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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Charles B. Simmons, Jr., Master in Equity

Case No. 2020-CP-23-02076

Jerry Powers, Appellant

v.

Rizan Properties, LLC, Anthony Pearson and Tiesha Dash, Defendants

of which Rizan Properties, LLC is the Respondent

INITIAL BRIEF OF RESPONDENT

May 18, 2021

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STATEMENT OF THE CASE

On April 10, 2020 Jerry Powers filed suit against Rizan Properties, LLC, Anthony Pearson and Tiesha Dash. Respondent is unclear as to the exact status of the response to Mr. Powers' Complaint from the co-defendants, however, Rizan answered denying the material allegations of the plaintiff's Complaint and asserted a number of defenses. (R. p. _____) (Amended Answer) The case was referred to the Master-in-Equity for Greenville County and on January 14, 2021 a hearing was held to address cross-motions for summary judgment filed by the parties. In an Order filed January 27, 2021 the Court found as follows:

Both parties move for summary judgment. For the most part the facts are not in controversy and the issues involve interpretation which can be made without the necessity of a trial. Plaintiff argued that any lease terms that he may have violated or breaches of the lease did not necessarily void the Option. Plaintiff further contended that neither the Lease nor the Option makes full compliance with the Lease a condition precedent to exercising the Option to purchase the real property. (R. p. ___) (Summary Judgment Order)

Defendant contended that the Lease and Option are all part of the same transaction and must be necessarily read and interpreted together and only so long as all Lease payments were

made in full, would the Option remaining valid and exercisable. Upon a full review of the record the Court felt compelled to find that the Lease and Option must be read together and without one the other cannot stand alone. The Court found that the last rent paid by Plaintiff was November 2018, the plaintiff breached the Lease for non-payment of rent for over eleven months, had vacated the premises and turned over the keys. The court found there was no option to purchase the property still in existence at the time Plaintiff attempted to exercise the same. (R. p. ____) (Summary Judgment Order) Thereafter, cross-motions were filed pursuant to Rule 59. By Order entered on February 11, 2021, the Court addressed the cross-motions to reconsider (R. p. ___) R. 59 Order). On February 23, 2021, Appellant served his Notice of Appeal.

STATEMENT OF FACTS

Lukas Rigdon was the sole member of Rizan Properties, LLC, the record owner of a house located at 39 Second Avenue in Greenville, South Carolina. On or about May 1, 2013, Jackie Pearson and Appellant Jerry Powers executed two documents regarding the property. Both documents were prepared, reviewed and executed with and in the offices of attorney Jack Heckman who sat at the table and went over the documents with Mr. Powers and Ms. Pearson. As confirmed by Mr. Heckman, he explained that the Lease and Option were documents to be construed together and as long as all of the lease payments were made in full, the option to purchase would remain valid and could be exercised. Attorney Heckman also explained that in the event that there was a default under the lease agreement, the option to purchase would lapse. (R. p. ____. Heckman Affidavit) Notably, no evidence exists in the record to dispute the testimony of Attorney Heckman.

The Lease provided that rent was payable at the rate of $550.00 per month, in advance. Rent not received by the 5th of each month was considered late and a late fee of $50.00 would be charged. The Lease also required a security deposit of $550.00.

The Lease provided at Article VII that the maintenance of the structure of the house and the major systems (electrical, plumbing, heating and air) shall be the responsibility of the Lessee and general cleanliness of the yard and interior of the house shall also be the responsibility of the Lessee. The Lease provided at Article VIII, that at expiration or termination of the Lease, Lessee shall remove all property belonging to them and repair all damage caused by such removal and restore the premises to the condition they were in prior to the removal of said property. The Lease specifically noted that the premises were in good repair at the time of signing. The Lease provided via Article XVI that if Lessee continued in default the payment of any rent for a period of ten days following notice of such default or if Lessee defaulted in the performance of any other terms, conditions or covenants of the Lease which were not remedied within ten days, or in the event the premises were vacated before the expiration of the lease, then in such event the Lessor shall have the right to terminate the Lease. The Lease provided at Article XVIII that time was of the essence for each provision and covenant contained within it.

The Lease provided at Article XXII that Lessee covenants and agrees to hold harmless and indemnify the Lessor from and against all losses, liability or expenses that may be incurred or in any way growing out of the negligent use, misuse or willful abuse of the premises. (R. p. ____ Lease)

Over the course of their rental, Mr. Powers and Ms. Pearson were late with their rental payments 55 times (R. p. ___ Plaintiff's Summary Judgment Ex. 9, Eviction Notice) and during the lease term while Mr. Powers and Ms. Pearson were occupying the premises, they allowed mold and water damage to occur, thus further breaching their obligations pursuant to the Lease. (R. p. ___ Plaintiff's Summary Judgment Ex. 9, Eviction Notice)

With regard to the water damage, in 2015 a tree hit the roof of the house knocking a hole in it which caused the roof to leak and allowed water to enter the house. (R. p. ____ Powers Depo 160:14-24) The hole allowed enough water to enter the house that it caused the ceiling to collapse (R. p. ____ Powers Depo 164:4-7) Mr. Powers did not undertake any efforts to repair the hole in the roof until three to four months after rain began entering and after the ceiling had actually collapsed. (R. p. ___ Powers Depo 165:22-166:4) In fact, Mr. Powers described having four five gallon buckets in different places to catch water coming into the interior of the house. (R. p. ___ Powers Depo 168:9-17)

After advising Mr. Powers and Mr. Pearson they would need to vacate the property, Ms. Pearson signed what has been referred to as the "Eviction Notice" confirming she would be out of the house by January 5, 2019. Although Mr. Powers did not sign the document, the following week Mr. Powers turned in his keys. (R. p. ___ Powers Depo 69:3-16) Thereafter, Jerry Powers began living with Jackie Pearson in a new rental property and during this time neither Mr. Powers nor Ms. Pearson were paying any rent to Rizan. (R. p. ___Powers Depo 120: 25-121:6) While Mr. Powers does not admit he was late or short paid his rent for October of 2018, it is undisputed that no rent was paid November of 2018, December of 2018, January, February or March of 2019 (R. p. ___Powers Depo ___: __) It is further undisputed that significant damages occurred during Mr. Powers' occupancy of the property.

STANDARD OF REVIEW

"Both parties have moved for Summary Judgment maintaining that, for the most part, the facts are not in controversy and the issues involve interpretation that can be done without necessity of a trial." (R. P. ___ SJ Order) Given this action was essentially tried by consent before the Master-In-Equity, Respondent submits that Appellant's action for specific performance is an

action to construe a contract. An action to construe a contract is an action at law. *Pruitt v. South Carolina Med. Malpractice Liab. Joint Underwriting Assn.,* 343 S.C. 335, 339, 540 S.E. 2d 843, 845 (2001). In an action at law, tried without a jury, the trial court's findings of fact will not be disturbed unless found to be without evidence which reasonably supports the Court's findings. *Stanley v. Atlantic Title Ins. Co.,* 377 S.C. 405, 409, 661 S.E. 2d 62, 64 (2008).

ARGUMENTS

I. The Trial Court Correctly Interpreted the Documents at Issue.

It is well settled in South Carolina that option contracts are strictly construed in favor of the optionor and against the optionee. *See Southern Silica Mining & Manufacturing Company v. Hoefer,* 215 S.C., 480, 497, 56 S.E. 2d 321, 328 (1949) ('(the) argument by the defendant that the Courts do not favor forfeiture and therefore the option to renew must be granted, overlooks the facts that options because unilateral, are strictly construed against the party claiming the option'). It is also well settled in this state that if the option requires performance in a certain manner, time is of the essence and exact compliance with the terms of the option are required. *See Pope v. Goethe,* 175 S.C. 394, 179 S.E. 319 (1935), *Edwards Lumber & Land Company v. Smith,* 191 N.C. 619, 132 S.E. 593, 594 (1926) ('(optioner) not bound by a mere notice of acceptance of his offer as contained in the option, unaccompanied by a tender of the purchase price'). See also 51 C C.J.S. Landlord & Tenant §57 (mode of exercising extension or renewal contained in lease must be in accordance with that prescribed in the agreement and lessee must strictly adhere to the terms thereof).

Our courts have recognized that harsh results in option cases are necessary to further more compelling considerations of public policy. *Dargan v. Page,* 222 S.C. 520, 73 S.E. 2d 705 (1952). When an individual grants an option he ties up his rights and property for a specified period of

time without binding the other side. For this reason he is entitled to strict compliance with time limits and other terms of the option. Thus, if the optionee fails to comply with the terms of the option, even though he may have an excuse, he must bear the responsibility and not the optionor.

In this case, Appellant argues that even though he breached the terms of his Lease, did not timely pay the rent in full due during the lease term, substantially damaged the property, vacated the premises, returned his keys to the landlord and moved into and paid rent for a completely different home on 300 Watson Road, he nevertheless has the absolute right to purchase the property at issue.

The Option was executed on May 1, 2013, the same date as the Lease. As noted by the affidavit of Jack Heckman, he was the attorney who prepared both the lease agreement and the option to purchase and who met with the plaintiff Jerry Powers, the deceased Lukas Rigdon and the other signatory to the Lease and the Option, the deceased Jackie Pearson. As confirmed by Mr. Heckman, he explained that the Lease and Option were documents to be construed together and as long as all of the lease payments were made in full, the Option would remain valid and could be exercised. As attorney Heckman also noted, he explained that in the event there was a default under the Lease, the Option would lapse.

In South Carolina, two contracts executed at different times relating to the same subject matter, entered into by the same parties, are to be construed as one contract and considered as a whole. *Café Assocs., Ltd. v. Gerngross*, 305 S.C. 6, 10 406 S.E. 2d 162, 164 (1991); *Moshtaghi v. Citadel*, 314 S.C. 316, 321, 443 S.E. 2d 915, 918 (Ct. App. 1994) (citing *Klutts Resort Realty Inc. v. Down'Round Dev. Corp.,* 268 S.C. 80, 88, 232 S.E.2d 20, 25 (1977)). "The date of the writings constituting the transaction is not material." *Moshtaghi*, 314 S.C. at 321, 443 S.E.2d at 918 (citing *Cafe Assocs., Ltd. v. Gerngross*, 305 S.C. 6, 10, 406 S.E.2d 162, 164 (1991)); *Plaza*

Dev. Servs. v. Joe Harden Builder, Inc., 294 S.C. 430, 433-34, 365 S.E.2d 231, 233 (Ct.App.1988) ("Where instruments are entered into by the same parties at different times but relate to the same subject matter, the instruments will be construed together to determine the entire agreement between the parties."). Moreover, where one of the contracts explains, amplifies, or limits the other, those provisions will be given effect between the parties so that the whole agreement, as actually contracted by the parties, may be effectuated. *Moshtaghi*, 314 S.C. at 321, 443 S.E.2d at 918; *Edward Pinckney Assocs., Ltd. v. Carver,* 294 S.C. 351, 354, 364 S.E.2d 473, 474 (Ct.App.1987) ("Construing contemporaneous instruments together means simply that if there are any provisions in one instrument limiting, explaining, or otherwise affecting the provisions of another, they will be given effect between the parties so that the whole agreement as actually made may be effectuated."); See *Wilbur Smith & Assocs. v. Nat'l Bank of South Carolina*, 274 S.C. 296, 299, 263 S.E.2d 643, 645 (1980) (finding two instruments must be read together to determine the whole agreement and intent of the parties where the broker and property owner entered into two exclusive listing agreements, the first of which provided that the sale price was to be mutually agreed upon after completion of a feasibility study and provided that the contract was binding on heirs and assigns, and the second of which set the sale price but made no reference to heirs and assigns). One contract draws contractual sustenance from the other. *Edward Pinckney Assocs.*, 294 S.C. at 354, 364 S.E.2d at 474.

II. The Parties Intended the Lease Option to be Construed Together.

Appellant goes to great lengths to suggest the intention of the parties on the issue of whether the Option and Lease should be construed together, should be gleaned by trying to infer that intent from selective references to the underlying documents. He claims the documents establish an intent to construe the documents separately. For instance, on Page 8 of Appellant's Initial brief he

indicates the Option in this case recited a separate consideration whereas in *Jackson* there was no separately listed consideration and "this indicates that the parties intended the Option...." However, one need look no further than Mr. Powers own sworn testimony. Appellant Powers specifically confirmed under questioning from his own attorney that he did **not** understand the Option and Lease were separate contracts. R. p. ____ Powers Depo 181:7-182:3) (emphasis added)

III. The Trial Court Correctly Ruled That Appellant Waived His Right to Exercise the Option.

It is abundantly clear that Appellant knew that he must comply with the terms of the Lease he executed and absent such compliance, he would be in default. It is further clear that Appellant and all other parties to the transaction discussed and intended that the Lease and Option were considered as a whole and a breach of the Lease would extinguish the Option. With this knowledge Mr. Powers and Jackie Pearson were presented with an eviction notice by Lukas Rigdon. At the time Ms. Pearson indicated she would vacate the property by January 5, 2019. The eviction notice provided confirmed that rent had been late 55 times and that significant water and wood damage resulting in mold and rot had occurred. Ms. Pearson moved out of the house and Appellant Jerry Powers turned in his keys to the landlord and followed approximately a week thereafter. They both began renting a different property paying no further rent to Rizan.

Appellant notes that a waiver is a voluntary and intentional abandonment or relinquishment of a known right and in order for a party to waive a right the party must have known of the right and known that it was being abandoned. Precisely. Mr. Powers knew that in order to exercise the Option or for the Option to remain in force, he was required to comply with the Lease and its obligations and further knew that defaulting under the Lease would result in an extinguishment of the Option. This is exactly what he, Mr. Rigdon, Ms. Pearson and attorney Heckman discussed.

Notwithstanding, Mr. Powers simply walked away from this house abandoning it with leaks in the roof and wood rot and mold damage and began renting a new house with his girlfriend. Eleven months later, Mr. Powers pops up claiming a right to purchase the house.

IV. Additional Affirmance of Summary Judgment in Favor of Respondent is Also Supported by Principals of Laches and Estoppel.

After being confronted with documentation of their numerous late payments and damage to the premises, although Ms. Pearson signed the Eviction Notice indicating she would vacate the property by January 5, 2019 and Mr. Powers vacated the house approximately a week later. After leaving in January of 2019, Mr. Powers never went back in the house (R. p. ___ Powers Depo 57:17-19) Mr. Powers moved with Ms. Pearson to 300 Watson Road in Greenville, South Carolina and while living there paid no rent for the property at issue for the months of January, 2019, February 2019, March 2019 and April of 2019. (R. p. ___ Powers Depo 55:15-56:10) After turning in his keys, vacating the property and ceasing to pay any further rent, Mr. Powers called Lukas Rigdon to let him know about the death of Ms. Pearson. Lukas Rigdon's mother answered the call and Mr. Powers passed on the information concerning the passing of Ms. Pearson. Nowhere does Mr. Powers indicate he ever made mention during this call of an ownership interest in the property, an Option to acquire an ownership interest in the property or any information inconsistent with his prior abandonment of the dwelling and his obligations relative thereto. (R. p. ___ Powers Depo 106:4-108:23) Likewise, never did Ms. Pearson indicate to anyone that she claimed a continuous interest in the property. By their words and deeds Mr. Powers and Ms. Pearson left no reasonable conclusion other than the fact that they were abandoning any further interest in the Lease and Option. To have mislead Rizan by those acts and deeds and to continue to fail to assert his alleged rights for an unreasonable period of time supports the verdict in favor of Respondent. As such, Respondent respectfully submits that in addition to the grounds asserted

by the trial judge, the verdict in favor of Respondent is also supported by principals of laches and estoppel.

CONCLUSION

The trial court properly analyzed the claims of the parties and the evidence submitted and reached the only logical conclusions based upon that evidence and in construing it in favor of Mr. Powers, the non-moving party. As such, the trial courts judgment in favor of Rizan should be upheld. Further, this Court should affirm the trial court's decision based upon the fact that Appellant is estopped to assert the claims made and such claims are barred by laches.

Respectfully submitted,

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Jerry Powers .....Appellant

v.

Rizan Properties, LLC .....Respondent

CERTIFICATE OF SERVICE

I certify that I have served the Respondent's Initial Brief and Respondent's Designation of Matter to be Included in the Record on Appeal on Appellant Jerry Powers by transmitting the same via email to Mark Fessler at markfessler@sclegal.org.

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May 18, 2021

Via Email
Jenny Abbott Kitchings, Clerk
The South Carolina Court of Appeals
P.O. Box 11629
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Re: *Jerry Powers v. Rizan Properties, LLC*
Appellate Case No.: 2021-000218

Dear Ms. Kitchings:

Enclosed please find Respondent Rizan Properties, LLC's Designation of Matter and Initial Brief in the above matter. I would be most appreciative if you would file the original of the Designation of Matter and Initial Brief and stamp copies to scan back to me if you don't mind. By copy of this letter via email and as evidenced by attached Certificate of Service, we have served copies of Respondent's Designation of Matter and Initial Brief on Mark P. Fessler, as attorney for Appellant.

Thank you for your assistance in this regard.

Sincerely,

BROWN, MASSEY, EVANS, McLEOD & HAYNSWORTH, LLC

Knox L. Haynsworth, III

KLH/ll

Enclosure

cc: Mark P. Fessler, Esquire