to the transfer. Respondent did not, opting to proceed to closing knowing that ROA's obligation under the contract was limited to removing liens on the property at the time of closing, such as PNC's mortgage, that could be removed by the payment of an ascertainable sum. Having chosen this course of conduct, the doctrines of waiver and estoppel preclude Respondent from now arguing that ROA breached any contractual obligation it owed to Respondent. *Eason v. Eason*, 384 S.C. 473, 480, 682 S.E.2d 804, 807 (2009) (citing *Parker v. Parker*, 313 S.C. 482,

487, 443 S.E.2d 388, 391 (1994)); *King v. James*, 388 S.C. 16, 30, 694 S.E.2d 35, 42 (Ct. App. 2010); *Sanford v. South Carolina State Ethics Comm'n*, 385 S.C. 483, 496-97, 685 S.E.2d 600, 607 (2009) (on the waiver defense) and *Eason* at 480, 682 S.E.2d at 807, and *Quail Hill, LLC v. County of Richland*, 379 S.C. 314, 324, 665 S.E.2d 194, 199 (Ct. App. 2008) (rev'd in part on separate grounds) (on the estoppel defense).

CONCLUSION

The Circuit Court erred in denying ROA's motion for judgment notwithstanding the verdict regarding its impossibility defense, and its waiver and estoppel defenses. The judgment against ROA must be reversed and judgment entered for ROA.

Respectfully submitted,

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ATTORNEYS FOR APPELLANT,
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April 11, 2019
Columbia, South Carolina

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PROOF OF SERVICE

I, Crystal Smith, an employee of Callison Tighe & Robinson LLC, Attorneys for the Appellant, do hereby certify that I have served a copy of the **Appellant's Initial Reply Brief** by depositing a copy of the same in the United States Mail, postage prepaid, addressed to opposing counsel of record, at the following address:

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April 11, 2019

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CALLISON TIGHE

April 11, 2019

VIA HAND-DELIVERY
Hon. Jenny Abbott Kitchings
Clerk of Court
Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: *Buck Investments, LLC v. ROA, LLC*
Appellate Case No: 2018-001729
CTR No: 6936.001

Dear Ms. Kitchings:

Enclosed for filing please find the original and one (1) copy of **Appellant's Initial Reply Brief and Proof of Service**, in connection with the above-referenced matter. Please file the original with your office and return the clocked-in copy to me via my courier.

By copy of this letter, I am serving copies of same upon counsel of record.

Thank you for your assistance in this matter.

With kind regards, I am

Sincerely yours,

CALLISON TIGHE & ROBINSON, LLC

Louis H. Lang

LHL/cs
Enclosures
cc: (w/ encl.) Thomas B. Boger, Esquire
Morgan S. Templeton, Esquire
6936.001\Clerk ltr.006