

Green Lotus' Complaint asserts causes of action for breach of contract, unjust enrichment, conversion, money had and received, assumpsit, and declaratory judgment. Black Bear has denied the allegations and has requested the Court to award it the \$100,000.00 earnest money. Green Lotus filed a lis pendens. In 2019, the \$100,000.00 earnest money was deposited by Black Bear with the Clerk of Court for Horry County when Black Bear sold the golf course to a third party.

II. TRIAL

At trial, Green Lotus called the following witnesses to testify: Jarrod Ownbey, former counsel for Green Lotus, Steve Brandenburg, former golf course superintendent at Black Bear Golf Course, Patrick Wilkinson, former golf pro and manager of Black Bear Golf Course, and Raymond Ou, Manager of Green Lotus Sports, LLC.

The defense called the following witnesses: Kang Zou, manager of Black Bear and 10% owner, ChunLan Li, ninety percent (90%) owner of Black Bear, Jane Zheng (through deposition testimony), real estate agent for Black Bear, and Judy Tang. Jay Haar, Esq. testified as an expert witness. Professor Allen Chao served as the Court interpreter.

Mr. Ownbey is a licensed South Carolina attorney who is a partner in the Mullins Law Firm in North Myrtle Beach. He was engaged by Green Lotus in July 2016 for the August 10, 2016 closing. Mr. Ownbey testified that from mid-July to August 10, 2016 he attempted on numerous occasions, through correspondence, emails and phone calls, to determine who was representing Black Bear as the seller's attorney for the closing. His testimony and time entries on his billing records indicate numerous phone calls, letters

and emails with the seller's agent, Jane Zheng, some potential seller attorneys, Black Bear's manager, Kang Zou, and ChunLan Li. His correspondence, which was entered into evidence, also indicates his attempts to determine the identity of the seller's closing attorney and to have the seller address the issues with the closing and the golf course.

Mr. Ownbey testified there were multiple problems with the title as revealed in the title search and in the previous title insurance policy. He testified as to the title defects, including a judgment, which impaired the ability of the seller to convey general warranty deed title to the property as required under the Contract. Mr. Ownbey testified that none of the title issues were addressed by the seller. Mr. Ownbey further testified that no documents were ever presented by Black Bear or any Black Bear attorney to him for the closing on August 10, 2016, the closing date. No general warranty deed or seller financing documents, such as a note, mortgage, security agreement, or UCC-1 financing statement, were ever presented to Mr. Ownbey's office for the closing.

Steve Brandenburg was called to testify. As Black Bear's golf course superintendent, he was familiar with the equipment that was used to maintain the golf course. He testified that on July 16, 2016, five pieces of equipment were sold by Kang Zou and removed from the golf course. Those pieces of equipment were the aerifier, bush hog, mower, chipper and spiker unit. He also testified that Raymond Ou was on the property for several weeks, that there were various problems with the golf course, and that its features, including the irrigation system, cart paths and roads, bunkers, ponds, and hole signs, needed to be repaired or replaced. Steve Brandenburg testified the golf course was in declining condition from June to August 10, 2016.

Patrick Wilkinson, the former Black Bear golf course professional, testified that he attempted to contact Jane Zheng in early August 2016 and he emailed her in an attempt to communicate with the seller, Black Bear, on the closing and the various issues that had arisen. These communications occurred on August 1 and 2, 2016, as reflected in the email communications between him and the seller's real estate agent, Jane Zheng.

Raymond Ou testified that he is the Manager of Green Lotus Sports, LLC, which is a South Carolina limited liability company. He testified that the purpose of Green Lotus' purchase of Black Bear golf course was to operate a golf course and to begin a golf course academy for juniors. He testified he and his four partners, including his cousin, a longtime golfing partner, a good friend from his university, and the father of a golf student from his Beijing golf academy, had sufficient monies to close on the property. He discussed his financial resources, the sale of his Beijing home for \$1,000,000, and savings from his work at IBM and Oracle that would provide a sufficient source of funds for the closing. Green Lotus' Bank of America bank statements for August and September 2016 were also entered into evidence.

Raymond Ou testified that from the end of June, 2016 to the first week of August, 2016, he stayed on site at the Black Bear golf course and identified various issues that he requested to be corrected by Black Bear to place it in proper condition, and that such requests were not addressed by Black Bear at all. The issues were set forth in his July 20, 2016 email to ChunLan Li which was entered into evidence.

Mr. Ou further testified that he was ready, willing and able to close on the property on August 10, 2016 in accordance with the Contract, but that the seller never responded to his requests to correct the conditions in the property, the seller never

provided any of the seller financing or the seller documents for closing, and the seller never addressed the title issues.

With respect to the earnest money, Raymond Ou testified he wired it to ChunLan Li at her request to her Chinese bank account which she provided to him.

Kang Zou testified for the defense. He is the manager of Black Bear. He testified he was not involved in the day-to-day operations of the golf course, and that he, at no time from August 1 through August 10, 2016, ever engaged a lawyer to represent Black Bear in the closing because Raymond Ou never presented proof of funds indicating Green Lotus' financial ability to close. He testified that Black Bear was not going to spend money on a closing lawyer when Green Lotus did not show proof of funds prior to the closing. Kang Zou further testified that at no time did he ask his mother, ChunLan Li, to transfer the earnest money in her Chinese bank account to the lawyer's trust account for the closing.

Kang Zou further testified Black Bear sold the property in January 2019, with the exception of approximately 4.5 acres on the corner of Highway 9 and Highway 905, for the sale price of \$1.35 Million. The January 2019 Deed for the transfer was entered into evidence. Kang Zou testified the 4.5 acres on the corner of Highway 9 and Highway 905 was worth \$150,000.

ChunLan Li testified that she received the \$100,000.00 earnest money in her Chinese bank account after she provided her Chinese bank account information to Raymond Ou. She further testified that Black Bear was not willing to spend money on a closing lawyer if Green Lotus did not receive proof of funds. She further testified that she intended to be bound by the terms of the Contract when she signed it on June 28,

2016. ChunLan Li testified she knew about a \$1.5 Million verbal offer for the property before August 12, 2016.

Judy Tang testified that she had power of attorney from ChunLan Li for the management of the golf course. Judy Tang testified she used the contract form of attorney Jay Haar to create the Contract for the sale of the property. Judy Tang worked at Black Bear for ChunLan Li.

Excerpts from the deposition of Jane Zheng were read into the record and various Zheng deposition exhibits were admitted into evidence. Jane Zheng testified that she had a listing agreement for Black Bear in 2016. She received a verbal offer from Roger Grigg prior to receiving the August 13, 2016 written offer from him for \$1.5 Million Dollars for the property. She communicated with ChunLan Li about the \$1.5 Million verbal offer prior to receiving the August 13, 2016 written offer. According to Jane Zheng, ChunLan Li did not want to address the \$1.5 Million verbal offer until after the August 10, 2016 closing date. The August 13, 2016 written offer was entered into evidence.

At the conclusion of the testimony, Green Lotus moved to amend the pleadings to conform to the evidence in two respects: (1) the express inclusion of a request for prejudgment interest, and (2) the amendment of the Plaintiff's causes of action to include a claim for breach of contract with fraudulent intent and/or fraudulent conduct. The Court granted the amendment request with respect to the prejudgment interest and denied the balance of the request.

The parties made motions for directed verdict. The Court dismissed Kang Zou as a defendant. In addition, the claims of money had and received, conversion, and

declaratory judgment were dismissed as to Black Bear. Green Lotus' motion for directed verdict was denied. Black Bear's motion for directed verdict on the claims of breach of contract and unjust enrichment was denied. Black Bear also moved to have Green Lotus elect its remedies between breach of contract and unjust enrichment, which is addressed below.

III. ANALYSIS

The claims of Green Lotus center on the Contract and the retention of the earnest money by the seller, Black Bear. The Contract specifically requires that the earnest money be held by the Law Firm. ("Any deposits made hereunder shall be placed and held in escrow by the Law Firm.") At no time did Black Bear place the earnest money in escrow with any "Law Firm".

The Contract requires seller financing as a contingency. The Contract describes seller financing as a loan secured by a note, mortgage, security agreement, and UCC-1 financing statement. At no time did Black Bear provide a note, mortgage, security agreement, or any UCC-1 financing statement. Black Bear never engaged a closing lawyer to consummate the closing. Black Bear never engaged a lawyer to prepare or review the note, mortgage, security agreement, and UCC-1 financing statement. The Contract references "Seller's Counsel" in two instances in paragraph 5.

The unequivocal testimony of both ChunLan Li and Kang Zou was that they did not want to incur the expense of a closing lawyer when they did not receive proof of funds from Green Lotus indicating it was financially able to consummate the closing.

Black Bear did not address any of the property conditions raised by Green Lotus. Black Bear did not address any of the title issues raised by Jarrod Ownbey in his pre-closing correspondence.

A. Breach of Contract

To recover for a breach of contract, the plaintiff must prove:

- (1) a binding contract entered into by the parties;
- (2) a breach or unjustifiable failure to perform the contract; and
- (3) damage suffered by the plaintiff as a direct and proximate result of the breach.

Fuller v. Eastern Fire & Cas. Inc. Co., 240 S.C. 75, 124 S.E.2d 602 (1962). The general rule is that for a breach of contract the defendant is liable for whatever damages follow as a natural consequence and a proximate result of such breach. *Id.* Damages recoverable for breach of contract either must flow as a natural consequence of the breach or must have been reasonably within the parties' contemplation at the time of the contract. *Manning v. City of Columbia*, 297 S.C. 451, 377 S.E.2d 335 (1989); *Kline Iron & Steel Co. v. Superior Trucking Co.*, 261 S.C. 542, 201 S.E.2d 388 (1973). The parties agreed to the liquidated damages provision in paragraph 10 of the Contract.

I find there was a binding contract of sale between Green Lotus and Black Bear. I further find the seller breached the Contract by retaining the earnest money and not placing it with the "Law Firm" in violation of the contractual terms. In addition, Black Bear breached the Contract by not providing any seller financing. The seller financing was a contingency such that if seller financing was not provided, Green Lotus could not move forward with the closing and it would be entitled to a refund of its earnest money. "The closing of this transaction shall be contingent upon seller providing financing in the

amount of \$550,000.00 at an annual interest rate of 5.0% for a term of one year. The loan shall be secured by a promissory Note, first real estate mortgage security agreement for personal property, and UCC-1 financing statements in a form satisfactory to Seller's counsel." Contract, Par. 5. The parties contemplated Black Bear would have an attorney for the closing as reflected in the Seller's Counsel reference in Paragraph 5 of the Contract. Black Bear never engaged an attorney for the closing.

Black Bear further breached the Contract when it failed to tender the closing documents necessary to close, including the general warranty deed, note, mortgage, security agreement, and UCC-1 financing statement. Black Bear further breached the Contract by not addressing the title issues and the property conditions on or before the date of closing.

Black Bear contends it was not required to perform because it received no proof of funds prior to closing. Black Bear's contention is without merit. The Contract does not contain any requirement for proof of funds. Moreover, there is no legal requirement in the State of South Carolina for a real estate buyer to show proof of funds to a seller prior to closing.

Green Lotus has demonstrated to the Court that it was financially capable of performing on the Contract through the testimony and other evidence, including the Bank of America bank statements. Moreover, Green Lotus was not required to conduct a closing and move funds to its lawyer's trust account when Black Bear had no intention of delivering the seller documents, or providing seller financing, or otherwise complying with the Contract. If the impossibility of performance arises directly or indirectly from the acts of the promisee, it is a sufficient excuse for non-performance. *Parks v. Lyons*, 64

S.E.2d 123 (S.C. 1951). As of August 1, 2016, Black Bear had effectively repudiated the Contract and was not undertaking any efforts to close on the sale. Although Green Lotus was actively pursuing its due diligence and the closing up through August 10, 2016, any transfer of funds to the trust account of Mr. Ownbey would have been futile because Black Bear was not moving forward with the Contract.

I find by a preponderance of the evidence that Black Bear breached the Contract and it is liable for damages. Damages in a breach of contract action are to place the nonbreaching party in the position he or she would have been had there been no breach and the contract was performed. See *Drews Co. v. Ledwith-Wolfe Assocs., Inc.*, 296 S.C. 207, 371 S.E.2d 532_(1988) (explaining that purpose of award of damages for breach is to give compensation, that is, to put plaintiff in as good a position as he would have been in had the contract been performed).

The Contract provides for the earnest money to serve as liquidated damages. Green Lotus is entitled to the return of its \$100,000.00 earnest money deposit. Pursuant to S.C. Code Ann. § 34-31-20(A), Green Lotus is further entitled to prejudgment interest on the \$100,000.00 from the date of the closing, August 10, 2016, to present at the prejudgment interest rate of 8.75%. The prejudgment interest through December 4, 2019 is \$29,006.83.

B. Unjust Enrichment

Green Lotus has pled unjust enrichment as an alternate theory of recovery. Equitable maxims are not binding legal precedent but represent notions and concepts of equity in various situations. See *Regions v. Wingard Properties*, 394 S.C. 241, 249 (Ct. App. 2011), citing Russell L. Weaver, et al, *Principles of Remedies Law* 8 (2007)

("[Equity courts]. . . began to develop 'rules' or 'maxims' governing equitable relief. Although these 'maxims' were generalizations of experience based on the results of prior cases, they eventually developed into a loose set of 'rules' designed to bring some coherency to the body of decided cases and some consistency to future decisions.")

The principle "equity regards as done that which ought to be done" applies in cases where the party seeking equitable relief establishes a clear obligation based upon a valuable consideration that another do some act which he has failed to perform." *Wilkie v. Phila. Life Ins. Co.*, 187 S.C. 382, 393-94, 197 S.E. 375, 380 (1938). The notion "equity looks to substance rather than form" evolved out of judicial regard for that which ought to be done. *Id.* at 393, 197 S.E. at 380. This maxim applies by "dispensing with pure formalities which would otherwise defeat the equity." *Id.*; see also *Kerr v. City of Columbia*, 232 S.C. 405, 410, 102 S.E.2d 364, 366 (1958).

The elements to recover for unjust enrichment based on quantum meruit, quasi-contract, or implied by law contract, which are equivalent terms for equitable relief, are "(1) a benefit conferred by the plaintiff upon the defendant; (2) realization of that benefit by the defendant; and (3) retention of the benefit by the defendant under circumstances that make it inequitable for him to retain it without paying its value." *Myrtle Beach Hosp., Inc. v. City of Myrtle Beach*, 341 S.C. 1, 8-9, 532 S.E.2d 868, 872 (2000). "A court of equity abhors forfeitures, and will not lend its aid to enforce them." *Jones v. N.Y. Guar. Indem. Co.*, 101 U.S. 622, 628, 25 L.Ed. 1030 (1879).

"A breach of contract claim and quantum meruit claim can be alternative rather than inconsistent remedies." *JASDIP Props. SC, LLC v. Estate of Richardson*, 395 S.C. 633, 639, 720 S.E.2d 485, 488 (Ct. App. 2011) (citing *Franke Assocs. by Simmons v.*

Russell, 295 S.C. 327, 332, 368 S.E.2d 462, 465 (1988). However, “[i]f the tasks the plaintiff is seeking compensation for under a quantum meruit theory are encompassed within the terms of an express contract which has not been abandoned or rescinded, the plaintiff may not recover under quantum meruit.” *Swanson*, 350 S.C. at 122, 564 S.E.2d at 120 (citing 66 Am. Jur. 2d *Restitution and Implied Contracts* § 81 (2001) (“[I]t is a defense to an action in quantum meruit that there is an express contract covering the issue of compensation for services or materials furnished.”)).

Black Bear sold the property in January 2019 for \$1.35 Million while it retained a 4.5 acre corner parcel worth at least \$150,000.00. The retention of the \$100,000.00 earnest money would result in a windfall to Black Bear for walking away from its 2016 Contract with Green Lotus. Although Black Bear would be unjustly enriched if it were allowed to retain the \$100,000.00 earnest money, case law bars recovering under both breach of contract and unjust enrichment. Because I find the Contract was not abandoned or rescinded by Green Lotus and that Black Bear breached the Contract and is liable to Green Lotus for the breach as discussed above, there can be no award or recovery under the unjust enrichment cause of action. Accordingly, Black Bear’s motion to elect remedies is moot.

C. Attorney Fees

The Contract permits the non-defaulting party to recover attorney fees. In the event of default “. . . the non-defaulting party **shall** be entitled to reasonable attorney’s fees and costs related to the closing contemplated hereunder or to any litigation or enforcement of rights hereunder.” Contract, Par. 10. Emphasis added.

Green Lotus is entitled to its reasonable attorney's fees and costs which shall be addressed in a separate Order upon Green Lotus' application for the same. Green Lotus shall submit its application for attorney fees and costs within ten (10) days of the date this Order is filed.

NOW, THEREFORE, IT IS HEREBY ORDERED, adjudged and decreed that judgment shall be entered in favor of Green Lotus Sports, LLC and against Black Bear Global, LLC in the amount of \$129,006.83 (\$100,000.00 plus \$29,006.83 in prejudgment interest).

And it is further ORDERED that Green Lotus shall submit its application for attorney fees and costs within ten (10) days of the date this Order is filed and any amount this Court subsequently approves for attorney's fees and costs shall be added to the judgment amount of \$129,006.83.

And it is further ORDERED that Black Bear's motion for election of remedies is moot.

And it is further ORDERED that the Clerk of Court shall remit the \$100,000.00 funds held by it to Green Lotus Sports, LLC, care of its counsel, within ten (10) days after this Order is final.

AND IT IS SO ORDERED.

Larry B. Hyman, Jr.
Chief Administrative Judge and
Presiding Judge
Fifteenth Judicial Circuit



Horry Common Pleas

Case Caption: Green Lotus Sports LLC VS Black Bear Global LLC , defendant, et al
Case Number: 2016CP2605916
Type: Order/Other

So Ordered

s/ Larry B. Hyman 2152