IN THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM BEAUFORT COUNTY

COURT OF COMMON PLEAS

THE HONORABLE MARVIN H. DUKES, III, MASTER IN EQUITY

Appellate Case No. 2015-000592

(2013-CP-07-02262)

Spanish Wells Investments, LLC, Respondent,

v.

Greg Luckenbill and Evelyn Luckenbill, Appellants.

FINAL BRIEF OF APPELLANTS

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SC Court of Appeals

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Hobgood v. Pennington, 300 S.C. 309, 387 S.E.2d 690 (Ct. App. 1999)

STATEMENTS OF ISSUES ON APPEAL

I. The Trial Judge erred in determining that the Appellants were in default of the Contract between the Appellants and the Respondent.

II. The Trial Judge erred in failing to make a finding that the Contract could not have been performed within a reasonable period of time.

III. The Trial Judge erred in determining that the Contract between the Appellants and the Respondent could only be terminated in three (3) ways: (1) The transaction closes. (2) The parties mutually agree to terminate the Contract. (3) A party is deemed in default after notice of the default and notice of right to cure under Paragraph 9 of the Contract received within ten (10) business days.

IV. The trial Judge erred in finding that under the terms of the Contract a party cannot be in default until a notice of default and a right to cure notice has been sent within ten (10) business days.

V. The Trial Judge erred in failing to find that appellants were not required to send a notice of default and a ten (10) business day right to cure notice to terminate the Contract.

V. In the alternative, if appellants were required to send notice of default and a ten (10) day right to cure notice, the Trial Judge erred in failing to find that the notice given by appellants to the Respondent by email on June 19, 2013 was sufficient to satisfy this provision.

VI. The Trial Judge erred in denying the directed verdict motion of the appellants.

STATEMENT OF CASE

The Respondent filed a Summons and Complaint against the Appellants alleging that the Appellants had breached a written contract by failing to purchase a vacant lot in Sea Pines Plantation and requesting damages as a result of that breach. The Appellants filed an Answer and Counterclaim alleging that the Contract had a closing date of June 17, 2013, a closing did not occur on that date, no Notice of Extension was requested by the Respondent thereby making the Contract no longer valid. In addition Appellants alleged that Respondent had notified Appellants it did not have short sale approval by the June 17, 2013 closing date, that Appellants notified Respondent it was in default and demanded the return of the $1,000.00 earnest money due to the voided Contract. They further requested damages as a result of this breach.

This case was referred to Judge Marvin H. Dukes, III as the Master in Equity for trial. Appellants and Respondent both made directed verdict motions which were taken under advisement and though not expressly denied, were not granted and therefore effectively denied upon the issuing of the Trial Court's ruling. A Final Order dated February 16, 2015 and filed February 17, 2015 was issued. The Court found that Appellants did not provide notice of default and a 10-day right to cure notice pursuant to Paragraph 9 of the Contract, which the Court found was required by the Contract. The Court found that the Respondent was not in default when the closing did not occur on June 17, 2013. The Court found that a party is not in default until the notice of default and a ten (10) business day right to cure has

been sent, found that this was a mandatory requirement, and found that no such notice was ever sent by the Appellants. The Court found that Appellants' June 19, 2013 email which was introduced as Respondent's Exhibit 1 subpart 35, clearly did not meet this requirement and as there was no 10-day right to cure language in that e-mail. The Court found that the Respondent did properly comply with the notice of default and the 10-day right to cure notice by its July 15, 2013 letter as introduced as Respondent's Exhibit 1 subpart 48. The Court found the Appellants did not cure their default during the subsequent 10 business days and that the Respondent thereafter on July 30, 2013 properly terminated. The Court then awarded damages in favor of the Respondent of $8,000.00 for the difference in sales price, of property owner assessments of $516.17, of real estate taxes of $1,739.82, of additional interest paid to Wells Fargo until the sale of the property of $5,818.69, and attorney fees and costs of $13,873.06, for total damages of $29,947.74.

There were no post-trial motions filed by either party. The Appellants timely filed and served a Notice of Appeal from the Order issued by the Trial Judge.

FACTS

This is a real estate closing dispute. The Respondent owned a vacant lot at 10 Otter Road in Sea Pines Plantation which it had been trying to sell for several years. On April 18, 2013 the Respondent and Appellants reached an agreement for the purchase and sale of the property by way of a written Contract of Sale - Offer and Acceptance (thus far and hereinafter referred to as the "Contract"). The purchase price was $100,000.00 with $1,000.00 earnest money paid at the execution of the contract and a second earnest money payment of $4,000.00 due twenty one (21) days after April 18, 2013, or by May 9, 2013. The date of closing was set for June 17, 2013, and the Contract did not provide that time was of the essence as to the closing date. Paragraph 6 of the Contract noted that this was a short sale which was subject to approval by Wells Fargo, which held the first mortgage on the vacant lot. Paragraph 9 of the Contract provided that upon the failure of either party to comply with the terms of the Contract within the stipulated time and after notice of this default and the sending of a 10 business days right to cure, either party may proceed with rights and remedies at law or in equity against the defaulting party.

The Respondents failed to obtain short sale approval from Wells Fargo by the closing date of June 17, 2013. (R. p. 278, line 4-6). On June 19, 2013 the Appellants sent an email to the Respondent indicating they were terminating the Contract since the June 17, 2013 closing date had passed. This email was received by the Respondents.

Neither prior to, nor on or after June 17, 2013 did the Respondent offer an extension to the closing date as set forth in the contract. (R. p. 287-288, line 23-25 [1st line 25 of transcript])

On July 12, 2013, Respondent received written short sale approval from Wells Fargo and on July 15, 2013 it sent the Appellants a notice of default and 10 business day right to cure. (R. p. 269, line 20 - p. 270, line 14 [2nd line 14 of transcript]). The transaction was not closed within the 10 business days after the July 15, 2013 notice. (R. p. 270, line 3). The agent for Respondent testified that Respondent could have closed on June 17, 2013 by paying cash for the difference in the purchase price and the loan amount owed, but Respondent did not offer or communicate this information, did not communicate a desire to proceed this way, and did not offer to amend the contract to eliminate the need for the short sale approval. (R. p. 278, line 7 - p. 279, line 23). However, Respondent through it's agent admitted it was not it's intent to close without getting short sale approval and that it did not want to bring cash to the closing to pay the difference due. (R. p. 279, line 25 & p. 279, line 5 [2nd line 5 of transcript]).

Respondent admitted in a Request for Admission introduced as Defendants' Exhibit 1 that it could not provide good marketable title, free and clear of all liens on June 17, 2013. (R. p. 281, line 12). Respondent was aware that Appellants' closing attorney would not order a title search without short sale approval and that the bank processing the Appellants loan would not order an appraisal without

the short sale approval. (R. p. 283, line 8 & p. 283, line 1 [2nd line 1 of transcript] & p. 315, lines 11-19). Appellants could not perform the necessary parts of the Contract to comply and close on June 17, 2013 without short sale approval by Wells Fargo. (R. p. 315, lines 11-19).

Appellants were attempting to obtain a loan to jointly purchase the lot and obtain construction funds to reduce closing costs. (R. p. 297, lines 6-9). However, appellants would have proceeded with a closing for a purchase only with cash if necessary. (R. p. 316, lines 11-18). As the June 17, 2013 closing date approached without short sale approval, Appellants looked at another option to purchase a home already constructed that they could renovate on the same street. (R. p. 304, lines 18-21). Appellants desire was to live on Otter Road because of its close location to their daughter's home. Though they preferred to build on the vacant lot to be purchased from Respondent, they looked into another option to buy a house at 20 Otter Road and renovate in case the short sale approval was not furnished. (R. 319-320). Appellants turned down an offer to buy a less expensive lot in the same subdivision because it was on a different street and not as close to their daughter's house. (R. p. 319, line 13 & p. 320, line 10). Appellants considered the other property on Otter Road prior to the June 17, 2013 closing date only as an option in case they were not being able to buy the lot from Respondent. (R. p. 308, line 24 [2nd line 24 of transcript] & p. 309, line 4 [1st line 4 of transcript]).

Appellants did not sign a construction contract to build a house on the vacant lot in the Contract because there was no short sale approval. (R. p. 305, line 9 [2nd line 9 of transcript] & p. 306, line 9). Appellants testified that they could have closed on June 17, 2013 by paying cash, if the Respondent had produced written short sale approval. (R. p. 306, lines 10-17 & p. 307, line 18 [1st line 18 of transcript]). Appellants bank would not move forward with the appraisal or loan process without short sale approval. (R. p. 307, lines 20-21 [2nd lines 20-21 of transcript]). Respondent was aware appellants' bank needed at least two (2) weeks after getting written short sale approval to close on the purchase/construction loan because the bank would have to order the appraisal and approve a construction contract from the Appellants. (R. p. 307, lines 15-22 & p. 308, lines 23-25 [1st lines 23-25 of transcript]).

Appellants would have agreed to extend the closing date for two (2) weeks had the Respondent received short sale approval by June 17, 2013. (R. p. 315, lines 1-4). When June 17, 2013 arrived with no short sale approval, Appellants decided to make an offer on the house at 20 Otter Road. (R. p. 310, lines 15-18). They sent an email to this effect and stated that if the house on 20 Otter did not close, that they would still purchase the vacant lot but would need to force the Respondent's hand with a short time limit. (R. p. 317, line 21 & line 8). They made a written offer on the house on 20 Otter Road on June 18, 2013 because the closing date in the Contract had passed with no short sale approval and their belief that the Contract was terminated or ended at that point in time. (R. p. 310, lines 1-10 & p.

311, lines 11-20). Appellants' had already spent $2,500.00 to hire an architect for the building of their house on the vacant lot. (R. p. 311, lines 14-15 [2nd lines 14-15 of transcript] & p. 312, lines 16-23).

Appellants were questioned at trial as to not wanting to close on the vacant lot because the construction of their home on this lot would exceed their initial construction budget of $200,000.00. The total budget for purchase and construction was $300,000.00. (R. p. 318, line 2 & p. 319, line 6). However, Appellants stated that their purchase and renovation of the house at 20 Otter Road cost them in excess of their total initial budget of $300,000.00 and it would have been acceptable to spend more than $300,000.00 for the purchase of the lot in question and construction of the house on the vacant lot. (R. p. 318, line 2 & p. 319, line 6). The Appellants desire to live on Otter Road was so strong they put the offer on the house on 20 Otter Road without seeing it because they lived in Texas, relying on their daughter. (R. p. 319, lines 1-2 [2nd lines 1-2 of transcript] & p. 320, lines 3-11). Appellants also had a time line to build and move in by Christmas of 2013, which was achievable based on their conversation with the primary builder they consulted if they could have closed on the vacant lot purchase in June of 2013. Because Respondent could not close on June 17, 2013 because of lack of short sale approval, they considered other options. (R. p. 322, line 16 [1st line 16 of transcript] & p. 322, line 5).

ARGUMENTS

STANDARD OF REVIEW

In lawsuits in equity, findings of facts are not to be disturbed on appeal unless it is shown that findings are either without evidentiary support or are against clear preponderance of evidence. Bishop v. Tolbert, 249 S.C. 289, 153 S.E.2d 912 (1967). Generally, time is not of essence for contracts to convey land unless made so by express terms, or by implication from nature or subject matter, object of contract, or situation or conduct of parties. Id. An action to construe a written contract is an action at law. Southern Atlantic Financial Services, Inc., v. Middleton, 349 S.C. 77, 562 S.E.2d 482 (Ct. App. 2002). In construing a contract, the primary objective is to ascertain and give effect to the intention of the parties. Id. In construing a contract, the parties' intention must, in the first instance, be derived from the language of the contract. Id. If the contract's language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and the contract's language determines the instruments force and effect. Id. In equity actions an appellate court can review the record and make findings based on its view of the preponderance of the evidence. Alexander's Land Company, LLC v. M&M&K Corp, IFBIFB Corp., 390 S.C. 582, 703 S.E.2d 207 (2010).. The interpretation of a contract is an

action at law. Id. In an action at law, tried without a jury, the trial court's factual findings will not be disturbed on appeal unless found to be without evidence that reasonably supports the court's findings. Id. The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language. Id.

I. The Trial Judge erred in determining that the Appellants were in default of the Contract between the Appellants and the Respondents.

II. The Trial Judge erred in failing to make a finding that the Contract could not have been performed by Appellants within a reasonable period of time.

Under South Carolina law, without a provision providing that time is of the essence, the law implies that a contract is to be performed within a reasonable period of time. Faulkner v. Millar, 319 S.C. 216, 460 S.E.2d 378 (1995); Hobgood v. Pennington, 300 S.C. 309, 387 S.E.2d 690 (Ct. App. 1999). In the case at hand, the purchase price was less than the amount owed by Respondent to his bank and short sale approval was required. Respondent was required to sign a non collateral promissory note to its bank for the difference owed and obtain short sale approval to sell the vacant lot. The closing date was set in the Contract for on or before June 17, 2013. The transaction was not closed because of lack of short sale approval by the Respondent's bank. Although, the Contract did not contain a "time is of the essence" provision, the contract must still be performed within a reasonable amount of time, and what is reasonable depends on the circumstances of each case. The Appellants were not in default of the

Contract on June 17, 2013 because Respondents could not provide good and marketable title, free and clear of all liens on that date and the transaction could not close on June 17, 2013. Without a "time is of the essence" provision, was Respondent ready to close within a reasonable amount of time? Respondent was not ready to close until July 12, 2013 when Respondent received short sale approval. Ten (10) business days from July 12, 2013 was not enough time for Appellants' bank to process their application as the bank required "at minimum" two weeks. It was not a reasonable amount of time from either date because of their bank's two weeks requirement and the time limitation to build by Christmas of 2013. Appellants could not obtain a title search, an appraisal ordered by the bank, or a construction contract with a builder without short sale approval provided by Respondent. They would have had to complete all of this within ten (10) business days of July 12, 2013, which is not reasonable. Respondent was aware of Appellants' bank's requirement of a minimum of two (2) weeks to be able to close. The failure to close on June 17, 2013 was directly related to Respondent's failure to obtain short sale approval. This failure by Respondent did not allow the closing to occur within a reasonable time as required. Appellants could not reasonably be required to wait and risk losing the only other viable alternate to live on Otter Road and reside close to their daughter, especially since Respondent had two (2) months approximately since the execution of the Contract to obtain short sale approval. There was no indication that short sale approval was forthcoming as of June 17, 2013. Appellants submit they were not in default of the Contract, either on

June 17, 2013 or after receiving the Respondent's notice of default and right to cure letter of July 15, 2015, and that the Trial Judge erred in so finding. Appellants request that the Trial Court's decision be reversed and the case remanded for determination of damages to be awarded to the Appellants.

III. The Trial Judge erred in determining that the Contract between the Appellants and the Respondent could only be terminated in three (3) ways: (1) The transaction closes. (2) The parties mutually agree to terminate the Contract. (3) A party is deemed in default after notice of the default and notice of right to cure under Paragraph 9 of the Contract received within ten (10) business days.

IV. The Trial Judge erred in finding that under the terms of the Contract a party cannot be in Default until a notice of default and a right to cure notice has been send within ten (10) business days.

V. The Trial Judge erred in failing to find that appellants were not required to send a notice of default and a ten (10) day right to cure notice to terminate the Contract.

VI. In the alternative, if appellants were required to send notice of default and a ten (10) business day right to cure notice, the Trial Judge erred in failing to find that the notice given by appellants to the Respondent by email on June 19, 2013 was sufficient to satisfy this provision.

The above issues deal with the manner in which contracts may be terminated and if Appellants pursuant to South Carolina law terminated the contract between the parties without being in default. Therefore, these will all be discussed together in this section.

Under South Carolina law, without a provision providing that time is of the essence, the law implies that a contract is to be performed within a reasonable period of time. Faulkner v. Millar, 319 S.C. 216, 460 S.E.2d 378 (1995); Hobgood v. Pennington, 300 S.C. 309, 387 S.E.2d 690 (Ct. App. 1999). The Trial Court erred in

finding the Contract between these parties could end in only three ways: (1)The transaction could close; (2) The parties could mutually agree to terminate the Contract; and (3) A party is deemed in default after notice of default and ten (10) business day right to cure under Paragraph 9 of the Contract has been given. This finding does not consider the holding in Faulkner. A contract must be performed within a reasonable period of time. Under the findings of the Trial Court, a contract such as entered into by the parties would never terminate if none of the three (3) procedures occur.

There is at least one additional method and that method occurs if the contract is not performed within a reasonable period of time. The Trial Court found that the Appellants were required to follow condition (3) as set forth above to terminate the contract. This is in error. The contract must be read in its entire context. The provisions of Paragraph 9 of the Contract provides for a notice of default and ten day right to cure notice but this only applies if the non-defaulting party wanted to pursue remedies at law and equity, such as filing a lawsuit for breach of contract or specific performance. Barring this desire by Appellant, the contract terminated if it could not be performed within a reasonable period of time. If Appellants in this case did not want to sue for damages or specific performance, they were not required to send the notice of default and ten (10) business day right to cure letter. The Respondent was in default of the Contract by failing to close on June 17, 2013 when it failed to obtain short sale approval. As detailed above, the Contract

was not performed within a reasonable period of time given all of the circumstances.

As a result, the Contract was terminated without the need for a written notice of default and ten (10) business day right to cure letter. Even so, in the alternative, Appellants did provide notice of that they were terminating the Contract on June 19, 2013 by email to Respondent (Respondent's exhibit 1). The email did not include specific right to cure language but met the spirit of the requirement in the Contract. Even if Appellants were required to provide the notice of default and ten (10) business day right to cure notice, Respondent was still not ready to close by July 3, 2013 which was 10 business days after this email notice was given.

Appellants requests that the Court find: (1) That the Contract expired because it could not have been reasonably performed under the specific circumstances of this case because of the failure of Respondent to timely obtain short sale approval; (2) That Appellants did not breach the contract of the parties; and (3) That the Respondent breached the contract of the parties. Appellants request that the case be reversed and remanded for determination of damages to be awarded to the Appellants.

VII. The Trial Judge erred in denying the directed verdict motion of the appellants.

Appellants moved for a directed verdict at the conclusion of the Respondent's case in chief which was effectively denied by the trial Court. Appellant submits that based on the evidence presented in a light most favorable to the Respondent that the Trial Court should have directed a verdict in Appellants favor.

The evidence of the case has been outlined above in detail and will not be repeated here. Based on the above evidence considered in a light most favorable to Respondent, Appellants believe that only one reasonable conclusion existed after presentation of Respondent's case and that conclusion is the Appellants did not breach the contract of the parties. Therefore, Appellants' motion for a directed verdict should have been granted. Therefore Appellants that the ruling of the Trial Court be reversed and the case remanded for damages to be determined for the Appellants.

CONCLUSION

The Trial Judge erred in finding that the Appellants were in default of the contract of the parties, finding that the Appellants did not properly terminate the contract, and awarding damages to Respondent. The Trial Judge erred in denying the directed verdict of Appellant. The Trial Judge erred in failing to find that the Contract could not be performed within a reasonable period of time. The Trial Court's decision should be reversed and remanded for damages to be awarded to the Appellants.

ALEXANDER LAW FIRM, LLC

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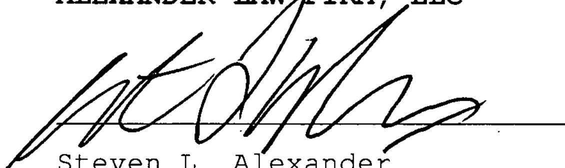

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RULE 211(b) CERTIFICATE

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Counsel for Appellants hereby certifies that the Final Brief of Respondent complies with Rule 211(b), SCACR.

January 28, 2016

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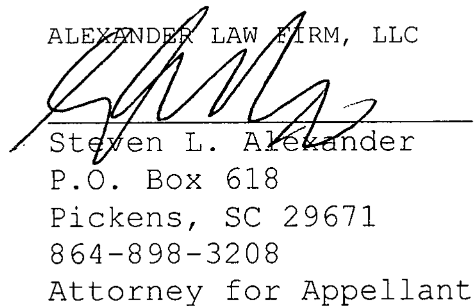

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