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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
The Honorable Marvin H. Dukes, III, Circuit Court Judge

APPELLATE CASE NO. 2020-001309

Colleton River Plantation Club, Inc.

Cross Appellant-Respondent,

vs.

Joel S. Lee,

Cross Respondent-Appellant.

INITIAL BRIEF OF CROSS APPELLANT
COLLETON RIVER PLANTATION CLUB, INC.

/s/ S. Harrison Williams

Barry L. Johnson, Attorney at Law
S. Harrison Williams, Attorney at Law
William Lamar Johnson, II, Attorney at Law
JOHNSON & DAVIS, PA
The Victoria Building, Suite 200
10 Pinckney Colony Road
Bluffton, SC 29909
(843) 815-7121
Barry@jd-pa.com
Harrison@jd-pa.com
Lamar@jd-pa.com

*Attorneys for Cross Appellant-Respondent,
Colleton River Club Plantation, Inc.*

Bluffton, SC
April 20, 2021

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STATEMENT OF ISSUE ON CROSS APPEAL

Did the trial court commit an error of law by not ruling in favor of Plaintiff on its cause of action for breach of contract accompanied by a fraudulent act despite the clear and convincing evidence presented to the trial court in favor thereof?

STATEMENT OF THE CASE

This case arises out of alleged unpaid dues and fees owed to the Cross-Appellant, Colleton River Plantation Club, Inc. (“Colleton”), a not-for-profit property owners association located in Bluffton, South Carolina by the Cross-Respondent, Joel Lee (“Lee”), a previous owner of record of Lot A02 (“Lot”) within Colleton River Plantation Club described as follows:

ALL that certain piece, parcel or lot of land, lying and being in Beaufort County, South Carolina and being shown and described as Lot A02, Phase I, Colleton River Plantation, on a plat thereof entitled "A Plat of Colleton River Plantation, Phase 1, Beaufort County, South Carolina", said plat being prepared by Thomas & Hutton Engineering Co., Savannah, Georgia, Boyce L. Young, S.C.R.L.S. No. 11079, said plat being dated August 1, 1990, last revised November 18, 1991, Sheets 1 through 3, and recorded in the Office of the Register of Deeds for Beaufort County, South Carolina, in Plat Book 43 at Page 100. For a more detailed description as to the courses and distances, metes and bounds of the above-mentioned lot, reference is had to said plat of record.

This conveyance is subject to all easements as shown on the plat of record and to that certain Colleton River Plantation Declaration of Covenants and Provisions for Membership in Colleton River Plantation Club, Inc., which Declaration is dated June 11, 1991, and recorded in the Office of the Register of Mesne Conveyances for Beaufort County, South Carolina, in Deed Book 579 at Page 1796, and as may be amended from time to time.

This is the same property conveyed to Joel S. Lee, by Deed from Colleton River Company, L.P., dated September 20, 1993, and recorded on October 7, 1993 in the Office of the Register of Deeds for Beaufort County, South Carolina, in Deed Book 656 at Page 1816.

Beaufort County Tax Map Reference:
R600-025-00A-0005-0000.

(R.p.____).

The trial court action was initiated on November 17, 2015, wherein Colleton filed a Summons and Complaint against Lee alleging two separate causes of action: breach of contract and breach of contract accompanied by a fraudulent act. The parties participated in extensive

discovery and motions practice, which culminated in a nonjury trial before the Honorable Marvin Dukes, on December 5, 2018. The trial court then issued its Trial Order on February 13, 2020, wherein the trial court found in favor of Colleton on its breach of contract cause of action, but the trial court denied Colleton's breach of contract accompanied by a fraudulent act cause of action, despite stating that "significant evidence was presented in favor of Colleton's position" on the breach of contact accompanied by a fraudulent act. (Tr. Order at 2) (R.p.__).

Then, Colleton filed a motion to reconsider on February 24, 2020, wherein Colleton moved the trial court to amend its Trial Order to rule in favor of Colleton on its cause of action for breach of contract accompanied by a fraudulent act. The trial court held a hearing on Colleton's motion, and, as well, on Lee's motion to reconsider, on April 24, 2020. Thereafter, the trial court issued its order on September 1, 2020, denying all motions to reconsider and affirming the Trial Order as the final order in the case. Then, Colleton filed its notice of cross appeal on September 30, 2020.

STANDARD OF REVIEW

This matter is an action at law as it is an action for breach of contract. *Mason v. Mason*, 412 S.C. 28, 56, 770 S.E.2d 405, 420 (Ct. App. 2015) (quoting *Electro-Lab of Aiken, Inc. v. Sharp Constr. Co. of Sumter*, 357 S.C. 363, 367, 593 S.E.2d 170, 172 (Ct. App. 2004)). In an action at law tried without a jury, the appellate court is “limited to determining whether the trial court based its ruling on an error of law or on a factual conclusion without evidentiary support.” *Stringer v. State Farm Mut. Auto. Ins. Co.*, 386 S.C. 188, 192, 687 S.E.2d 58, 60 (Ct. App. 2009) (citing *S.C. Farm Bureau Mut. Ins. Co. v. S.E.C.U.R.E Underwriters Risk Retention Group*, 347 S.C. 333, 338, 554 S.E.2d 870, 873 (Ct. App. 2001)).

ARGUMENT

I. The Trial Court committed an error of law by denying Colleton’s cause of action for breach of contract accompanied by a fraudulent act because the findings of fact by the trial court met all the elements of said cause of action.

The trial court, in the final Trial Order, stated that “significant evidence was presented in favor of Colleton’s position” on its cause of action for breach of contract accompanied by a fraudulent act. (R.p. ___). Further, as discussed below, the trial court made numerous findings of fact that meet the elements of breach of contract accompanied by a fraudulent act. (R.p. ___). Therefore, the trial court erred when it ultimately declined to rule in favor of Colleton’s position to find that Lee breached his contract with Colleton accompanied by fraudulent acts, which should entitle Colleton to punitive damages in this matter.

“To recover for breach of contract accompanied by a fraudulent act, a plaintiff must establish (1) the contract was breached; (2) the breach was accomplished with a fraudulent intention; and (3) the breach was accompanied by a fraudulent act. [T]he fraudulent act element is met by any act characterized by dishonesty in fact, unfair dealing, or the unlawful appropriation of the another’s property by design.” *Maro v. Lewis*, 389 S.C. 216, 223–224, 697 S.E.2d 684, 688 (Ct. App. 2010).

The above elements have been thoroughly explained by this court in *Parker v. Nat’l Honorary Beta Club*, 423 S.C. 590, 593, 815 S.E.2d 769, 771 (Ct. App. 2018). In *Parker*, the court explained that the “fraudulent intent is normally proved by circumstances surrounding the breach,” and “the fraudulent act may be prior to, contemporaneous with, or subsequent to the breach of contract, but it must be connected with the breach itself and cannot be too remote in either time or character.” *Id.*

A. The first element, breach of contract, was found by the trial court.

The first element, breach of contract, was found by the trial court as Colleton prevailed on its first cause of action for breach of contract. (R.p.____).

B. The second element, fraudulent intention, was shown during the trial.

The second element, fraudulent intention, was established in both the findings of fact in the Trial Order and by the testimony presented to the trial court. The trial court made the following findings of fact that demonstrate Lee’s fraudulent intention in breaching his contract with Colleton:

- “Lee is a former practicing lawyer with decades of extensive experience in commercial real estate and, thereafter, was a principal in his home state of Wisconsin, in substantial and sophisticated real estate transactions and investments.” (R.p.____).
- “Lee for many decades has invested in, owned, used, bought and sold residential properties in private, gated, golf course communities in southern Beaufort County.” (R.p.____).
- “The consideration for the Conveyance was only One and No/100’s Dollar (\$1.00), at best a nominal consideration.” (R.p.____).
- “The address for Nevada Bluffton Properties, LLC as it was listed on the Deed involved in the Conveyance, as the preparer of the deed, is the same as the address for Thomas B. Burke (“Burke”)¹, the preparer of this Deed, and an attorney at law in the State of Wisconsin, but not ever an attorney at law in the State of South Carolina and is also the same as the address for Lee.” (R.p.____).

¹ It was clearly established in the record that Lee and Burke had been close friends for many years, and that Burke functioned as Lee’s attorney in Wisconsin. (R.p.____).

- “Burke functioned as the attorney for both Lee and Nevada Bluffton Properties, LLC, and maintained his office with Lee.” (R.p.__).
- “The Conveyance Deed, just like the Deed to Lee in 1993 for Lot A02, made the Conveyance to Nevada Bluffton Properties, LLC subject to the Covenants, etc. as amended.” (R.p.__).
- “The Conveyance Deed did not identify the jurisdiction in which the grantee, Nevada Bluffton Properties, LLC was formed.” (R.p.__).
- “The Conveyance, lacked both the required written notice to Colleton and the proffer of a Designated User.” (R.p.__).

As found by the trial court, the above factors clearly and convincingly demonstrate that Lee had a fraudulent intent when he breached his contract with Colleton by transferring his lot to a shell corporation for the sole intention of avoiding his contractual obligations to Colleton. Lee’s actions demonstrate a clear intention to hide and obscure his actions from Colleton, in an effort to defraud Colleton of its right to collect Lee’s obligations to Colleton.

Further, Colleton presented evidence and testimony to the trial court that established Lee’s fraudulent intention in breaching his contract with Colleton:

- “Lee’s efforts at trial to explain that, in his estate planning with Burke, Lee transferred Lot A02 in Colleton River Plantation, and the lots in the other two communities to Tom Burke because ‘you’re 20 years younger than me. These lots are valueless. Someday they may be worth something. I’m going to transfer them and they’re yours. The theory that someday they might be worth something again,’ lacked any meaningful credibility. This lack of credibility is particularly shown by noting the conflicting testimony of Lee that he did still own the lots in Berkeley and Belfair through a couple of LLCs, which

are the same lots which, with Lot A02 of Colleton River Plantation, were deeded on December 31, 2012 to Nevada Bluffton Properties, LLC. Contributing to this conclusion was Burke's testimony [in his deposition this case] that he had no ownership of Nevada Bluffton Properties, LLC, in spite of Lee's testimony." (R.p.__).

- "No arrangements were made to capitalize Nevada Bluffton Properties, LLC adequately to carry forward the liabilities associated with ownership of Colleton Lot A02 and the other lots at Belfair Plantation and Berkeley Hall Plantation." (R.p.__).
- "In executing these three deeds into Nevada Bluffton Properties, LLC, Lee made no inquiry into whether or not those transfers terminated his personal liabilities to Colleton or what was required for the transfer to comply with the Covenants." (R.p.__).
- "By using Burke, his personal lawyer who had represented Lee for about thirty-five years when his deposition was taken in 2018, to help a staff person in Lee's office to organize the Nevada limited liability company, Bluffton Properties, LLC, and then obfuscating the ownership thereof by stating, in his own testimony in this matter, variously that Lee was the owner of Bluffton Properties, LLC and/or that Burke was the owner or member of Bluffton Properties, LLC, while the testimony of Mr. Burke was that he had no knowledge of the identity of the members of Bluffton Properties, LLC." (R.p.__).
- "By not using – as required by law in South Carolina for transfers of residential property – a licensed South Carolina lawyer to prepare the Deed of Conveyance, then to supervise the Closing thereof including appropriate notices and cooperation with Colleton, and then to supervise the recording of the Deed of Conveyance and other

public-record documents with the Office of the Register of Deeds for Beaufort County, South Carolina.”

These additional facts in the record in the matter further demonstrate that Lee clearly intended to defraud Colleton of its contractual rights under the Covenants by making this fraudulent transfer so as to avoid any further obligations to Colleton.

C. The third element, fraudulent act, was clearly shown during the trial.

Finally, the third element, fraudulent act, was established by the trial court’s findings that Lee transferred the Property into his shell company, Bluffton Properties, LLC, for the purpose of avoiding his contractual obligations to Colleton. Specifically, the trial court found that:

After having been the Owner since 1993 of Lot A02 in Colleton River Plantation, Lee executed a deed (Title to Real Estate), to Bluffton Properties, LLC, Series I, (hereinafter “Nevada Bluffton Properties, LLC”) bearing date of December 31, 2012, and not recorded in the Office of the Register of Deeds for Beaufort County, South Carolina until May 28, 2013, then recorded in Book 03242 at Pgs. 2923-2924-A, by which he purported to convey the said Lot A02(the “Conveyance”), in these circumstances:

The consideration for the Conveyance was only One and No/100’s Dollar (\$1.00), at best a nominal consideration;

The address for Nevada Bluffton Properties, LLC as it was listed on the Deed involved in the Conveyance, as the preparer of the deed, is the same as the address for Thomas B. Burke (“Burke”), the preparer of this Deed, and an attorney at law in the State of Wisconsin, but not ever an attorney at law in the State of South Carolina (“Burke”) and is also the same as the address for Lee;

Burke functioned as the attorney for both Lee and Nevada Bluffton Properties, LLC, and maintained his office with Lee;

The Conveyance Deed, just like the Deed to Lee in 1993 for Lot A02, made the Conveyance to Nevada Bluffton Properties, LLC subject to the Covenants, etc. as amended;

The Conveyance Deed did not identify the jurisdiction in which the grantee, Nevada Bluffton Properties, LLC was formed;

The Conveyance, lacked both the required written notice to Colleton and the proffer of a Designated User.” (R.p.____).

Clearly, Lee transferred the Lot for the fraudulent purpose of avoiding his debts to Colleton without any regard to his contractual obligations to Colleton under the Covenants. Lee’s fraudulent intention was shown at trial by the circumstances surrounding the breach, such as the lack of consideration, the failure to capitalize Bluffton Properties, LLC and the fact he is the owner of Bluffton Properties, LLC, the failure to comply with South Carolina law in making the real estate transfer, the obfuscation of the state of incorporation of Bluffton Properties, LLC, and Lee’s extensive and in-depth knowledge of real estate transactions showing he knew exactly what he was doing in defrauding Colleton. *Parker*, 423 S.C. at 593, 815 S.E.2d at 771. Finally, Lee’s fraudulent act was Lee’s action in transferring the Lot to Bluffton Properties, LLC for the sole purpose of avoiding his contractual obligations to Colleton, which was the same act that the trial court found that breached Lee’s contract with Colleton. *Id.*

CONCLUSION

It is clear that the trial court committed an error of law by acknowledging there was significant evidence presented in Colleton’s favor, but ultimately not ruling in Colleton’s favor on its cause of action for breach of contract accompanied by a fraudulent act, and by not acknowledging and finding the proof outlined above did not clearly and convincingly meet the fraud elements of breach of contract accompanied by a fraudulent act. Further, the trial court erred in not conducting a damages hearing and not awarding Colleton punitive damages against Lee.

Colleton respectfully requests that the appellate court reverse the trial court’s finding on this cause of action, and remand this action for a further damages hearing.