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

Case No. 2014-CP-07-0052
Appellate Case No. 2018-001969

Lady Beaufort, LLC & Tideland Realty, Inc.,..... *Respondents/Appellants*,

v.

Hird Island Investments, Inc., Sherwood N. Fender, Addison D. Fender, Martha B. Fender, William B. Bowen, Lady Kemmerlin, LLC, Brickyard Holdings, Inc., and A&K Holding Co., LLC, Defendants,

AND

William M. Bowen, Third-Party Plaintiff,

v.

James S. Kerr and Matt Trumps, Third-Party Defendants,

Of Which Hird Island Investments, Inc. and Sherwood N. Fender are the Appellants/Respondents.

FINAL BRIEF OF RESPONDENTS/APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATEMENT OF ISSUES ON APPEAL

1. Whether an objection to the amount attorneys' fees was waived when not raised at trial.

2. Whether a contract provision allowing a party to "recover attorneys' fees and all other direct costs of litigation if [that party] prevails in any action against Seller" entitles Lady Beaufort to its attorneys' fees and costs in this case.

STATEMENT OF THE CASE

Lady Beaufort, LLC ("Lady Beaufort") and Tideland Realty, Inc. ("Tideland"), Respondent/Appellants (hereafter "Respondents") filed suit against Inverness, LLC ("Inverness") and Hird Island Investments, Inc. ("Hird") on January 7, 2014, bringing claims for breach of contract and fraudulent conveyance relating to a failed real estate transaction in which Respondents were the buyer and broker respectively. Complaint, **R. p. 039**. Respondents settled with Inverness in May 2014 and dismissed Inverness from the litigation. The complaint was amended on May 29, 2014 (**R. p. 050**) and again on November 11, 2014 (**R. p. 060**), at which time Sherwood N. Fender ("Fender"), the principal of Hird, was added as a defendant (hereafter, Hird and Fender will be collectively referred to as "Appellants") 2nd Am. Compl. (**R. p. 060**).

A bench trial was held on March 1, 2017, and on May 11, 2017, a judgment was entered in favor of Respondents for $33,654.15 in actual damages and prejudgment interest and $53,924.41 in attorneys' fees and costs. Order (May 11, 2017) (**R. p. 018**). Appellants moved for reconsideration on May 19, 2017 (**R. p. 070**), and the Court conducted a hearing on that motion on November 13, 2017. On February 14, 2018, Appellants' motion was denied as to reconsideration of Respondents' damages, but the court allowed additional evidence as to the award of attorneys' fees.[1] Order (Feb. 14, 2018) (**R. p. 013**). Accordingly, a second hearing was

[1] No evidence of the reasonableness of Respondents' attorneys' fees had been adduced at trial because Appellants' counsel stipulated Respondents' fee affidavit at that time. Nor was the reasonableness of the fees challenged on the motion for reconsideration. *See infra* Part III.

held July 23, 2018. At that hearing, Appellants did not challenge the reasonableness of Respondents' fees, but argued that the contract did not allow for recovery of all attorneys' fees associated with the lawsuit in which Respondents had prevailed, i.e. only those fees incurred at the time Inverness was dismissed as a party.

On October 26, 2018, the trial court reduced Respondents' attorneys' fee award from $53,924.41 to $17,857.00. Order (Oct. 26, 2018) (**R. p. 001**). On November 5, 2018, Appellants filed a notice of appeal of both the underlying judgment and the amended judgment. Notice of Appeal (**R. p. 037**). On November 15, 2018, Respondents cross-appealed with regard to the amended judgment's reduction of attorneys' fees. Notice of Cross-Appeal (**R. p. 035**).

STATEMENT OF THE FACTS

On August 19, 2013, Respondents entered into a contract with Appellants for the purchase of a 2.99-acre parcel of real estate located in Beaufort County. Contract, (**R. p. 076**). The contract provided for a "drop dead" date of closing of October 15, 2013.

On October 10, 2013, while the contract was still in force, Appellants sold the property in question to a third party, Inverness. On May 30, 2014, Respondents were able settle with and acquire the subject property for $25,000.00 more than the price agreed with Appellants.

The contract between Respondents and Appellants contained a provision stating that:

> If Seller defaults in the performance of any of the Seller's obligations under this Contract ("Default"), Buyer may: [. . .] (ii) Pursue any remedies available to Buyer at law or equity and (iii) Recover attorneys' fees and all other direct costs of litigation if Buyer prevails in any action against Seller.

Contract at 6, § 27(A) (**R. p. 081**).

Prevailing at trial in March 2017, Respondents were awarded their attorneys' fees associated with the lawsuit through the date of trial. On reconsideration, however, the trial court

held that the contract allowed recovery of attorneys' fees only until the date on which Respondents obtained the property from Inverness and reduced the award of attorneys' fees from $53,924.41 to $17,857.00. Order (Oct. 26, 2018) at 8 (**R. p. 008**).

ARGUMENT

I. Standard of Review

This Court reviews questions of contract interpretation—like all questions of law—*de novo*. *See, e.g.*, *Lee v. Univ. of S.C.*, 407 S.C. 512, 517, 757 S.E.2d 394, 397 (2014) ("Because the construction of a clear and unambiguous contract is a matter of law for the court, we review the trial court's findings of law de novo."); *Doe v. Bishop of Charleston*, 407 S.C. 128, 134, 754 S.E.2d 494, 498 (2014) ("Questions of law are reviewed *de novo*.").

II. The Trial Court's Reduction of Attorneys' Fees Was Based on Contract Interpretation and Is Not Entitled to Deference From This Court

In holding that Respondents were entitled to recover only those attorneys' fees and costs incurred "in order to obtain the property it lost because of the Defendants' conduct" (Order (Oct. 26, 2018) at 8, ¶ 26, **R. p. 008**), the trial court set forth an interpretation of the contract limiting the extent to which attorneys' fees and costs are recoverable thereunder. This is a legal question, a matter of contract interpretation.

Indeed, and as stated by counsel for Appellants at the July 23, 2018 hearing, "we've agreed that [Respondents' challenge to the award attorneys' fees] is basically a matter of law." *See* Hearing Tr. (July 23, 2018) at 20:23–21:8 (**R. pp. 424–25**).[2] As stated *supra*, findings of law are reviewed *de novo* by this Court.

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[2] Further, counsel for Appellants stated "I believe that – I believe that's pretty much – we can agree on the facts. It's pretty much a matter of law that we need Your Honor to rule on." *Id.* at 21:6–8 **(R. p. 425)**.

III. Appellants Cannot Raise on a Motion to Reconsider that Which They Did not Raise Previously

It is axiomatic that "a party cannot use a motion to reconsider, alter, or amend a judgment to present an issue that could have been raised prior to the judgment but was not." *Dixon v. Dixon*, 362 S.C. 388, 399, 608 S.E.2d 849, 854 (2005) (finding issue raised for first time in Rule 59, SCRCP, motion is not preserved for review); *Kiawah Prop. Owners Grp. v. Public Serv. Comm'n*, 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004) (stating an issue raised for first time in petition for rehearing not preserved).

A. Appellants Not Only Failed to Preserve, but *Waived* Any Objection to the Amount of Attorneys' Fees

No objection to the amount of Respondents' attorneys' fees was raised at trial. Fee affidavits were presented by each party during the course of the trial, and Appellants never challenged the amount of the fees included in Respondents' affidavits. On the contrary, trial counsel for Appellants stipulated to the accuracy of Respondents' attorneys' fee affidavits and stated there was no need for the invoices to be provided to the Court to support the affidavits. *See* Hearing Tr. (Mar. 1, 2017) at 180:20–181:11 (**R. pp. 264–65**). The trial judge responded, "[i]t sounds like it's an all or nothing situation." *Id.* at 180:8–9.

Accordingly, any objection to the amount of the fees was waived at trial and could not properly be raised on a Rule 59(e), SCRCP motion to reconsider. The trial court's October 26, 2018 order should be vacated.

i. Reasonableness of Fees

After the November 11, 2013 hearing on the motion to reconsider, the trial court allowed the record to be reopened in order for evidence to be adduced to support the award of attorneys'

fees.[3] At the July 23, 2018 hearing for that purpose, Respondents put on evidence of the reasonableness of the fees,[4] *see* Hearing Tr. (July 23, 2018) at 31:16–55:25 (**R. pp. 434–56**), and no argument was made—nor evidence presented—by Appellants to rebut Respondents' evidence as to the reasonableness of the fees incurred.

Indeed, Appellants conceded—and the trial court's October 26, 2018 order found—that the rates charged by the attorneys for Respondents were reasonable and in keeping with the fees customarily charged for services of this nature. Order (Oct. 26, 2018) ¶¶ 19, 20, 22 (**R. p. 007**).

Because the reasonableness of Respondents' fees and hourly rates was not challenged at trial, in the motion to reconsider, or at the hearing on that motion, no such argument is preserved for appeal.

ii. Appellants' Argument on Reconsideration

Appellants' motion to reconsider was hardly expansive as to the substance of their objection to the award of attorneys' fees. Rather, Appellants weakly stated that the fee "amount is excessive, and the Court did not make any findings of fact as to the factors in determining an award of attorney's fees." Mot. for Reconsideration at 5, ¶ 15 (**R. p. 074**).

The only argument advanced in the motion to reconsider was that Lady Beaufort's entitlement to fees ended at the time Lady Beaufort purchased the property from Inverness. *See* Hearing Tr. (Jul. 23, 2018) at 58:4–23 (**R. pp. 458–59**). This argument was not preserved, for the reasons stated *supra*, Part III.A. Accordingly, this argument was not preserved or properly considered by the trial court, and the trial court's October 26, 2018 order must be vacated.

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[3] Without reopening the record for to allow for these findings of fact, the award may have been subject to reversal and remand by this Court.

[4] Respondents' fees through the time of trial were virtually identical to Appellants' fees through that period.

IV. Respondents are Entitled to All Attorneys' Fees Associated With the Litigation Against Appellants

Even were the issue of the award of fees and costs preserved for appeal, Appellants' argument must fail. The express, unambiguous language of the contract between Respondents and Appellants demands that Respondents be awarded their attorneys' fees and costs associated with the instant lawsuit. There is no basis in the contract or in law for the trial court's ruling that the attorneys' fees are recoverable only until the date that Respondents were able to acquire the subject property from Inverness.

A. The Contract Expressly Provides that Respondents Are Entitled to All Their Attorneys' Fees

It is a cardinal rule of contract interpretation that courts must give words their ordinary meanings. *E.g.*, *24th Senatorial Dist. Republican Committee v. Alcorn*, 820 F.3d 624, 636 (4th Cir. 2016). "Language whose meaning is otherwise plain does not become ambiguous merely because the parties urge different interpretations in the litigation," and courts are "not required to find the language ambiguous where the interpretation urged by one party would strain the contract language beyond its reasonable and ordinary meaning." *Hunt Ltd. v. Lifschultz Fast Freight, Inc.*, 889 F.2d 1274, 1277 (2d Cir. 1989) (internal quotation omitted). Courts disfavor interpretations of contract provisions that render words or phrases superfluous. *See, e.g.*, *In re Witt*, 113 F.3d 508, 512 (4th Cir. 1997).

The Contract between the Parties states, in pertinent part:

> If Seller defaults in the performance of any of the Seller's obligations under this Contract ("Default"), Buyer may: [. . .] (ii) Pursue any remedies available to Buyer at law or equity and (iii) Recover attorneys' fees and all other direct costs of litigation if Buyer prevails in any action against Seller.

Contract at 6, § 27(A) (**R. p. 081**). This provision is plain and unambiguous. It establishes (i) that Lady Beaufort, as Buyer, had broad latitude to bring claims against Appellants for failure to

perform any part of the contract, and (ii) that, should Lady Beaufort prevail on such a claim, it will recover its "attorneys' fees and all other direct costs of litigation." *Id.*

B. The Attorneys' Fee Provision is Broadly-Worded, and Logic Dictates Appellants' Position is in Error

After Appellants breached the Parties' contract, Lady Beaufort was able to obtain the property from Inverness.[5] However, it paid $25,000 over the price agreed with Appellants to do so, and thus pursued that $25,000 of damage plus prejudgment interest in its suit against Appellants.[6] The suit for those damages went through discovery, motions practice, and on to trial, where Respondents ultimately prevailed. The suit continued through a motion to reconsider and multiple hearings thereon, through additional post-trial motions practice,[7] and continues to this day with the instant appeal, with fees and costs being incurred all the while.

The contract placed no limitation on the fees and costs recoverable by Lady Beaufort, except that they must stem from a default by Appellants.[8] Logic dictates this is the proper reading of the contract and that Appellants' position does not hold water. The contract does not, for example, say attorney fees are recoverable "through the time at which the default in question is cured."[9] Rather, it says Buyer may "[p]ursue *any remedies* available to Buyer at law or

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[5] The third party to whom Appellants sold it while the contract between Respondents and Appellants was still in force.

[6] Tideland pursued, and was awarded, the $13,000 commission that it would have earned had Appellants sold Lady Beaufort the property.

[7] In the summer of 2017, Respondents learned that Defendant Sherwood Fender had transferred certain properties to family and colleagues for no consideration, including a transfer on the day of the trial and a transfer months after the judgment was handed down. Accordingly, Respondents engaged in motions practice to rescind those transfers and prevent further transfers.

[8] Indeed, per the above language, Buyer will be entitled to recover its appellate fees in addition to the fees incurred to date.

[9] Per Appellants' argument, what result if Lady Beaufort had been unsuccessful in obtaining the property from Inverness?

equity" and "[r]ecover attorneys' fees and all other direct costs of litigation if Buyer prevails *in any action* against Seller." Contract at 6, § 27(A) (**R.p. 081**) (emphases added).

Accordingly, there is no basis in the contract or in law for the trial court's decision to cut off the attorneys' fees at the date of the closing between Inverness and Lady Beaufort. Lady Beaufort's acquisition of the property from Inverness did not resolve all of the harm caused by Appellants' conduct. That harm—the additional $25,000 Lady Beaufort was forced to spend to obtain the property from Inverness, plus interest, and the commission Tideland Realty lost on the sale—has not been redressed to this day. Respondents continue to incur attorneys' fees costs in pursuit of their rights under the contract and are entitled to recover all of those additional fees and costs.

CONCLUSION

Under the contract between Lady Beaufort and Hird, Lady Beaufort is entitled to all attorneys' fees and costs incurred as a result of a default by Hird. Because the trial court limited Respondents' recovery of those fees in a way inconsistent with the contract between the parties, the trial court's October 26, 2018 order should be vacated and an order entered awarding Respondents all attorneys' fees incurred in this matter to date.

Respectfully submitted,

October 30, 2019

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CERTIFICATE OF COUNSEL PURSUANT TO RULE 211(B)

The undersigned certifies that the Final Brief of Respondents/Appellants, Final Reply Brief of Respondents/Appellants, and Final Brief of Respondents/Appellants as Respondents comply with Rule 211(b).

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